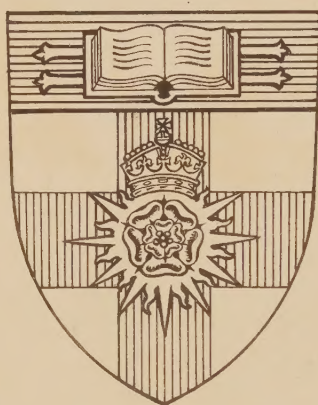


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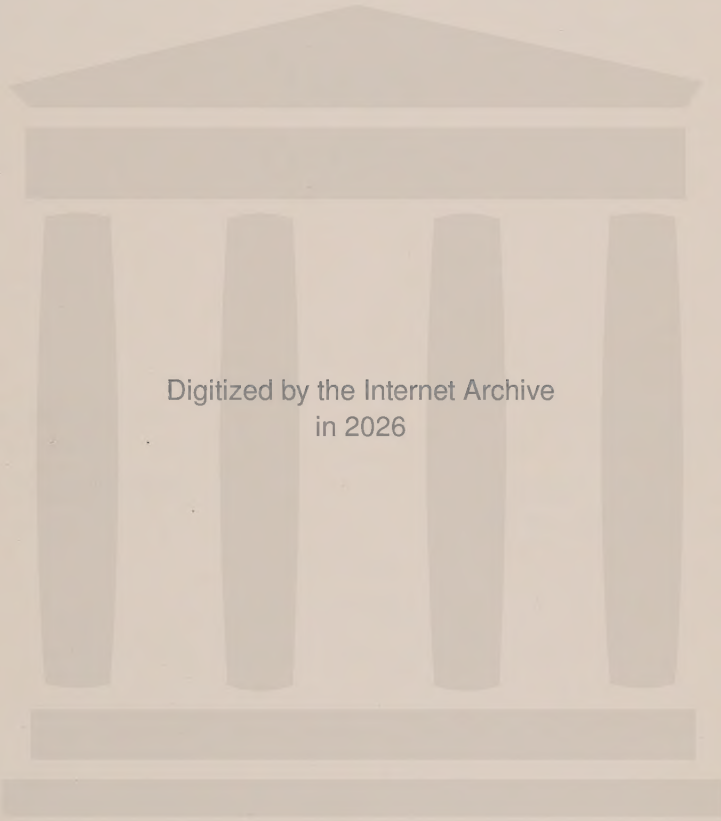
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HALSBURY'S LAWS OF ENGLAND, SIMONDS EDITION

The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

HALSBURY'S STATUTORY INSTRUMENTS

The reference 12 HALSBURY'S STATUTORY INSTRUMENTS 124, refers to page 124 of Volume 12 of Halsbury's Statutory Instruments, first edition.

A reference to a volume as "1st Re-issue" refers to the first re-issue of the appropriate volume of Halsbury's Statutory Instruments.

ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, THIRD EDITION

The reference 15 ENCY. FORMS. & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.

CASES REPORTED IN VOLUME I

	PAGE		PAGE
ADAMASTOS SHIPPING CO., LTD., ANGLO-SAXON PETROLEUM CO., LTD. <i>v.</i> [Q.B.D.]	673	CAMBRIDGE COUNTY COUNCIL, CHIVERS & SONS, LTD. <i>v.</i> [C.A.]	882
ADLER <i>v.</i> UPPER GROSVENOR STREET INVESTMENT, LTD. [Q.B.D.]	229	CAMBRIDGE COUNTY COUNCIL, NATIONAL INSTITUTE OF AGRICULTURAL BOTANY REGISTERED (TRUSTEES) <i>v.</i> [C.A.]	882
ALLIANCE PERPETUAL BUILDING SOCIETY <i>v.</i> BELRUM INVESTMENTS, LTD. [CH.D.]	635	CAMERON AND ROBERTSON, LTD., QUINN <i>v.</i> [H.L.]	760
ALSEY STEAM FISHING CO., LTD. <i>v.</i> HILLMAN (OWNERS) [ADM.]	97	CAMKIN'S QUESTIONS, Re [CH.D.]	69
ANGLO-SAXON PETROLEUM CO., LTD. <i>v.</i> ADAMASTOS SHIPPING CO., LTD. [Q.B.D.]	673	CAPELOVITCH'S ESTATE AND WILL TRUSTS, Re [CH.D.]	33
ANNIS & CO., LTD., PYRAH (INSPECTOR OF TAXES) <i>v.</i> [C.A.]	196	CARMARTHEN CORPN., MORGAN <i>v.</i> [CH.D.]	437
ARMSTRONG <i>v.</i> CLARK [Q.B.D. DIVL. CT.]	433	CARRINGTON <i>v.</i> SUMMERS (JOHN) & SONS, LTD. [CHESTER ASSIZES]	457
ARNOLD <i>v.</i> ARNOLD [DIV.]	570	CASSIDY (PETER) SEED CO., LTD. <i>v.</i> OSUUSTUK-KUKAUPPA I.L. [Q.B.D.]	484
ASHDOWN <i>v.</i> WILLIAMS (SAMUEL) & SONS, LTD. [C.A.]	35	CENTRAL LAND BOARD, WOOTTON <i>v.</i> [C.A.]	441
ATLAS STEEL FOUNDRY AND ENGINEERING CO., LTD., NICHOLSON <i>v.</i> [H.L.]	776	CHAMPION PAPER AND FIBRE CO., <i>Ex parte</i> . R. <i>v.</i> PATENTS APPEAL TRIBUNAL [Q.B.D. DIVL. CT.]	227
ATTORNEY-GENERAL (ON THE RELATION OF HORNCHURCH URBAN DISTRICT COUNCIL) <i>v.</i> BASTOW [Q.B.D.]	497	CHARLES MARSHALL PROPRIETARY, LTD. <i>v.</i> COLLINS [P.C.]	923
ATTORNEY-GENERAL <i>v.</i> HANOVER (H.R.H. PRINCE ERNEST AUGUSTUS OF) [H.L.]	49	CHARTER <i>v.</i> SULLIVAN [C.A.]	809
ATTORNEY-GENERAL (ON THE RELATION OF GLAMORGAN COUNTY COUNCIL AND PONTARDAWE RURAL DISTRICT COUNCIL) <i>v.</i> P.Y.A. QUARRIES, LTD. [C.A.]	894	CHIVERS & SONS, LTD. <i>v.</i> CAMBRIDGE COUNTY COUNCIL [C.A.]	882
AUTOMATIC WOODTURNING CO., LTD., <i>v.</i> STRINGER [H.L.]	90	CITY OF LONDON REAL PROPERTY CO., LTD. <i>v.</i> WAR DAMAGE COMMISSION [C.A.]	519
B.P. REFINERY (KENT), LTD. <i>v.</i> WALKER (VALUATION OFFICER) [C.A.]	700	CLARK, ARMSTRONG <i>v.</i> [Q.B.D. DIVL. CT.]	433
BALFOUR <i>v.</i> BARTY-KING (HYDER & SONS (BUILDERS), LTD., THIRD PARTIES) [C.A.]	156	COLLINS, CHARLES MARSHALL PROPRIETARY, LTD. <i>v.</i> [P.C.]	923
BARNETT <i>v.</i> BARNETT AND BROWN [CARDIFF DISTRICT REGISTRY]	388	CO-OPERATIVE WHOLESALE SOCIETY, LTD., GRAHAM <i>v.</i> [Q.B.D.]	654
BARNETT, NEUCHATEL ASPHALTE CO., LTD. <i>v.</i> [C.A.]	362	CORBETT <i>v.</i> CORBETT [DIV.]	621
BARRETT, <i>Ex parte</i> . R. <i>v.</i> COUNTY LICENSING (STAGE PLAYS) COMMITTEE OF FLINT COUNTY COUNCIL [C.A.]	112	COUNTY LABORATORIES, LTD. <i>v.</i> MINDEL (J.), LTD. [CH.D.]	806, 861
BARRY, LEE <i>v.</i> [C.A.]	191	COUNTY LICENSING (STAGE PLAYS) COMMITTEE OF FLINT COUNTY COUNCIL, R. <i>v.</i> <i>Ex parte</i> BARRETT [C.A.]	112
BARTY-KING, BALFOUR <i>v.</i> (HYDER & SONS (BUILDERS), LTD., THIRD PARTIES) [C.A.]	156	CRAWLEY DEVELOPMENT CORPN., HARVEY <i>v.</i> [C.A.]	504
BASTOW, ATTORNEY-GENERAL (ON THE RELATION OF HORNCHURCH URBAN DISTRICT COUNCIL) <i>v.</i> [Q.B.D.]	497	CROYDON CORPN., METROPOLITAN POLICE DISTRICT RECEIVER <i>v.</i> [C.A.]	78
BATTERSEA, WANDSWORTH, MITCHAM AND WIMBLEDON RENT TRIBUNAL, R. <i>v.</i> , <i>Ex parte</i> PARIKH [Q.B.D. DIVL. CT.]	352	CRUICKSHANKS <i>v.</i> CRUICKSHANKS [DIV.]	889
BEAUCHAMP'S EXECUTORS <i>v.</i> INLAND REVENUE COMRS. [CH.D.]	788	CUSTOMS AND EXCISE COMRS. <i>v.</i> I.F.S. IRISH FULLY FASHIONED STOCKINGS, LTD. [Q.B.D.]	108
BEHRENS <i>v.</i> BERTRAM MILLS CIRCUS, LTD. [Q.B.D.]	583	DARLINGTON COUNTY BOROUGH JUVENILE COURT, R. <i>v.</i> <i>Ex parte</i> WEST HARTLEPOOL CORPN. [Q.B.D. DIVL. CT.]	398
BELRUM INVESTMENTS, LTD., ALLIANCE PERPETUAL BUILDING SOCIETY <i>v.</i> [CH.D.]	635	DAWSON'S WILL TRUSTS, Re [CH.D.]	177
BERENDSEN (S.), LTD. <i>v.</i> INLAND REVENUE COMRS. [CH.D.]	727	DAY <i>v.</i> DAY [DIV.]	848
BERRY <i>v.</i> ST. MARYLEBONE CORPN. [CH.D.]	681	DELIUS' WILL TRUSTS, Re [CH.D.]	854
BERTRAM MILLS CIRCUS, LTD., BEHRENS <i>v.</i> [Q.B.D.]	583	DIRECTOR OF PUBLIC PROSECUTIONS, <i>Ex parte</i> , R. <i>v.</i> SHIPTON [Q.B.D. DIVL. CT.]	206
BETTY'S CAFÉS, LTD. <i>v.</i> PHILLIPS FURNISHING STORES, LTD. [C.A.]	1	EDWARDS <i>v.</i> WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE [C.A.]	541
BILES <i>v.</i> CAESAR [C.A.]	151	ESCOIGNE PROPERTIES, LTD. <i>v.</i> INLAND REVENUE COMRS. [C.A.]	291
BIRKETT <i>v.</i> MCGLOSSONS, LTD. [Q.B.D. DIVL. CT.]	369	EVANS MEDICAL SUPPLIES, LTD. <i>v.</i> MORIARTY (INSPECTOR OF TAXES) [C.A.]	336
BOARD OF TRADE <i>v.</i> OWEN [H.L.]	411	F. (AN INFANT), Re [CH.D.]	819
BRISTOL PLANT HIRE, LTD., HAYES <i>v.</i> [CH.D.]	685	FARRANT <i>v.</i> FARRANT [DIV.]	204
BRITISH TRANSPORT COMMISSION, MONMOUTHSHIRE COUNTY COUNCIL <i>v.</i> [Q.B.D.]	662	FIRESTONE TYRE AND RUBBER CO. LTD. (AS AGENTS FOR FIRESTONE TYRE AND RUBBER CO. OF AKRON IN THE UNITED STATES OF AMERICA) <i>v.</i> LEWELLIN (INSPECTOR OF TAXES) [H.L.]	561
BRIZELL, HALSALL <i>v.</i> [CH.D.]	371	FLOWER'S SETTLEMENT TRUSTS, Re [C.A.]	462
BROUGHTON <i>v.</i> THORNE [CH.D.]	87	FRANCIS <i>v.</i> YIEWSLEY AND WEST DRAYTON URBAN DISTRICT COUNCIL [Q.B.D.]	825
BURTON, VILLA D'ESTE RESTAURANT, LTD. <i>v.</i> [C.A.]	862	FREEMAN-THOMAS INDENTURE, Re [CH.D.]	532
C. <i>v.</i> C. [DIV.]	536	FRIBANCE <i>v.</i> FRIBANCE [C.A.]	357
CADE <i>v.</i> CADE [DIV.]	609	GILMORE'S APPLICATION, Re [C.A.]	796
CADLE (PERCY E.) & CO., LTD. <i>v.</i> JACMARCH PROPERTIES, LTD. [C.A.]	148	GOLDSCHMIDT (dec'd.), Re [CH.D.]	513
CAESAR, BILES <i>v.</i> [C.A.]	151	GOUK (dec'd.), Re [CH.D.]	469
		GRAHAM <i>v.</i> CO-OPERATIVE WHOLESALE SOCIETY, LTD. [Q.B.D.]	654
		GRAZEBROOK (M. & W.), LTD., HOARE <i>v.</i> [BR-MINGHAM ASSIZES]	470
		GRIFFITH <i>v.</i> GRIFFITH [DIV.]	494
		HACKER, R. <i>v.</i> [C.C.A.]	608

	PAGE
HALL v. MEYRICK [Q.B.D.]	208
HALLAM, R. v. [C.C.A.]	665
HALSALL v. BRIZELL [CH.D.]	371
HAMPSTEAD BOROUGH COUNCIL, SUMMERFIELD v. [CH.D.]	221
HANOVER (H.R.H. PRINCE ERNEST AUGUSTUS OF), ATTORNEY-GENERAL v. [H.L.]	49
HARBEN v. HARBEN [Div.]	379
HARVEY v. CRAWLEY DEVELOPMENT CORPN. [C.A.]	504
HAVANT JUSTICES, R. v., <i>Ex parte</i> JACOBS [Q.B.D. DIVL. CT.]	475
HAYES v. BRISTOL PLANT HIRE, LTD. [CH.D.]	685
HAYFIELD v. HAYFIELD [Div.]	598
HAYMAN v. ROWLANDS [C.A.]	321
HIGH DUTY ALLOYS, LTD., LEWIS v. [MONMOUTH ASSIZES]	740
HILLMAN (OWNERS), ALSLEY STEAM FISHING CO., LTD. v. [ADM.]	97
HOARE v. GRAZEBROOK (M. & W.), LTD. [BIRMINGHAM ASSIZES]	470
HOOD BARRS v. INLAND REVENUE COMRS. [H.L.]	832
Huddersfield CORPN., WEST RIDING OF YORKSHIRE COUNTY COUNCIL v. [Q.B.D.]	669
HUGHES v. WAITE [CH.D.]	603
HUNTLEY v. THORNTON [CH.D.]	234
HYDERABAD (NIZAM OF) v. JUNG [C.A.]	257
I.P.S. IRISH FULLY FASHIONED STOCKINGS, LTD., CUSTOMS AND EXCISE COMRS. v. [Q.B.D.]	108
INLAND REVENUE COMRS., BEAUCHAMP'S EXECUTORS v. [CH.D.]	788
INLAND REVENUE COMRS., BERENDSEN (S.), LTD. v. [CH.D.]	727
INLAND REVENUE COMRS., ESCOIGNE PROPERTIES, LTD. v. [C.A.]	291
INLAND REVENUE COMRS., HOOD BARRS v. [H.L.]	832
INLAND REVENUE COMRS., LONDON INVESTMENT AND MORTGAGE CO., LTD. v. [C.A.]	277
INLAND REVENUE COMRS. v. THORNTON, KELLEY & CO., LTD. [CH.D.]	650
INLAND REVENUE COMRS., WIGRAM FAMILY SETTLED ESTATES, LTD. (IN LIQUIDATION) v. [C.A.]	311
JACMARCH PROPERTIES, LTD., CADLE (PERCY E.) & CO., LTD. v. [C.A.]	148
JACOBS, <i>Ex parte</i> , R. v. HAVANT JUSTICES [Q.B.D. DIVL. CT.]	475
JUNG, NIZAM OF HYDERABAD v. [C.A.]	257
KIRKES, THE [ADM.]	97
L. v. L. [Div.]	536
LEE v. BARREY [C.A.]	191
LEVETT v. LEVETT [C.A.]	720
LEVY (BY HER NEXT FRIEND) v. LEVY [Div.]	478
LEWELLIN (INSPECTOR OF TAXES), FIRESTONE TYRE AND RUBBER CO., LTD. (AS AGENTS FOR FIRESTONE TYRE AND RUBBER CO. OF AKRON IN THE UNITED STATES OF AMERICA) v. [H.L.]	561
LEWIS v. HIGH DUTY ALLOYS, LTD. [MONMOUTH ASSIZES]	740
LEWIS, MCCARTHY v. [Q.B.D. DIVL. CT.]	556
LISTER v. ROMFORD ICE & COLD STORAGE CO., LTD. [H.L.]	125
LOBELL, R. v. [C.C.A.]	734
LOCK, TRAYFOOT v. [C.A.]	423
LONDON INVESTMENT AND MORTGAGE CO., LTD. v. INLAND REVENUE COMRS. [C.A.]	277
LONDON INVESTMENT AND MORTGAGE CO., LTD. v. WORTHINGTON (INSPECTOR OF TAXES) [C.A.]	277
MCCARTHY v. LEWIS [Q.B.D. DIVL. CT.]	556
MCGLOSSANS, LTD., BIRKETT v. [Q.B.D. DIVL. CT.]	369
MARSHALL (<i>decd.</i>), Re [CH.D.]	549
MARSHALL (CHARLES) PROPRIETARY, LTD. v. COLLINS [P.C.]	923
MAWJ v. REGINAM [P.C.]	385
METROPOLITAN POLICE DISTRICT RECEIVER v. CROYDON CORPN. [C.A.]	78
MEYRICK, HALL v. [Q.B.D.]	208
MINDL (J.), LTD., COUNTY LABORATORIES, LTD. v. [CH.D.]	806
MINES v. MINES [Div.]	667
MONMOUTHSHIRE COUNTY COUNCIL v. BRITISH TRANSPORT COMMISSION [Q.B.D.]	662
MONMOUTHSHIRE COUNTY COUNCIL v. SMITH [C.A.]	78
MORGAN v. CARMARTHEN CORPN. [CH.D.]	437
MORIARTY (INSPECTOR OF TAXES), EVANS MEDICAL SUPPLIES, LTD. v. [C.A.]	336
MURFIN v. UNITED STEEL COMPANIES, LTD. (POWER GAS CORPN., LTD. THIRD PARTY) [C.A.]	23
N. v. N. [Div.]	536
N. v. N. AND L. [Div.]	914
NATIONAL ASSISTANCE BOARD, TAYLOR v. [C.A.]	183

	PAGE
NATIONAL ASSISTANCE BOARD v. TUGBY [Q.B.D. DIVL. CT.]	509
NATIONAL DEPOSIT FRIENDLY SOCIETY (TRUSTEES) v. SKEGNESS URBAN DISTRICT COUNCIL [Q.B.D. DIVL. CT.]	407
NATIONAL INSTITUTE OF AGRICULTURAL BOTANY REGISTERED (TRUSTEES) v. CAMBRIDGE COUNTY COUNCIL [C.A.]	882
NEUCHÂTEL ASPHALTE CO., LTD. v. BARNETT [C.A.]	362
NICHOLSON v. ATLAS STEEL FOUNDRY AND ENGINEERING CO., LTD. [H.L.]	776
NICHOLSON, R. v. [C.M.A.C.]	67
NIZAM OF HYDERABAD v. JUNG [C.A.]	257
NOKES v. NOKES [Div.]	490
NORTHERN GAS BOARD, WEST HARTLEPOOL CORPN. v. [Q.B.D. DIVL. CT.]	394
OSCAR CHESS, LTD. v. WILLIAMS [C.A.]	325
OSUSTUKKUKAUPPA I.L., CASSIDY (PETER) SEED CO., LTD. v. [Q.B.D.]	484
OWEN, BOARD OF TRADE v. [H.L.]	411
P.Y.A. QUARRIES, LTD., ATTORNEY-GENERAL (ON THE RELATION OF GLAMORGAN COUNTY COUNCIL AND PONTARDAWE RURAL DISTRICT COUNCIL) v. [C.A.]	894
PANTHER (THE) AND THE ERICKBANK [ADM.]	641
PARIKH, <i>Ex parte</i> , R. v. BATTERSEA, WANDSWORTH, MITCHAM AND WIMBLEDON RENT TRIBUNAL [Q.B.D. DIVL. CT.]	352
PATENTS APPEAL TRIBUNAL, R. v. <i>Ex parte</i> CHAMPION PAPER AND FIBRE CO. [Q.B.D. DIVL. CT.]	227
PHILLIPS FURNISHING STORES, LTD., BETTY'S CAFÉS, LTD. v. [C.A.]	1
PINNICK v. PINNICK [Div.]	873
POSTLETHWAITE v. POSTLETHWAITE [Div.]	909
POWELL v. REPRESENTATIVE BODY OF THE CHURCH IN WALES [CH.D.]	400
POWELL-COTTON'S RE-SETTLEMENT, Re [CH.D.]	404
PRACTICE DIRECTION (ADMINISTRATION OF ESTATES: ATTORNEY) [PROB.]	602
PRACTICE DIRECTION (ADMINISTRATION OF ESTATES: FOREIGN LAW) [PROB.]	576
PRACTICE DIRECTION (COURT OF PROTECTION) [COURT OF PROTECTION]	581
PRACTICE DIRECTION (FIXING DATE FOR NON-JURY ACTIONS) [Q.B.D.]	219
PRACTICE DIRECTION (GUARDIANSHIP OF INFANTS ACTS) [CH.D.]	32
PRACTICE DIRECTION (POSTPONING DATE OF TRIAL OF NON-JURY ACTIONS) [Q.B.D.]	422
PRACTICE NOTE (DIVORCE: ORIGINATING SUMMONS: MARRIAGE CERTIFICATE) [P.D.A.]	290
PRACTICE NOTE (JUROR'S OATH) [C.C.A.]	290
PRACTICE NOTES (MATRIMONIAL CAUSES RULES) [Div.]	860
PYRAH (INSPECTOR OF TAXES) v. ANNIS & CO., LTD. [C.A.]	196
QUINN v. CAMERON AND ROBERTSON, LTD. [H.L.]	760
R. v. BATTERSEA, WANDSWORTH, MITCHAM AND WIMBLEDON RENT TRIBUNAL, <i>Ex parte</i> PARIKH [Q.B.D. DIVL. CT.]	352
R. v. COUNTY LICENSING (STAGE PLAYS) COMMITTEE OF FLINT COUNTY COUNCIL, <i>Ex parte</i> BARRETT [C.A.]	112
R. v. DARLINGTON COUNTY BOROUGH JUVENILE COURT, <i>Ex parte</i> WEST HARTLEPOOL CORPN. [Q.B.D. DIVL. CT.]	398
R. v. HACKER [C.C.A.]	608
R. v. HALLAM [C.C.A.]	665
R. v. HAVANT JUSTICES, <i>Ex parte</i> JACOBS [Q.B.D. DIVL. CT.]	475
R. v. LOBELL [C.C.A.]	734
REGINAM, MAWJ v. [P.C.]	385
R. v. NICHOLSON [C.M.A.C.]	67
R. v. PATENTS APPEAL TRIBUNAL, <i>Ex parte</i> CHAMPION PAPER AND FIBRE CO. [Q.B.D. DIVL. CT.]	227
REGINAM, ROSS v. [P.C.]	451
R. v. SHARP [C.C.A.]	577
R. v. SHIPTON, <i>Ex parte</i> DIRECTOR OF PUBLIC PROSECUTIONS [Q.B.D. DIVL. CT.]	206
R. v. WILLIAMS [C.C.A.]	689
RANSOME'S WILL TRUSTS, Re [CH.D.]	690
REPRESENTATIVE BODY OF THE CHURCH IN WALES, POWELL v. [CH.D.]	400
RIGBY v. WOODWARD [Q.B.D. DIVL. CT.]	391
ROMFORD ICE & COLD STORAGE CO., LTD., LISTER v. [H.L.]	125
ROSE v. ROSE [Div.]	517
ROSS v. REGINAM [P.C.]	451
ROWLANDS, HAYMAN v. [C.A.]	321
RUSSELL v. RUSSELL AND ROEBUCK [Div.]	929

	PAGE		PAGE
ST. MARYLEBONE CORPN., <i>BERRY v.</i> [CH.D.] ..	681	TULL'S PERSONAL REPRESENTATIVES <i>v.</i> SECRETARY OF STATE FOR AIR [C.A.] ..	480
SCOTT <i>v.</i> SCOTT [DIV.] ..	63	UNITED STEEL COMPANIES, LTD., MURFIN <i>v.</i> (POWER GAS CORPN., LTD. THIRD PARTY) [C.A.] ..	23
SECRETARY OF STATE FOR AIR, TULL'S PERSONAL REPRESENTATIVES <i>v.</i> [C.A.] ..	480	UPPER GROSVENOR STREET INVESTMENT, LTD., ADLER <i>v.</i> [Q.B.D.] ..	229
SHARMAN (R. W.), LTD., <i>Re</i> [CH.D.] ..	737	VILLA D'ESTE RESTAURANT, LTD. <i>v.</i> BURTON [C.A.] ..	862
SHARP, R. <i>v.</i> [C.C.A.] ..	577	WAITE'S SETTLEMENT TRUSTS, <i>Re</i> [CH.D.] ..	629
SHAW (<i>dead.</i>), <i>Re</i> [CH.D.] ..	745	WAITE, HUGHES <i>v.</i> [CH.D.] ..	603
SHIPTON, R. <i>v.</i> <i>Ex parte</i> DIRECTOR OF PUBLIC PROSECUTIONS [Q.B.D. DIVL. CT.] ..	206	WALKER (VALUATION OFFICER), B.P. REFINERY (KENT), LTD. <i>v.</i> [C.A.] ..	700
SKEGNESS URBAN DISTRICT COUNCIL, NATIONAL DEPOSIT FRIENDLY SOCIETY (TRUSTEES) <i>v.</i> [Q.B.D. DIVL. CT.] ..	407	WAR DAMAGE COMMISSION, CITY OF LONDON REAL PROPERTY CO., LTD. <i>v.</i> [C.A.] ..	519
SMITH, MONMOUTHSHIRE COUNTY COUNCIL <i>v.</i> [C.A.] ..	78	WEST HARTLEPOOL CORPN., <i>Ex parte</i> R. <i>v.</i> DARLINGTON COUNTY BOROUGH JUVENILE COURT [Q.B.D. DIVL. CT.] ..	398
SOLICITOR, <i>Re</i> A [C.A.] ..	427	WEST HARTLEPOOL CORPN. <i>v.</i> NORTHERN GAS BOARD [Q.B.D. DIVL. CT.] ..	394
STERNE <i>v.</i> STERNE [C.A.] ..	792	WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE, EDWARDS <i>v.</i> [C.A.] ..	541
STOCK, TRUCKELL <i>v.</i> [C.A.] ..	74	WEST RIDING OF YORKSHIRE COUNTY COUNCIL <i>v.</i> HUDDERSFIELD CORPN. [Q.B.D.] ..	669
STRINGER, AUTOMATIC WOODTURNING CO., LTD. <i>v.</i> [H.L.] ..	90	WIGRAM FAMILY SETTLED ESTATES, LTD. (IN LIQUIDATION) <i>v.</i> INLAND REVENUE COMRS. [C.A.] ..	311
SUGDEN <i>v.</i> SUGDEN [C.A.] ..	300	WILLIAMS, OSCAR CHESH, LTD. <i>v.</i> [C.A.] ..	325
SULLIVAN, CHARTER <i>v.</i> [C.A.] ..	809	WILLIAMS, R. <i>v.</i> [C.C.A.] ..	689
SUMMERFIELD <i>v.</i> HAMPSTEAD BOROUGH COUNCIL [CH.D.] ..	221	WILLIAMS <i>v.</i> WILLIAMS [C.A.] ..	305
SUMMERS (JOHN) & SONS, LTD., CARRINGTON <i>v.</i> [CHESTER ASSIZES] ..	457	WILLIAMS (SAMUEL) & SONS, LTD., ASHDOWN <i>v.</i> [C.A.] ..	35
TAXATION OF COSTS, <i>Re</i> [C.A.] ..	427	WOODWARD, RIGBY <i>v.</i> [Q.B.D. DIVL. CT.] ..	391
TAYLOR <i>v.</i> NATIONAL ASSISTANCE BOARD [C.A.] ..	183	WOOTTON <i>v.</i> CENTRAL LAND BOARD [C.A.] ..	441
TAYLOR, YELLAND <i>v.</i> [C.A.] ..	627	WORTHINGTON (INSPECTOR OF TAXES), LONDON INVESTMENT AND MORTGAGE CO., LTD. <i>v.</i> [C.A.] ..	277
TELEMACHUS, THE [ADM.] ..	72	YELLAND <i>v.</i> TAYLOR [C.A.] ..	627
TERRACE, THE, HAMPTON WICK, MIDDLESEX, <i>Re</i> No. 10 [CH.D.] ..	87	VIEWSLEY AND WEST DRAYTON URBAN DISTRICT COUNCIL, FRANCIS <i>v.</i> [Q.B.D.] ..	825
THOMPSON <i>v.</i> THOMPSON [C.A.] ..	161		
THORNE, BROUGHTON <i>v.</i> [CH.D.] ..	87		
THORNTON, HUNTLEY <i>v.</i> [CH.D.] ..	234		
THORNTON, KELLEY & CO., LTD., INLAND REVENUE COMRS. <i>v.</i> [CH.D.] ..	650		
TRAYFOOT <i>v.</i> LOOK [C.A.] ..	423		
TRUCKELL <i>v.</i> STOCK [C.A.] ..	74		
TUGBY, NATIONAL ASSISTANCE BOARD <i>v.</i> [Q.B.D. DIVL. CT.] ..	509		

INDEX

	PAGE
ACCELERATION Trust, of. <i>See</i> SETTLEMENT (Acceleration).	
ACCORD AND SATISFACTION Amount due under contract— <i>Payment of smaller sum by cheque—Words “In full and final settlement of account” typed by payor on back of cheque—Indorsement by payee—Intention of payee</i> [NEUCHÂTEL ASPHALTE CO., LTD. v. BARNETT]	362
ACCUMULATION Accumulation of income for excessive period— <i>Accumulation directed for the benefit of a class—Interests of members of class contingent—Cesser of statutory period—Entitlement to surplus income—Rights on attainment of twenty-one of person having contingent interest—Direction to accumulate excluding statutory power of maintenance—Law of Property Act, 1925 (c. 20), s. 164 (1) (b)—Trustees Act, 1925 (c. 19), s. 31 (1) (ii), s. 69 (2) [Re RANSOME'S WILL TRUSTS]</i>	690
ACTION Trial. <i>See</i> PRACTICE (Trial).	
ADMINISTRATION ACTION <i>See</i> ADMINISTRATION OF ESTATES.	
ADMINISTRATION OF ESTATES Administration action— <i>Transfer of action commenced in Queen's Bench Division—Plaintiff in transferred action not served with notice of administration order or of order transferring his action—Whether plaintiff entitled to apply for order of transfer to be discharged—R.S.C., Ord. 49, r. 5 [Re CAPELOVITCH'S ESTATE AND WILL TRUSTS]</i>	33
Grant of administration— <i>Attorney—Further grant to attorney administrator [PRACTICE DIRECTION]</i>	602
Deceased domiciled abroad— <i>Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 29 [PRACTICE DIRECTION]</i>	576
ADMIRALTY Limitation of liability. <i>See</i> SHIPPING (Limitation of liability).	
ADOPTION Consent of parents— <i>Parents' consent given by deed in 1954—Withdrawn after application for order—Infant in care of adopters for six years—Whether consent unreasonably withheld—Adoption Act, 1950 (c. 26), s. 3 (1) (c) [Re F. (AN INFANT)]</i>	819
Foreign adoption— <i>Adopters and adopted child domiciled in foreign country—Rights of child under English will—Whether “issue” of adoptive parent [Re MARSHALL (decd.)]</i>	549
ADULTERY <i>See</i> DIVORCE.	
AFFIDAVIT Foreign law— <i>Grant of administration. See</i> FOREIGN LAW (Administration of estates).	
AFFILIATION ORDER <i>See</i> BASTARDY.	
AFFRAY <i>See</i> CRIMINAL LAW.	
AGENT Liability to person other than principal— <i>Money received on behalf of principal—Payment to agent a mistaken or wrongful act—Agent informed of wrongful nature of payment—Money still in possession of agent—Duty of agent [NIZAM OF HYDERABAD v. JUNG]</i>	257
ALIEN British nationality— <i>Lineal descendant of Electress Sophia—4 Anne c. 4 or 4 & 5 Anne c. 16—British Nationality Act, 1948 (c. 56), s. 12 [ATTORNEY-GENERAL v. H.R.H. PRINCE ERNEST AUGUSTUS OF HANOVER]</i>	49
ALIMONY <i>See</i> DIVORCE.	
ALPHABET Reform of— <i>Whether charitable. See</i> CHARITY (Education—Alphabet).	
ANIMAL Liability for keeping dangerous animals— <i>Elephants—Burmese circus elephants frightened by barking dog—Dog illicitly brought into fun fair booth by licensee without knowledge of circus owners—Booth knocked down by elephants—Midgets inside booth injured—Elephants not acting viciously—Whether circus owners liable for damages [BEHRENS v. BERTRAM MILLS CIRCUS, LTD.]</i>	583
APPEAL Case Stated, by. <i>See</i> CASE STATED. Guardianship of infants. <i>See</i> INFANT. Income tax. <i>See</i> INCOME TAX.	
APPOINTMENT Power of. <i>See</i> POWER OF APPOINTMENT.	
ARBITRATION Limitation of time— <i>Statutory arbitration—Arbitration under Local Government Act, 1933, s. 151 (3)—Claims by one local authority against another for financial adjustment in respect of alteration of areas—Claims presented more than six years after alteration of areas—Date from which time runs—Limitation Act, 1939 (c. 51), s. 2 (1) (d), s. 27 (1), (6) [WEST RIDING OF YORKSHIRE COUNTY COUNCIL v. HUDDERSFIELD CORPN.]</i>	669
Setting aside award— <i>Rejection of relevant evidence [TRAYFORT v. LOCK]</i>	423

ARMY	PAGE
Offences. <i>See</i> COURT-MARTIAL.	
ASSIGNMENT	
Lease, of. <i>See</i> LANDLORD AND TENANT (Lease).	
ATTACHMENT	
Matrimonial causes. <i>See</i> DIVORCE.	
ATTORNEY ADMINISTRATOR	
<i>See</i> ADMINISTRATION OF ESTATES (Grant of administration).	
ATTORNEY-GENERAL	
Remedy— <i>Administrative discretion—Relator action</i> [ATTORNEY-GENERAL (ON THE RELATION OF HORNCHURCH URBAN DISTRICT COUNCIL) <i>v.</i> BASTOW]	497
AUSTRALIA	
<i>See</i> PRIVY COUNCIL.	
AUTREFOIS ACQUIT	
<i>See</i> CRIMINAL LAW.	
BASTARDY	
Application for order— <i>Right of National Assistance Board to apply—Whether necessary to prove that mother is a single woman—National Assistance Act, 1948 (c. 29), s. 44 (2)</i> [NATIONAL ASSISTANCE BOARD <i>v.</i> TUGBY]	509
BENEFIT	
Person taking benefit under deed, bound to assume burden [HALSALL <i>v.</i> BRIZELL]	371
BEQUEST	
Will, by. <i>See</i> WILL.	
BLACKMAIL	
<i>See</i> CRIMINAL LAW (Demanding money with menaces).	
BOUNDARY	
Conveyance of dwelling-house— <i>Footings and eaves extending beyond area depicted by plan—Parcels referring to plan—Whether footings conveyed</i> [TRUCKELL <i>v.</i> STOCK]	74
Registered land. <i>See</i> LAND REGISTRATION.	
BREACH OF CONTRACT	
<i>See</i> CONTRACT.	
BREACH OF WARRANTY	
<i>See</i> WARRANTY.	
BRIDGE	
Railway. <i>See</i> RAILWAY.	
BRITISH NATIONALITY	
<i>See</i> ALIEN.	
BUILDING	
Building in course of construction— <i>Indemnity—Indemnity clause in contract—Whether "negligence" included "breach of statutory duty" in particular context</i> [MURFIN <i>v.</i> UNITED STEEL CO., LTD. (POWER GAS CORPN., LTD., THIRD PARTY)]	23
BUILDING SCHEME	
Positive covenant— <i>Enforceability. See</i> DEED (Covenant).	
BURDEN OF PROOF	
<i>See</i> CRIMINAL LAW.	
BUSINESS PREMISES	
New tenancy. <i>See</i> LANDLORD AND TENANT (New tenancy).	
CASE STATED	
Appeal from quarter sessions— <i>Inference of fact—Right of appellate court to draw such inferences—Necessity of showing error of law—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 25 (2)</i> [CHIVERS & SONS, LTD. <i>v.</i> CAMBRIDGE COUNTY COUNCIL, TRUSTEES OF THE NATIONAL INSTITUTE OF AGRICULTURAL BOTANY REGISTERED <i>v.</i> SAME]	882
Income tax. <i>See</i> INCOME TAX (Appeal).	
Jurisdiction— <i>Case Stated by magistrates' court—Conviction of appellant and acquittal of co-defendant—Refusal of justices to allow cross-examination of co-defendant who gave evidence incriminating appellant—Conviction wrong in law—Whether jurisdiction to order re-trial—Summary Jurisdiction Act, 1857 (c. 43), s. 6—Magistrates' Courts Act, 1952 (c. 55), s. 87 (1)</i> [RIGBY <i>v.</i> WOODWARD]	391
CERTIORARI	
Patents— <i>Certiorari will lie to Patents Appeal Tribunal—Patents Act, 1949 (c. 87), s. 85 (2), (10)</i> [R. <i>v.</i> PATENTS APPEAL TRIBUNAL, <i>Ex parte</i> CHAMPION PAPER AND FIBRE CO.]	227
Statutory tribunal— <i>Error of law on face of decision—Medical appeal tribunal—Incorporation of medical report which disclosed facts showing error—Decisions of tribunal to be "final"—Whether subject to certiorari—National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 36 (3)</i> [Re GILMORE'S APPLICATION]	796
CHAMBERS	
Publication concerning proceedings in. <i>See</i> CONTEMPT OF COURT (Chambers proceedings).	
CHARITY	
Cy-près doctrine— <i>Gift to institution—Gift one of a series of legacies to charitable institutions—Institution not identifiable—Residuary gift to another charity—Finding of general charitable intention</i> [Re GOLDSCHMIDT (<i>dec'd.</i>)]	513
Education— <i>Alphabet—Research into and propaganda on advantages of reform of alphabet—Whether for advancement of education—Whether beneficial to the community</i> [Re SHAW (<i>dec'd.</i>)]	745
Gift for general purposes of named charity— <i>Charity amalgamated with another having similar purposes—Lapse</i> [Re DAWSON'S WILL TRUSTS]	177
Music— <i>Trusts for the advancement of the works of Delius, the testatrix' late husband—Gift over to testatrix' brother if nothing further could be undertaken in connexion with the furtherance or perpetuation of Delius' works—Whether trusts charitable</i> [Re DELIUS' WILL TRUSTS]	854
Trust— <i>Invalid trust—Impersonal trust—Whether effect would be given to testator's directions as a power on which trustees might act</i> [Re SHAW (<i>dec'd.</i>)]	745

CHARTERPARTY	PAGE
See SHIPPING.	
CHILD	
Adopted—Inclusion in "issue" in will. See WILL (Gift to issue).	
Adultery—Girl aged twelve cannot consent [BARNETT v. BARNETT AND BROWN]	388
Care. See CHILDREN AND YOUNG PERSONS (Fit person order).	
Custody. See DIVORCE (Custody).	
CHILDREN AND YOUNG PERSONS	
Fit person order—Order committing child to care of local authority—Supervision order in force when fit person order made—Need for consent of local authority to making of fit person order—Need for recital of such consent in fit person order—Children and Young Persons Act, 1933 (c. 12), s. 76 (1), as substituted by Children Act, 1948 (c. 43), s. 5 (1) [R. v. DARLINGTON COUNTY BOROUGH JUVENILE COURT, <i>Ex parte</i> WEST HARTLEPOOL CORPN.]	398
CHURCH IN WALES	
See ECCLESIASTICAL LAW.	
COAL MINING	
Statutory regulation of mines—Ventilation—Deliberate stopping of fan for repair—Liability of manager—Coal Mines Act, 1911 (c. 50), s. 29 (1), s. 75 [MC CARTHY v. LEWIS]	556
COLLISION	
At sea. See SHIPPING.	
COMPANY	
Director—Exclusion from board—Action claiming equitable relief—What is a sufficient proprietary interest to support the claim [HAYES v. BRISTOL PLANT HIRE, LTD.]	685
Income tax. See INCOME TAX.	
Stamp duty. See STAMP DUTY (Transfer of property from one associated company to another).	
Winding-up—Petition by judgment creditor—Majority of creditors opposing—Petition dismissed—Costs—Whether petition should be dismissed with costs or without order as to costs [Re R. W. SHARMAN, LTD.]	737
COMPENSATION	
Compulsory purchase, for. See COMPULSORY PURCHASE.	
COMPULSORY PURCHASE	
Compensation—Assessment—Compensation for disturbance—Surveyors' fees, solicitors' costs, travelling expenses, etc., reasonably incurred by owner-occupier in finding and purchasing another house for occupation—Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2 (1), (5), (6) [HARVEY v. CRAWLEY DEVELOPMENT CORPN.]	504
Licensed premises—Licence in suspense—Whether freeholders' compensation should include difference between value of the current licence and value of the suspended licence—Defence Act, 1842 (c. 94), s. 19—Finance Act, 1946 (c. 64), s. 12 [TULL'S PERSONAL REPRESENTATIVES v. SECRETARY OF STATE FOR AIR]	480
CONFLICT OF LAWS	
Adoption. See ADOPTION (Foreign adoption).	
Divorce. See DIVORCE (Foreign decree).	
Impleading foreign sovereign state. See CONSTITUTIONAL LAW (Foreign sovereign state—Immunity from suit).	
Nullity. See NULLITY (Foreign decree).	
Powers of appointment—General powers—Power given by English settlement—Residuary gift by will of testatrix domiciled abroad—Whether valid exercise of power—Wills Act, 1837 (c. 26), s. 27 [Re WAITE'S SETTLEMENT TRUSTS]	629
CONSPIRACY	
Civil action for. See TRADE UNION.	
Criminal. See CRIMINAL LAW.	
CONSTABLE	
See POLICE.	
CONSTITUTIONAL LAW	
Foreign sovereign state—Immunity from suit—Impleading foreign sovereign state—Money deposited with bank in London—Transferred, on instructions of agent of beneficial owner, to account of servant of foreign state—Transfer unauthorised by beneficial owner—Demand for re-transfer—Action by beneficial owner against bank and servant of foreign state claiming return of money [NIZAM OF HYDERABAD v. JUNG]	257
CONTEMPT OF COURT	
Chambers proceedings—Action for possession by mortgagee—Inaccurate newspaper report [ALLIANCE PERPETUAL BUILDING SOCIETY v. BELRUM INVESTMENTS, LTD.]	635
Committal—Costs—No order on motion except costs to be paid by respondents as between solicitor and client—Whether indemnity for costs [MORGAN v. CARMARTHEN CORPN.]	437
CONTRACT	
Accord and satisfaction. See ACCORD AND SATISFACTION.	
Breach—Damages—Measure—Sale of motor car—Repudiation by purchaser—Seller's resale to another purchaser at same price—Seller able to find purchaser for every such car that he could get from manufacturers—Sale of Goods Act, 1893 (c. 71), s. 50 (2), (3) [CHARTER v. SULLIVAN]	809
Condition—Contractual condition distinguished from warranty or misrepresentation [OSCAR CHESS, LTD. v. WILLIAMS]	325
Implied term—Hospital—House physician—Obligation to reside in near-by hostel—Theft of personal effects from bedroom—Whether hospital management committee liable [EDWARDS v. WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE]	541
Indemnity. See INDEMNITY.	
Non-performance—Licence necessary for export—Whether warranty by sellers to obtain it implied [PETER CASSIDY SEED CO., LTD. v. OSUUSTUKKAUPPA I.L.]	484
Quasi-contract—Wages paid, under statutory obligation, to police officer during illness caused by third party's negligence—Sums not recoverable by officer from third party—Whether authority in charge of police fund entitled to recover amount of wages from third party—[METROPOLITAN POLICE DISTRICT RECEIVER v. CROYDON CORPN., MONMOUTHSHIRE COUNTY COUNCIL v. SMITH]	78

CONTRACT—continued.	
Sale of goods. <i>See</i> SALE OF GOODS.	
Warranty. <i>See</i> WARRANTY.	
Written words on printed or typed form— <i>Whether inconsistent printed or typed words rejected</i> [NEUCHÂTEL ASPHALTE CO., LTD. v. BARNETT]	362
CONVEYANCE	
<i>See</i> SALE OF LAND.	
COSTS	
Company winding-up. <i>See</i> COMPANY.	
Land registration. <i>See</i> LAND REGISTRATION.	
Lands Tribunal— <i>Discretion—Judicial exercise—Determination of development value by Central Land Board—Appeal to Lands Tribunal—Successful party overstating case—Deprived of costs—Hearing fees—Lands Tribunal Act, 1949 (c. 42), s. 3 (5), (6)—Lands Tribunal Rules, 1949 (S.I. 1949 No. 2263), r. 52</i> [WOOTTON v. CENTRAL LAND BOARD]	441
Legal aid. <i>See</i> LEGAL AID.	
Of litigation— <i>Deduction in computing profits for income tax—Abortive application for variation of A licence for vehicles</i> [PYRAH (INSPECTOR OF TAXES) v. ANNIS & CO., LTD.]	196
Registered land. <i>See</i> LAND REGISTRATION.	
Taxation— <i>Solicitor and client—Standard to be adopted—Contempt of court—Motion for com- mittal or attachment—Applicants' costs of motion</i> [MORGAN v. CARMARTHEN CORPN.]	437
Trial— <i>Fixed date—Fee allowable on taxation for informing Clerk of the Lists of settlement or withdrawal of action</i> [PRACTICE DIRECTION]	219
COUNTY COURT	
Appeal— <i>New trial—Refusal—Grounds that the same conclusion would have been reached on a fresh hearing—County Court Rules, Ord. 37, r. 2</i> [HAYMAN v. ROWLANDS]	321
<i>Note of judgment—Incomplete note—Whether affidavit evidence of grounds of judgment admissible on appeal—R.S.C., Ord. 58, r. 18 (5)</i> [HAYMAN v. ROWLANDS]	321
COURT OF APPEAL	
County court— <i>Appeal from.</i> <i>See</i> COUNTY COURT.	
Judge's note— <i>Incomplete note—Whether affidavit evidence of grounds of judgment admissible— Appeal from county court</i> [HAYMAN v. ROWLANDS]	321
New trial— <i>Order for new trial—Appeal against order allowed by House of Lords—R.S.C., Ord. 58, r. 5, since replaced by S.I. 1955 No. 1885</i> [AUTOMATIC WOODTURNING CO., LTD. v. STRINGER]	90
<i>Refusal—Grounds that the same conclusion would have been reached on a fresh hearing— County Court Rules, Ord. 37, r. 2</i> [HAYMAN v. ROWLANDS]	321
COURT-MARTIAL	
Fraudulent misapplication— <i>Misapplying mess funds—Bar takings in warrant officer's mess— Whether "service property"—Army Act, s. 17, s. 190, as amended by Army and Air Force (Annual) Act, 1951 (c. 24), s. 7 (1) (a), (b), (4)</i> [R. v. NICHOLSON]	67
COVENANTS	
Deed, in. <i>See</i> DEED.	
Lease, in. <i>See</i> LANDLORD AND TENANT.	
Not to sue. <i>See</i> HUSBAND AND WIFE (Separation deed).	
CRANE	
<i>See</i> FACTORY (Lifting machine).	
CRIMINAL LAW	
Affray— <i>Evidence—Self-defence—Whether direct evidence of persons being put in terror necessary</i> [R. v. SHARP]	577
Appeal— <i>New trial.</i> <i>See</i> Re-trial, <i>post</i> .	
Autrefois acquit— <i>Manslaughter—Accused found not guilty of manslaughter and jury not agreed on alternative verdict of dangerous driving—Case sent by judge to quarter sessions for trial of dangerous driving—Whether quarter sessions had jurisdiction to try issue of dangerous driving on indictment for manslaughter—Road Traffic Act, 1934 (c. 50), s. 34</i> [R. v. SHIPTON, Ex parte DIRECTOR OF PUBLIC PROSECUTIONS]	206
Burden of proof— <i>Self-defence—Degree of proof required</i> [R. v. LOBELL]	734
Conspiracy— <i>Conspiracy to commit crime abroad—Whether indictable in England</i> [BOARD OF TRADE v. OWEN]	411
<i>Husband and wife—Whether the rule that husband and wife cannot be guilty of conspiracy may apply to a potentially polygamous marriage</i> [MAWJI v. REGINAM]	385
Demanding money with menaces— <i>Committal for trial should be to assizes—Larceny Act, 1916 (c. 50), s. 30—Magistrates' Courts Act, 1952 (c. 55), s. 10</i> [R. v. HACKER]	608
Evidence— <i>Evidence by one prisoner against another—Right of latter to cross-examine—Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (iii)</i> [RIGBY v. WOODWARD]	391
Explosives— <i>Possession.</i> <i>See</i> EXPLOSIVES.	
Jurisdiction— <i>Conspiracy to commit crime abroad</i> [BOARD OF TRADE v. OWEN]	411
Manslaughter— <i>Reckless or dangerous driving.</i> <i>See</i> ROAD TRAFFIC (Dangerous driving).	
Practice— <i>Oath of juror—Form</i> [PRACTICE NOTE]	290
<i>Report of inquiries subsequent to trial not to be sent to Court of Criminal Appeal</i> [R. v. WILLIAMS]	689
Re-trial— <i>Whether re-trial is a matter of practice or procedure</i> [ROSS v. REGINAM]	451
Riot— <i>Evidence—Whether direct evidence of terror being caused was necessary</i> [R. v. SHARP]	577
Self-defence— <i>See</i> Burden of proof, <i>ante</i> .	
CRUELTY	
<i>See</i> DIVORCE; MAGISTRATES (Husband and wife).	
CUSTODY	
Child. <i>See</i> DIVORCE.	
CUSTOMS	
Service of writ claiming condemnation of seized goods— <i>Notice of claim given by solicitors acting for company with registered office abroad—Service of writ on solicitors more than a year later— Whether writ properly served on company—Customs and Excise Act, 1952 (c. 44), Sch. 7, para. 4</i> [COMRS. OF CUSTOMS AND EXCISE v. I.F.S. IRISH FULLY FASHIONED STOCKINGS, LTD.]	108

See CHARITY.

DAMAGE

- Remoteness—Negligence of solicitor instructed to draft wills—Failure to advise clients that wills would be revoked by their marriage [HALL v. MEYRICK] 208
- Servant's negligence—Master's liability to third party—Recovery from servant [LISTER v. ROMFORD ICE & COLD STORAGE CO., LTD.] 125

DAMAGES

- Divorce suit. See DIVORCE.
- Measure of damages—Breach of contract. See CONTRACT (Breach).
- Loss of joint earnings—Husband and wife performing midgets—Act not joint one, but husband exceptionally dependent on wife—No work done by husband during wife's incapacity although husband fit to work—Whether husband entitled to damages in respect of loss of half the joint earnings during period of wife's illness [BEHRENS v. BERTRAM MILLS CIRCUS, LTD.] 583
- Mental shock—Fun fair booth knocked down by elephant—No physical injury to plaintiff who was inside booth—Whether damages recoverable for shock [BEHRENS v. BERTRAM MILLS CIRCUS, LTD.] 583
- Negligence of solicitor. See SOLICITOR.

DANGEROUS DRIVING

See ROAD TRAFFIC.

DANGEROUS MACHINERY

See FACTORY.

DATE

- Trial—Fixing—Non-jury actions in Queen's Bench Division [PRACTICE DIRECTION] 219

DECLARATION

- Jurisdiction to grant—Equitable relief—Action by director for exclusion from board meetings—Whether sufficient proprietary interest to maintain action [HAYES v. BRISTOL PLANT HIRE, LTD.] 685

DECREE ABSOLUTE

See DIVORCE.

DEED

- Covenant—Positive covenant—Enforceability—Roads and sewers declared to be held in trust for owners of land—Covenant by owners to contribute to upkeep—Liability of successors in title of owners using roads and sewers [HALSALL v. BRIZELL] 371
- Separation. See HUSBAND AND WIFE (Separation deed).

DEFENCE

Divorce proceedings, in. See DIVORCE.

DESERTION

See DIVORCE.

DIFFERENTIAL RENT SCHEME

See HOUSING (House of local authority).

DIRECTOR

See COMPANY.

DISCRETION

Exercise by court. See DIVORCE.

DISTURBANCE

Compensation. See COMPULSORY PURCHASE (Compensation—Assessment).

DIVORCE

- Adultery—Consensual act—Adultery with child twelve years of age—Child incapable in law of consenting to act of sexual intercourse [BARNETT v. BARNETT AND BROWN] 388
- Alimony—Pendente lite—Amount—Whether wife's earning capacity should be taken into account—Wife's petition for restitution of conjugal rights—Matrimonial Causes Act, 1950 (c. 25), s. 19 (1) [GRIFFITH v. GRIFFITH] 494
- Wife receiving national assistance—Matrimonial Causes Act, 1950 (c. 25), s. 19 (1) [STERNE v. STERNE] 792
- Attachment—Maintenance order—Order that husband pay children's school fees—Breach of order—"Default in payment of a sum of money"—Jurisdiction—Debtors Act, 1869 (c. 62), s. 4 [FARRANT v. FARRANT] 204
- Bars to relief—Covenant not to sue. See Defence, post.
- Costs—Legal aid. See LEGAL AID.
- Cruelty—Desertion—Neglect of wife and child by husband—Course of conduct amounting to cruelty causing spouse to leave matrimonial home—Whether conduct amounting to desertion can be cruelty [CADE v. CADE] 609
- Custody—Child out of jurisdiction—Children taken from wife—Wife's application for custody—Order against husband to deliver child to wife within the jurisdiction—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1) [HARBEN v. HARBEN] 379
- Damages—Claim against co-respondent—Factors to be taken into account—Respondent's responsibility for liaison—Co-respondent's means [SCOTT v. SCOTT] 63
- Decree absolute—Application for leave to apply for decree to be made absolute—Decree nisi on grounds of husband's adultery—Resumption of cohabitation—Condonation—Subsequent desertion and adultery by husband—Evidence in support of application [ROSE v. ROSE] 517
- Defence—Covenant not to take proceedings in respect of matrimonial offences committed before date of deed of separation—Petition by husband on ground of wife's subsequent adultery—Allegations of husband's matrimonial offences before date of deed struck out of wife's and co-respondent's answers—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 16 (1) [N. v. N. AND L.] 914
- Desertion—Course of conduct amounting to cruelty and causing spouse to leave matrimonial home [CADE v. CADE] 609
- Defence—"Just cause"—Adultery by deserted spouse prior to date of desertion—Effect on deserting spouse's mind—Onus on petitioner—Continuance of separation without cause—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (b) [DAY v. DAY] 848
- Misconduct conducting—Misconduct not amounting to just cause—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2), proviso (iv) [POSTLETHWAITE v. POSTLETHWAITE] 909
- Termination—Jewish bill of divorce—Effect in English law—Consent of wife to be determined in the light of all the circumstances [CORBETT v. CORBETT] 621

DIVORCE—continued.

	PAGE
Discretion—Appeal—Exercise of discretion on appeal—Discretion statement—Matters in discretion statement not fully explored—Matrimonial Causes Act, 1950 (c. 25), s. 4 (2), proviso [LEVETT v. LEVETT]	720
Petition alleging adultery after the date of a deed of separation containing a covenant not to sue for prior matrimonial offences—Petitioner asking for exercise of court's discretion—Duty to disclose prior matrimonial offences—Matrimonial Causes Act, 1950 (c. 25), s. 4—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 28 [N. v. N. AND L.]	914
Domicil—Domicil of choice—Serving soldier—Scotsman posted to England—Evidence as to voluntary residence—Factum and animus [CRUICKSHANKS v. CRUICKSHANKS]	889
Estoppel—Paternity of child—Order for maintenance of child—Application to vary order on ground that child was not child of marriage—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1) [NOKES v. NOKES]	490
Same allegations raised in wife's answer to petition for divorce as previously raised by wife in unsuccessful application to High Court for maintenance—Husband's allegation in petition that wife had made untrue charges—Whether wife estopped from repeating charges in answer [THOMPSON v. THOMPSON]	161
Foreign decree—Decree granted to wife in Finland on ground of husband's desertion—Husband domiciled in Finland at date of desertion—Subsequent acquisition by husband of English domicil—Recognition of decree by English court—Matrimonial Causes Act, 1950 (c. 25), s. 18 (1) (a) [ARNOLD v. ARNOLD]	570
Petition by wife ordinarily resident in Germany—Decree granted to husband on cross-petition—Husband domiciled in England—No recognition of foreign decree—Matrimonial Causes Act, 1950 (c. 25), s. 6, s. 18 (1) (b) [LEVETT v. LEVETT]	720
Infant—Service—Notice of motion of appeal to Divisional Court against magistrates' court order—Service on infant respondent personally instead of on guardian ad litem—Infant legally aided—Whether good service—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 64 (3) [LEVY (BY HER NEXT FRIEND) v. LEVY]	478
Jurisdiction—Husband domiciled in Eire—Petition by wife based on her residence in England—Husband not entitled to relief in cross-prayer or cross-petition—Matrimonial Causes Act, 1950 (c. 25), s. 6, s. 18 (1) [RUSSELL v. RUSSELL AND ROEBUCK]	929
Legal aid—Costs. See LEGAL AID.	
Maintenance of wife—Death of divorced husband—Order made against him in his lifetime to pay maintenance for children—Whether maintenance payable out of his estate after his death—Proper method of securing that maintenance should continue after husband's death—Meaning of "cause of action" in Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1) [SUGDEN v. SUGDEN]	300
Variation of order—Re-marriage of wife—Husband's application to vary—Affidavit sworn by wife as feme sole—False affidavit—Conduct to be considered in varying maintenance—Matrimonial Causes Act, 1950 (c. 25), s. 28 (3) [HAYFIELD v. HAYFIELD]	598
Petition—Form of petition—Prayer for discretion—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 4, as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), r. 5 [PRACTICE NOTE]	860
Residence of petitioner—Omission of statement of residence—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 4 (1) (d), substituted by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), r. 5 (1) [PRACTICE NOTE]	860
Petition within three years of marriage—Leave to present—Marriage certificate to be lodged [PRACTICE NOTE]	290
Service. See Practice, post.	
Practice—Ancillary relief—Amendment of petition—Application for relief—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 3 (3), proviso, r. 15, r. 19, r. 44 (1), as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), r. 4, r. 16 [PRACTICE NOTE]	860
Service—Petition—Dispensing with service—Petition for presumption of death and dissolution of marriage—Principles applicable—Matrimonial Causes Act, 1950 (c. 25), s. 16 (1)—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 9 (5) [N. v. N., L. v. L., C. v. C.]	536
Striking out pleading—Estoppel—Prolixity and want of reasonable cause—Answer to petition for divorce—Pleading based in part on same matters as had been raised on previous unsuccessful application for maintenance—Defects invited by similar defects in petition [THOMPSON v. THOMPSON]	161
Residence by wife—Petition by husband—Prayer in answer and cross-petition by wife—Husband domiciled in Eire—Wife resident in England for appropriate time—Wife entitled to relief—Matrimonial Causes Act, 1950 (c. 25), s. 6, s. 18 (1) [RUSSELL v. RUSSELL AND ROEBUCK]	929
Service. See Practice, ante.	

DOMICIL

Divorce, for purposes of. See DIVORCE.

DRIVING

While under influence of drug. See ROAD TRAFFIC.

DRUG

Driving while under the influence. See ROAD TRAFFIC (Driving while under the influence of a drug).

DUST

Nuisance—Public nuisance. See NUISANCE (Public nuisance).

Removal of, in factory. See FACTORY.

EARNINGS

Loss. See DAMAGES (Measure of damages).

EASTERN AFRICA

See PRIVY COUNCIL.

ECCLESIASTICAL LAW

Church in Wales—Peculiar—Marriage licences—Right of rector concurrent with bishop of diocese to grant—Whether right continued after date of disestablishment of Church in Wales—Welsh Church Act, 1914 (c. 91), s. 3, s. 23—Welsh Church (Temporalities) Act, 1919 (c. 65), s. 6 [POWELL v. REPRESENTATIVE BODY OF THE CHURCH IN WALES]

400

ELECTRICITY

Factory, in. See FACTORY (Electricity regulations).

ESTOPPEL
Divorce. See DIVORCE.

EVIDENCE
Criminal proceedings, in. See CRIMINAL LAW.
Foreign law. See FOREIGN LAW.

EXPLOSIVES
Possession—"Knowingly" in possession of explosives for unlawful object—*Explosive Substances Act, 1883 (c. 3), s. 4 (1) [R. v. HALLAM]* 665

FACTORY
Dangerous machinery—Circular saw—Fenced in compliance with *Woodworking Machinery Regulations, 1922, reg. 10 (c)*—Operator injured in course of ancillary operation—*Liability to fence under Factories Act, 1937, s. 14 (1), modified by regulations—Woodworking Machinery Regulations, 1922 (S.R. & O. 1922 No. 1196), reg. 10 (c)*—*Factories Act, 1937 (c. 67), s. 14 (1) [AUTOMATIC WOODTURNING CO., LTD. v. STRINGER]* 90
Duty to fence—Component to be bored affixed to machine—Danger arising from machinery in use with component affixed—Vertical boring machine—Whether duty to fence component affixed to machine—*Factories Act, 1937 (c. 67), s. 14 (1) [HOARE v. M. & W. GRAZEBROOK, LTD.]* 470
Part of machinery not dangerous by itself—Danger caused by conjunction of part of machine with part of materials used on it—*Factories Act, 1937 (c. 67), s. 14 (1) [LEWIS v. HIGH DUTY ALLOYS, LTD.]* 740
Dust—Wood dust—Duty to provide adequate ventilation—Duty to prevent "accumulation" of dust—*Factories Act, 1937 (c. 67), s. 4 (1), s. 47 (1) [GRAHAM v. CO-OPERATIVE WHOLESALE SOCIETY, LTD.]* 654
Electricity regulations—Absolute duty—*Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy etc. (S.R. & O. 1908 No. 1312), reg. 18 (d), as substituted by Electricity (Factories Act) Special Regulations, 1944 (S.R. & O. 1944 No. 739) [MURFIN v. UNITED STEEL COMPANIES, LTD. (POWER GAS CORPN., LTD. THIRD PARTY)]* 23
Insulating stands or screens—Duty to provide even in place set apart for switchboards having bare conductors—*Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy etc. (S.R. & O. 1908 No. 1312), reg. 15, reg. 24 [MURFIN v. UNITED STEEL COMPANIES, LTD. (POWER GAS CORPN., LTD. THIRD PARTY)]* 23
Grinding machines—Swing frame grinder—Whether portable grinding machine within exemption certificate—*Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O. 1925 No. 904), reg. 1 [NICHOLSON v. ATLAS STEEL FOUNDRY AND ENGINEERING CO., LTD.]* 776
Lifting machine—Travelling crane—Crane working overhead but running along ground—Whether "overhead travelling crane"—*Factories Act, 1937 (c. 67), s. 24 (7) [CARRINGTON v. JOHN SUMMERS & SONS, LTD.]* 457
Removal of dust—Metal grinding—Plough buff—Failure to provide appliances for the interception of dust—Whether operation of plough buff was dry grinding—*Definitions of grinding, cleaning of castings, and abrasive wheel—Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O. 1925 No. 904), Definitions, reg. 1 [QUINN v. CAMERON AND ROBERTON, LTD.]* 760
Ventilation—Failure to ventilate—Increase of risk of injury from noxious dust—*Factories Act, 1937 (c. 67), s. 4 (1) [NICHOLSON v. ATLAS STEEL FOUNDRY AND ENGINEERING CO., LTD.]* 776

FENCING
Dangerous machinery. See FACTORY (Dangerous machinery—Duty to fence).

FINE
Rent—Whether lump sum payment rent or a fine—*Law of Property Act, 1925 (c. 20), s. 99, s. 205 (xxiii) [HUGHES v. WAITE]* 603

FIRE
Escape of—Adjoining premises damaged. See NEGLIGENCE (Escape—Fire).

FISH
Salmon—Possession of salmon within period of prohibition of sale for selling after end of period—Whether prohibited—*Salmon and Freshwater Fisheries Act, 1923 (c. 16), s. 30 (1) [BIRKETT v. MCGLOSSONS, LTD.]* 369

FIT PERSON
See CHILDREN AND YOUNG PERSONS.

FOREIGN ADOPTION
See ADOPTION.

FOREIGN COMPANY
Income tax. See INCOME TAX.

FOREIGN DECREE
Validity. See DIVORCE (Foreign decree); NULLITY.

FOREIGN LAW
Administration of estates—Grant—Deceased domiciled abroad—*Affidavit of foreign law—Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 29 [PRACTICE DIRECTION]* 576

FRAUDULENT CONVERSION
See COURT-MARTIAL (Fraudulent misapplication).

FRIENDLY SOCIETY
Rates—Limitation of rates. See RATES (Limitation of rates chargeable).

GAS
Rating of gas boards. See RATES (Gas boards).

GIFT
Husband and wife, between. See HUSBAND AND WIFE (Title to property).

GRANT
Administration, of. See ADMINISTRATION OF ESTATES.

GRINDING MACHINE
Dust, from. See FACTORY (Removal of dust).

HIGHWAY		
Repair—Bridge carrying road over railway—New stretches of road joining existing road to bridge carried along embankment—Embankment slipping into railway cutting—Extent of liability of railway company's successors to repair embankment and road—Railways Clauses Consolidation Act, 1845 (c. 20), s. 46 [MONMOUTHSHIRE COUNTY COUNCIL v. BRITISH TRANSPORT COMMISSION] ..		PAGE 662
HOSPITAL		
Negligence—Property—Loss of property from hostel—House physician obliged to reside in hostel—Theft of his personal effects from bedroom—Whether management committee owed duty to take reasonable care of employee's property in hostel [EDWARDS v. WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE] ..		541
HOUSEKEEPING		
Savings. See HUSBAND AND WIFE (Title to property).		
HOUSING		
House of local authority—Rent—Increase—"Reasonable charges"—Differential rent scheme—Duties of local authority in fixing rents—Housing Act, 1936 (c. 51), s. 83 (1), s. 85 (5) (as substituted by Housing Act, 1949 (c. 60), s. 1, Sch. 1), s. 85 (6) [SUMMERFIELD v. HAMPSTEAD BOROUGH COUNCIL] ..		221
HUSBAND AND WIFE		
Legal proceedings—Summary proceedings as to property—Jurisdiction—Money claim—Questions involving inquiry as to the existence of fund on which the court's decision could operate—Questions the answer to which will merely show an indebtedness—Whether court has jurisdiction—Married Women's Property Act, 1882 (c. 75), s. 17 [Re CAMKIN'S QUESTIONS] ..		69
Maintenance—Agreement—Enforceability—Wife in desertion—Agreement by wife to maintain herself, to indemnify husband against debts incurred by her, and not to pledge his credit—Consideration—Wife's right to maintenance suspended, not forfeited [WILLIAMS v. WILLIAMS] ..		305
Separation—Consensual separation—No agreement to maintain wife while living apart from husband—No change of circumstances—Whether wife entitled to maintenance [PINNICK v. PINNICK] ..		873
Separation deed—Covenant not to sue in respect of matrimonial offences committed before the date of the deed—Petition by husband on the ground of the wife's subsequent adultery—Allegations of husband's matrimonial offences before the date of the deed struck out of wife's and co-respondent's answer [N. v. N. AND L.] ..		914
Title to property—Matrimonial home—Both parties contributing to purchase—Intention of parties—Married Women's Property Act, 1882 (c. 75), s. 17 [FRIBANCE v. FRIBANCE] ..		357
IMPLEADING		
Foreign state. See CONSTITUTIONAL LAW (Foreign sovereign state—Immunity from suit).		
INCOME TAX		
Appeal—Case Stated—Remission of case to commissioners—Failure to call evidence—Judge's assumption on evidence available [PYRAH (INSPECTOR OF TAXES) v. ANNIS & CO., LTD.] ..		196
Deduction in computing profits—Capital expenditure—Expenditure on abortive application for variation in road haulage licence—Income Tax Act, 1952 (c. 10), Sch. D, Case I [PYRAH (INSPECTOR OF TAXES) v. ANNIS & CO., LTD.] ..		196
Purchase of standing timber by timber merchant [HOOD BARRS v. INLAND REVENUE COMRS.] ..		832
Foreign company—Subsidiary in United Kingdom—Contracts with foreign distributors—Whether agents of foreign company—Whether foreign company carrying on trade within United Kingdom—Income Tax Act, 1918 (c. 40), Sch. D, para. 1, All Schedules Rules, r. 5 [FIRESTONE TYRE AND RUBBER CO., LTD. (AS AGENTS FOR FIRESTONE TIRE AND RUBBER CO. OF AKRON IN THE UNITED STATES OF AMERICA) v. LEWELLIN (INSPECTOR OF TAXES)] ..		561
Income—Payment of lump sum for imparting secret processes and for furnishing plans, etc., for erecting factory—Whether income or capital receipt—Income Tax Act, 1952 (c. 10), Sch. D, Case I [EVANS MEDICAL SUPPLIES, LTD. v. MORIARTY (INSPECTOR OF TAXES)] ..		336
Profits—Lump sum payment—Whether income. See Income, ante.		
War damage value payments—Property dealing company—Damage to properties comprising stock-in-trade—Whether value payments part of trading receipts—War Damage Act, 1943 (c. 21), s. 66 (1)—Income Tax Act, 1918 (c. 40), Sch. D, Case I—War Damage (Public Utility Undertakings, etc.) Act, 1949 (c. 36), s. 28 [LONDON INVESTMENT AND MORTGAGE CO., LTD. v. INLAND REVENUE COMRS. SAME v. WORTHINGTON (INSPECTOR OF TAXES)] ..		277
Surtax. See SURTAX.		
INDECENCY		
Adultery with a child. See DIVORCE (Adultery).		
INDEMNITY		
Factory building contract—Indemnity against every "claim . . . under any statute or at common law . . . arising . . . from any cause other than negligence"—Whether "negligence" included breach of statutory duty [MURFIN v. UNITED STEEL COMPANIES, LTD. (POWER GAS CORPN., LTD. THIRD PARTY)] ..		23
INDEPENDENT CONTRACTOR		
Negligence—Fire created by acts of servants of contractor employed to thaw frozen pipes—Adjoining premises damaged—Whether occupier liable for acts of contractor's servants [BALFOUR v. BARTY-KING (HYDER & SONS (BUILDERS), LTD. THIRD PARTIES)] ..		156
INFANT		
Adoption. See ADOPTION.		
Divorce. See DIVORCE.		
Guardianship of Infants Acts—Appeals from county courts or justices—Applications in regard to two or more children of same parents—Guardianship of Infants Acts, 1886 and 1925—R.S.C., Ord. 55A, r. 6 [PRACTICE DIRECTION] ..		32
Maintenance—Order for maintenance of children of marriage—Order against husband for payment of annual sums—Death of husband—Whether maintenance thereafter payable out of husband's estate—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1) [SUGDEN v. SUGDEN] ..		300
Order of High Court—Enforcement—Attachment—Default in payment of amount of school fees—Whether writ of attachment will issue—Debtors Act, 1869 (c. 62), s. 4 [FARRANT v. FARRANT] ..		204
Paternity—Estoppel. See DIVORCE (Estoppel).		

INJUNCTION	PAGE
Breach of statute— <i>Relator action to restrain breach—Scope of court's discretion in relator action</i> [ATTORNEY-GENERAL (ON THE RELATION OF HORNCHURCH URBAN DISTRICT COUNCIL) v. BASTOW]	497
Jurisdiction— <i>Equitable relief—Proprietary interest—Action for excluding director from board of company</i> [HAYES v. BRISTOL PLANT HIRE, LTD.]	685
Nuisance— <i>Public nuisance—Dust and vibration from quarry affecting adjoining householders— Remedial measures taken since action began—Relevance of defendants' attitude to complaints— Whether injunction should be granted—Whether isolated acts would amount to a public nuisance and thus constitute a breach of an injunction against committing one</i> [ATTORNEY- GENERAL (ON THE RELATION OF GLAMORGAN COUNTY COUNCIL AND PONTARDAWE RURAL DISTRICT COUNCIL) v. P.Y.A. QUARRIES, LTD.]	894
Restraining infringement of public right conferred by statute— <i>Relator action—Administrative discretion of Attorney-General where doubtful whether other remedies exhausted</i> [ATTORNEY- GENERAL (ON THE RELATION OF HORNCHURCH URBAN DISTRICT COUNCIL) v. BASTOW]	497
INSURANCE	
Motor insurance— <i>Whether employer required to take out policy covering personal liability of servant while driving vehicle in the course of his employment—Road Traffic Act, 1930 (c. 43), s. 35 (1), s. 36 (1), s. 121</i> [LISTER v. ROMFORD ICE & COLD STORAGE CO., LTD.]	125
INTESTACY	
Grant of administration— <i>Deceased domiciled abroad—Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 29</i> [PRACTICE DIRECTION]	576
INVESTMENT CLAUSE	
See SETTLEMENT.	
INVESTMENT COMPANY	
Surtax. See SURTAX.	
JUDGMENT	
Judicial decision as authority— <i>Ratio decidendi or obiter dictum</i> [BEHRENS v. BERTRAM MILLS CIRCUS, LTD.]	583
Note— <i>County court judgment.</i> See COUNTY COURT.	
JURISDICTION	
Criminal. See CRIMINAL LAW.	
Magistrate. See CASE STATED; MAGISTRATES.	
JUROR	
Oath— <i>Form of oath to be administered at trial of criminal charge</i> [PRACTICE NOTE]	290
JUSTICES	
See MAGISTRATES.	
JUVENILE COURT	
See CHILDREN AND YOUNG PERSONS.	
LAND REGISTRATION	
Boundary— <i>Filed plan—Plan on land certificate at variance with plan attached to transfer— Which plan prevails—Land Registration Act, 1925 (c. 21), s. 19, s. 69, s. 76—Land Regis- tration Rules, 1925 (S.R. & O. 1925 No. 1093), r. 278</i> [LEE v. BARREY]	191
Costs— <i>Transfer of registered land on sale—Scale fee—Not all work done to which scale fee applied —Whether scale fee chargeable—Solicitors' Remuneration (Registered Land) Order, 1925 (S.R. & O. 1926 No. 2), art. 1 (D) (i), (H), Schedule (as substituted by Solicitors' Re- muneration (Registered Land) Order, 1953 (S.I. 1953 No. 118))</i> [Re TAXATION OF COSTS, Re A SOLICITOR]	427
<i>Transfer of registered land on sale by order of court—Scale fee—Not all work completed to which scale fee applied—Whether scale fee chargeable—Solicitors' Remuneration (Registered Land) Order, 1925 (S.R. & O. 1926 No. 2), art. 1 (D) (i), (H), Schedule (as substituted by Solicitors' Remuneration (Registered Land) Order, 1953 (S.I. 1953 No. 118))</i> [Re No. 10, THE TERRACE, HAMPTON WICK, MIDDLESEX]	87
LANDLORD AND TENANT	
Covenant— <i>Against assignment.</i> See Lease—Assignment, post.	
Lease— <i>Assignment—Covenant not to assign without consent—Express provision in lease for consent not to be unreasonably withheld—Proviso that tenant, if wishing to assign, should first offer to surrender lease—Validity of proviso—Landlord and Tenant Act, 1927 (c. 36), s. 19 (1) (a)</i> [ADLER v. UPPER GROSVENOR STREET INVESTMENT, LTD.]	229
New tenancy— <i>Business premises—Duration of new tenancy—Regard had to terms of previous leases granted to tenant in respect of the premises—Landlord and Tenant Act, 1954 (c. 56), s. 33</i> [BETTY'S CAFÉS, LTD. v. PHILLIPS FURNISHING STORES, LTD.]	1
<i>Opposition by landlord—Intention to reconstruct premises on termination of current tenancy—Date at which fixed and genuine intention to reconstruct must exist—Landlord and Tenant Act, 1954 (c. 56), s. 30 (1) (f)</i> [BETTY'S CAFÉS, LTD. v. PHILLIPS FURNISHING STORES, LTD.]	1
<i>Intention to reconstruct premises on termination of current tenancy—Intention stated to reconstruct whole of premises—Evidence of intention to reconstruct sub- stantial part of premises only—Landlords joint owners—Death of one co-owner— Evidence by surviving co-owner and executor of deceased co-owner before probate— Whether intention proved—Landlord and Tenant Act, 1954 (c. 56), s. 25 (1), s. 30 (1) (f)</i> [BILES v. CAESAR]	151
<i>"Reconstruct"—Landlord and Tenant Act, 1954 (c. 56), s. 30 (1) (f)</i> [PERCY E. CADLE & CO., LTD. v. JACMARCH PROPERTIES, LTD.]	148
Rent— <i>Increase of contractual rent by rent tribunal</i> [VILLA D'ESTE RESTAURANT, LTD. v. BURTON]	862
Rent control. See RENT CONTROL.	
Rent restriction. See RENT RESTRICTION.	
LANDS TRIBUNAL	
Costs. See COSTS.	
LEASE	
See LANDLORD AND TENANT.	
LEGACY	
Charity, to. See CHARITY.	
See also WILL.	

LEGAL AID	PAGE
Assessment of resources— <i>Exclusion of subject-matter of dispute—Divorce—Application by wife for legal aid to defend petition, to cross-petition and to claim maintenance—Alimony pending suit ordered subsequently—Whether alimony taken into account in computing wife's disposable income—Legal Aid and Advice Act, 1949 (c. 51), s. 4 (3)—Legal Aid (Assessment of Resources) Regulations, 1950 (S.I. 1950 No. 1358), reg. 2 [TAYLOR v. NATIONAL ASSISTANCE BOARD]</i>	183
Costs— <i>Security for costs—Wife, respondent to divorce petition, an assisted person—Respondent's answer and cross-prayer abandoned at hearing in view of respondent's evidence—Whether respondent entitled to order for costs, the husband having given security [MINES v. MINES]</i>	667
LICENCE	
Export— <i>Duty to obtain. See CONTRACT (Non-performance).</i>	
LICENSED PREMISES	
<i>See LICENSING.</i>	
LICENSEE	
Negligence— <i>Licensor excluding liability—Notice on land purporting to exclude liability—Knowledge of licensee of existence of notice but allegation of ignorance of most of its terms—Whether liability of licensor for negligence excluded—Whether conditions sufficiently brought to licensee's notice—Construction of licence—Whether exclusion of liability limited to static condition of the land [ASHDOWN v. SAMUEL WILLIAMS & SONS, LTD.]</i>	35
LICENSING	
Licensed premises— <i>Compulsory acquisition—Compensation. See COMPULSORY PURCHASE (Compensation).</i>	
Theatre— <i>For theatrical performances. See THEATRE.</i>	
LIMITATION OF ACTION	
Arbitration. <i>See ARBITRATION.</i>	
LIMITATION OF LIABILITY	
Shipping. <i>See SHIPPING.</i>	
LOCAL AUTHORITY	
House— <i>Rent. See HOUSING.</i>	
LOCAL GOVERNMENT	
Alteration of area— <i>Extension of county borough boundaries to include part of administrative county area—Financial adjustments—Claims presented by county council against corporation of borough more than six years after alteration of areas—Limitation of time—Date from which time runs—Local Government Act, 1933 (c. 51), s. 151 (1), (3)—Limitation Act, 1939 (c. 21), s. 2 (1) (d), s. 27 (1), (6) [WEST RIDING OF YORKSHIRE COUNTY COUNCIL v. HUDDERSFIELD CORPN.]</i>	669
LODGER	
Rent tribunal— <i>Right to refer contract to tribunal [R. v. BATTERSEA WANDSWORTH, MITCHAM AND WIMBLEDON RENT TRIBUNAL, Ex parte PARIKH]</i>	352
LODGING-HOUSE	
Property of lodgers— <i>Loss—Whether lodging-house keeper owed duty to take reasonable care of property against theft [EDWARDS v. WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE]</i>	541
LUNATIC	
<i>See PERSON OF UNSOUND MIND.</i>	
MACHINERY	
Valuation for rating. <i>See RATES (Valuation).</i>	
MAGISTRATES	
<i>Case Stated. See CASE STATED.</i>	
Husband and wife— <i>Appeal—Infant respondent—Service on infant respondent instead of on guardian ad litem—Infant legally aided—Whether good service—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 64 (3) [LEVY (BY HER NEXT FRIEND) v. LEVY]</i>	478
<i>Cruelty—Persistent cruelty—Indifference—Neglect of wife and child by husband—Whether conduct amounting to desertion can be cruelty [CADE v. CADE]</i>	609
<i>Maintenance—Wilful neglect to maintain—Consensual separation—No agreement as to maintenance—No change of circumstances after separation—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4 [PINNICK v. PINNICK]</i>	873
<i>Jurisdiction—Probation—Breach of probation order—Power to make fresh probation order for period of three years from date of fresh order—Effect of supervising court's decision on existing probation order—Criminal Justice Act, 1948 (c. 58), s. 3 (1), s. 6 (3), Sch. 1, para. 3, proviso (a) [R. v. HAVANT JUSTICES, Ex parte JACOBS]</i>	475
Juvenile court. <i>See CHILDREN AND YOUNG PERSONS.</i>	
<i>Order—Form of order—Recitals of facts showing the jurisdiction of the court—Juvenile court [R. v. DARLINGTON CORPN. JUVENILE COURT, Ex parte WEST HARTLEPOOL CORPN.]</i>	398
MAINTENANCE	
Infant. <i>See INFANT.</i>	
Power, of. <i>See TRUST AND TRUSTEE (Powers of trustee).</i>	
Wife. <i>See DIVORCE; HUSBAND AND WIFE.</i>	
MARRIAGE	
Nullity of. <i>See NULLITY.</i>	
MARRIED WOMAN	
Property— <i>Disputes as to. See HUSBAND AND WIFE (Legal proceedings).</i>	
MASTER AND SERVANT	
Duty of master— <i>Access to place of work over private land of another person—Whether master under duty to provide reasonably safe route of access or to warn servant of dangers on authorised route [ASHDOWN v. SAMUEL WILLIAMS & SONS, LTD.]</i>	35
<i>Property of servant—House physician's clothing stolen from hostel—Whether master owed duty to take reasonable care of property [EDWARDS v. WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE]</i>	541
<i>Reasonable precautions not to expose employee to unnecessary risk—Factory containing many machines of which a few were dangerous to oil when in motion—Whether employers owed duty to give instructions not to oil dangerous machines when in motion [LEWIS v. HIGH DUTY ALLOYS, LTD.]</i>	740
<i>Knowledge of risk—Duty to keep knowledge up to date [GRAHAM v. CO-OPERATIVE WHOLESALE SOCIETY, LTD.]</i>	654
Independent contractor. <i>See INDEPENDENT CONTRACTOR.</i>	

MASTER AND SERVANT—continued.	PAGE
Liability of servant— <i>Negligence—Injury to fellow workman—Implied terms of contract of service</i>	
<i>Duty of servant to take care—Whether master required to insure servant against his own negligence—Whether servant entitled to benefit of insurance effected by master [LISTER v. ROMFORD ICE & COLD STORAGE CO., LTD.]</i>	125
Loan of servant— <i>Tug and crew under towage contract—Collision between tug and another vessel—Negligence of officer-in-charge of tug—Whether tug-owners or tow-owners liable [THE PANTHER AND THE ERICBANK]</i>	641
MEDICAL APPEAL TRIBUNAL	
Certiorari. <i>See</i> CERTIORARI (Statutory tribunal).	
MINE	
Coal mine. <i>See</i> COAL MINING.	
MISREPRESENTATION	
Condition— <i>Contractual condition and warranty distinguished from misrepresentation [OSCAR CHESS, LTD. v. WILLIAMS]</i>	325
MORTGAGE	
Possession of mortgaged property— <i>Mortgagor not in occupation—Person in occupation under agreement with mortgagor—Agreements made before mortgagor had any title to mortgaged premises—Payment of lump sums to mortgagor by tenant said to be rent for a specified period—Whether payments constituted rent or a fine—Whether tenancy binding on mortgagee—Law of Property Act, 1925 (c. 20), s. 99 (6), s. 205 (1) (xxiii) [HUGHES v. WAITE]</i>	603
MOTOR INSURANCE	
<i>See</i> INSURANCE.	
MOTOR VEHICLE	
Sale— <i>Breach of contract by buyer—Measure of damages [CHARTER v. SULLIVAN]</i>	809
<i>See also</i> ROAD TRAFFIC.	
MUSIC	
Charitable gift for. <i>See</i> CHARITY (Music).	
NATIONAL ASSISTANCE	
Bastardy order— <i>Right of National Assistance Board to apply—Whether proof necessary that mother a single woman—National Assistance Act, 1948 (c. 29), s. 44 (2) [NATIONAL ASSISTANCE BOARD v. TUGBY]</i>	509
NATIONAL INSURANCE	
Certiorari— <i>Medical appeal tribunal—Insurance commissioners—Jurisdiction [Re GILMORE'S APPLICATION]</i>	796
NATIONALITY	
<i>See</i> ALIEN.	
NEGLIGENCE	
Escape— <i>Fire—Escape to adjoining premises—Liability of occupier for acts of independent contractor—Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86 [BALFOUR v. BARTY-KING (HYDER & SONS (BUILDERS), LTD. THIRD PARTIES)]</i>	156
Hospital. <i>See</i> HOSPITAL.	
Indemnity clause. <i>See</i> INDEMNITY (Factory building contract).	
Independent contractor. <i>See</i> INDEPENDENT CONTRACTOR.	
Licensee. <i>See</i> LICENSEE.	
Loss of employee's property from employer's premises. <i>See</i> HOSPITAL (Negligence).	
Servant, of— <i>Liability of servant to master. See</i> MASTER AND SERVANT.	
Solicitor. <i>See</i> SOLICITOR.	
NEW TENANCY	
Business premises. <i>See</i> LANDLORD AND TENANT (New tenancy).	
NEW TRIAL	
<i>See</i> COURT OF APPEAL.	
NEWSPAPER	
Contempt of court. <i>See</i> CONTEMPT OF COURT.	
NUISANCE	
Injunction. <i>See</i> INJUNCTION.	
Public nuisance— <i>Public and private nuisance distinguished—Who must be affected to constitute public nuisance—Whether isolated act can constitute public nuisance—Dust and vibration from quarry affecting adjoining householders—Evidence—Injunction—Remedial measures taken since action begun—Whether injunction should be granted [ATTORNEY-GENERAL (ON THE RELATION OF GLAMORGAN COUNTY COUNCIL AND PONTARDAWE RURAL DISTRICT COUNCIL) v. P.Y.A. QUARRIES, LTD.]</i>	894
NULLITY	
Foreign decree— <i>Decree granted to wife on ground of religious incapacity—Wife domiciled in foreign country at date of marriage—Decree by court of country where marriage celebrated—Recognition of decree by English court [CORBETT v. CORBETT]</i>	621
OATH	
Juror's oath at criminal trial— <i>Form [PRACTICE NOTE]</i>	290
OBITER DICTUM	
<i>See</i> JUDGMENT (Judicial decision as authority).	
PATENT	
Appeal tribunal— <i>Certiorari—Patents Act, 1949 (c. 87), s. 85 (1) [R. v. PATENTS APPEAL TRIBUNAL, Ex parte CHAMPION PAPER AND FIBRE CO.]</i>	227
PAYMENT	
Smaller sum— <i>Whether satisfaction. See</i> ACCORD AND SATISFACTION (Amount due under contract).	
PERSON OF UNSOUND MIND	
Trustee— <i>Appointment of new trustee in place of trustee of unsound mind—Form of originating summons [PRACTICE DIRECTION]</i>	581
PETITION	
Divorce. <i>See</i> DIVORCE.	
PLAN	
Conveyance— <i>Referring to. See</i> SALE OF LAND (Conveyance).	

PLANT		
Valuation for rating. <i>See</i> RATES (Valuation).		PAGE
POLICE		
Constable—Injury through negligence of third party—Wages during illness paid out of police fund—Whether authority in charge of fund entitled to recover amount of wages from third party [METROPOLITAN POLICE DISTRICT RECEIVER v. CROYDON CORPN., MONMOUTHSHIRE COUNTY COUNCIL v. SMITH]		78
POSSESSION		
Mortgaged property, of. <i>See</i> MORTGAGE .		
POWER OF APPOINTMENT		
Exercise—General power—Power given by English settlement—Residuary gift by will of testatrix domiciled abroad—Wills Act, 1837 (c. 26), s. 27 [Re WAITE'S SETTLEMENT TRUSTS]		629
PRACTICE		
Criminal court. <i>See</i> CRIMINAL LAW .		
Divorce. <i>See</i> DIVORCE .		
Service—Service on foreign company—Action by Commissioners of Customs and Excise for condemnation of seized goods—Notice of claim by solicitors in London acting on behalf of foreign company—Writ served on solicitors more than a year later—Customs and Excise Act, 1952 (c. 44), Sch. 7, para. 4—R.S.C., Ord. 13, r. 2 [COMRS. OF CUSTOMS AND EXCISE v. I.P.S. IRISH FULLY FASHIONED STOCKINGS, LTD.]		108
Transfer of action. <i>See</i> ADMINISTRATION OF ESTATES (Administration action).		
Trial—Date—Postponing date of trial of non-jury actions [PRACTICE DIRECTION]		422
Fixing date for non-jury actions—Lists to be kept by Clerk of the Lists [PRACTICE DIRECTION]		219
PRINTED FORM		
Written words on printed form—Regugnancy—Writing dominant [NEUCHÂTEL ASPHALTE CO., LTD. v. BARNETT]		362
PRIVY COUNCIL		
Australia—Victoria—Validity of Factories and Shops (Long Service Leave) Act, 1953 (Victoria)—Whether inconsistent with Metal Trades Award, 1952, made under Commonwealth Conciliation and Arbitration Act, 1904-1952—Factories and Shops (Long Service Leave) Act, 1953 (Victoria) (1953 No. 5706), s. 7 (2) (c)—Commonwealth Conciliation and Arbitration Act, 1904-1952, s. 13, s. 25—Constitution of the Commonwealth of Australia, 1900 (c. 12, s. 9), s. 109 [CHARLES MARSHALL PTY., LTD. v. COLLINS]		923
Eastern Africa—Criminal law—Conspiracy—Husband and wife charged with conspiracy—Potentially polygamous marriage—Whether rule of English criminal law that husband and wife cannot be guilty of conspiracy applicable in Tanganyika and to a potentially polygamous marriage [MAWJI v. REGINAM]		385
Jurisdiction of Court of Appeal for Eastern Africa to order new trial in criminal case—Eastern African Court of Appeal Order in Council, 1950 (S.I. 1950 No. 1968), s. 16 (1), s. 18 (1)—Eastern African Court of Appeal Rules, 1954 (Kenya Proclamations, Rules and Regulations, 1954, No. 33), r. 41 [ROSS v. REGINAM]		451
PROBATE		
Grant—Attorney—Further grant to attorney administrator [PRACTICE DIRECTION]		602
PROBATION		
Breach of probation order—Jurisdiction to make new probation order—Effect on original order [R. v. HAVANT JUSTICES, Ex parte JACOBS]		475
PROFITS TAX		
Computation of profits—Deduction of director's remuneration—"Controlling interest" of directors—Directors not holding majority of shares—Majority of shares held by another company—Director owning majority of shares of that company—Conclusiveness of register of members—Finance Act, 1937 (c. 54), Sch. 4, para. 11—Finance Act, 1952 (c. 33), s. 34 [S. BERENDSEN, LTD. v. INLAND REVENUE COMRS.]		727
War damage value payments—Whether to be included in computing profits of property dealing company [LONDON INVESTMENT AND MORTGAGE CO., LTD. v. INLAND REVENUE COMRS., SAME v. WORTHINGTON (INSPECTOR OF TAXES)]		277
PUBLIC NUISANCE		
<i>See</i> NUISANCE .		
QUARRY		
Nuisance—Public nuisance. <i>See</i> NUISANCE (Public nuisance).		
QUARTER SESSIONS		
Case Stated. <i>See</i> CASE STATED .		
QUASI-CONTRACT		
<i>See</i> CONTRACT .		
RAILWAY		
Bridge carrying road over railway—"Immediate approaches" of bridge—Extent of liability to repair road and embankment—Railways Clauses Consolidation Act, 1845 (c. 20), s. 46 [MONMOUTHSHIRE COUNTY COUNCIL v. BRITISH TRANSPORT COMMISSION]		662
RATES		
Gas boards—Rate period beginning after Mar. 31, 1952, and before Apr. 1, 1956—Calculation of amount of rates leviable—Repayment or allowance of difference between amount leviable and amount actually levied—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), Sch. 4, para. 2 (1) [WEST HARTLEPOOL CORPN. v. NORTHERN GAS BOARD]		394
Limitation of rates chargeable—Hereditament occupied for the purposes of non-profit making organisation—Friendly society—Whether organisation whose main objects are charitable or are otherwise concerned with the advancement of social welfare—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) [TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY v. SKEGNESS URBAN DISTRICT COUNCIL]		407
Organisation concerned with the advancement of religion, education or social welfare—Theosophical Society in England—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (c. 9), s. 8 (1) (a) [BERRY v. ST. MARYLEBONE CORPN.]		681
Valuation—Plant and machinery—"Structure"—In the nature of a building or structure—Plant conveyed to site in one piece—Whether feat of engineering involved not a test—Catawalks and connecting pipes—Constituent parts of a process boiler separately rateable—Rating and Valuation Act, 1925 (c. 90), s. 24 (1), (5)—Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480), Schedule, class 4 [B.P. REFINERY (KENT), LTD. v. WALKER (VALUATION OFFICER)]		700

REAL PROPERTY	PAGE
Restrictive covenant—Declaration whether any longer affecting land—Covenants not to build or to fell trees—Nobody legally entitled to enforce them—Small part of land subject to covenants intended as school site—No appearance of persons interested—Discretion whether to make declaration—Law of Property Act, 1925 (c. 20), s. 84 (2) [Re FREEMAN-THOMAS INDENTURE]	532
RECKLESS OR DANGEROUS DRIVING	
See ROAD TRAFFIC (Dangerous driving).	
REMOTENESS OF DAMAGE	
See DAMAGE.	
RENT	
Control. See RENT CONTROL.	
Fine—Whether lump sum payment was rent or fine—Law of Property Act, 1925 (c. 20), s. 99, s. 205 (xxiii) [HUGHES v. WAITE]	603
Housing—Local authority's. See HOUSING.	
RENT CONTROL	
Furnished room—"Exclusive occupation"—Contract for "paying guest" to occupy furnished room at a weekly charge—Landlady to have access to room at all times—Contract referred to rent tribunal—Jurisdiction—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2 (1) [R. v. BATTERSEA, WANDSWORTH, MITCHAM AND WIMLEDON RENT TRIBUNAL, Ex parte PARIKH]	352
Rent tribunal—Jurisdiction—Increase of contractual rent—Whether increase recoverable—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2 (2), (3) [VILLA D'ESTE RESTAURANT, LTD. v. BURTON]	862
RENT RESTRICTION	
Death of tenant—Member of tenant's family—Default of agreement—Distinction between submission and agreement—Whether wishes of deceased tenant relevant circumstances to be considered in deciding who should be statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g) [TRAYFOOT v. LOCK]	423
Possession—Reasonableness—Discretion of judge—Greater hardship on landlord—Landlord giving untrue evidence that accommodation furnished—Whether a proper consideration in deciding reasonableness of order—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) [YELLAND v. TAYLOR]	627
RENT TRIBUNAL	
See RENT CONTROL.	
REPAIR	
Highway. See HIGHWAY.	
RESIDENCE	
Divorce—Residence by wife. See DIVORCE.	
RESTRICTIVE COVENANT	
Discharge or modification. See REAL PROPERTY (Restrictive covenant).	
Price maintenance—Covenant running with goods. See RESTRICTIVE TRADE PRACTICES.	
RESTRICTIVE TRADE PRACTICES	
Condition for price maintenance—Injunction against sale by retailer below fixed price—Whether goods acquired with notice of the condition—Restrictive Trade Practices Act, 1956 (c. 68), s. 25 (1), (4) [COUNTY LABORATORIES, LTD. v. J. MINDEL, LTD.]	806, 861
RE-TRIAL	
Jurisdiction to order—Case Stated. See CASE STATED (Jurisdiction).	
Criminal case. See CRIMINAL LAW (Re-trial).	
RIOT	
See CRIMINAL LAW.	
ROAD	
Maintenance—Covenant to contribute to cost of upkeep—Whether successors in title of covenantor bound to make contribution [HALSALL v. BRIZELL]	371
ROAD TRAFFIC	
Dangerous driving—Whether jurisdiction in quarter sessions to try issue of dangerous driving after jury at assizes found accused not guilty of manslaughter—Road Traffic Act, 1934 (c. 50), s. 34 [R. v. SHIPTON, Ex parte DIRECTOR OF PUBLIC PROSECUTIONS]	206
Driving while under the influence of a drug—Over-action of insulin properly taken by a diabetic—Whether insulin a "drug"—Road Traffic Act, 1930 (c. 43), s. 15 (1) [ARMSTRONG v. CLARK]	433
Insurance of motor vehicles. See INSURANCE (Motor insurance).	
SALE OF GOODS	
Condition—Condition, warranty and misrepresentation distinguished [OSCAR CHESSE, LTD. v. WILLIAMS]	325
Contract—Licence for export from Finland necessary—Contract provided for delivery: as soon as export licence granted—Licences granted only to members of Finnish exporters' association—Sellers not members of association—Whether sellers liable in damages for failure to deliver goods [PETER CASSIDY SEED CO., LTD. v. OSVUSTURKUKAUPPA I.L.]	484
Damages for breach of contract. See CONTRACT.	
Price maintenance—Covenant—Injunction. See RESTRICTIVE TRADE PRACTICES.	
Warranty. See WARRANTY.	
SALE OF LAND	
Conveyance—Description of parcels—Reference to plan—Conveyance of dwelling-house—Footings and eaves projecting beyond area conveyed as depicted by plan—Whether footings conveyed [TRUCKELL v. STOCK]	74
Covenant—Covenants by owners to contribute to upkeep of common roads and sewers—Deed declaring trusts of roads and sewers for benefit of owners of plot—Liability of successors in title of owners to make contribution [HALSALL v. BRIZELL]	371
Solicitors' remuneration. See LAND REGISTRATION (Costs).	
SALMON	
See FISH.	
SALVAGE	
See SHIPPING.	
SAVINGS	
Housekeeping. See HUSBAND AND WIFE (Title to property).	

SELF-DEFENCE	PAGE
See CRIMINAL LAW (Burden of proof).	
SEPARATION AGREEMENT	
See HUSBAND AND WIFE (Separation deed).	
SERVANT	
See MASTER AND SERVANT.	
SERVICE	
Divorce petition. See DIVORCE (Practice).	
Writ. See PRACTICE.	
SETTLEMENT	
Acceleration—Invalidity of primary trust—Resulting trust to settlor or acceleration of secondary trust [Re FLOWER'S SETTLEMENT TRUSTS]	462
Investment—"Ordinary preferred stock or shares" [Re POWELL-COTTON'S RE-SETTLEMENT]	404
SEWER	
Maintenance—Covenant to contribute to cost of upkeep—Whether successors in title of covenantor bound to make contribution [HALSALL v. BRIZELL]	371
SHIPPING	
Charterparty—Construction—Incorporation of U.S. Paramount Clause—Application to charterparty of United States Carriage of Goods by Sea Act, 1936—"Loss or damage"—United States Carriage of Goods by Sea Act, 1936 (Public Statutes No. 521), s. 3 (1), s. 4 (1), (2), s. 5, s. 13 [ANGLO-SAXON PETROLEUM CO., LTD. v. ADAMASTOS SHIPPING CO., LTD.]	673
Collision—Apportionment of liability—Ship in canal under tow—Collision between steam tug and passing vessel—No signal by tow to tug to warn her of on-coming vessel—Officer-in-charge of tug negligent in not stopping her port propeller revolving on seeing on-coming vessel—Whether tug-owners or tow-owners liable for negligence of officer-in-charge of tug—Maritime Conventions Act, 1911 (c. 57), s. 1 (1) [THE PANTHER AND THE ERICBANK]	641
Limitation of liability—Towage—Collision between trawler in tow and tug—Loss of tug and of lives of members of crew—Negligent navigation of trawler—Agreement to indemnify tug-owners against all loss and damage—Standard towage conditions—Claims by dependants of deceased and by owners of tug for negligent navigation—Claim by owners of tug for contractual indemnity—Whether owners of trawler entitled to limit liability—Merchant Shipping Act, 1894 (c. 60), s. 503 (1) [ALSLEY STEAM FISHING CO., LTD. v. HILLMAN (OWNERS), THE KIRKES]	97
Salvage—Award—Amount—Award for personal services—Award liable to taxation in hands of salvors—Whether taxation taken into account in assessing amount of award [THE TELEMACHUS]	72
Towage—Collision between tug and passing vessel—No signal by tow to tug to warn her of on-coming vessel—Whether tug-owners or tow-owners liable for negligence of officer-in-charge of tug [THE PANTHER AND THE ERICBANK]	641
SHOCK	
Mental shock—Damages. See DAMAGES (Mental shock).	
SOLDIER	
Domicil—Change of domicil—Voluntary residence necessary in addition to residence in country in which serving [CRUICKSHANKS v. CRUICKSHANKS]	889
Offence—Military. See COURT-MARTIAL.	
SOLICITOR	
Costs—Registered land. See LAND REGISTRATION (Costs).	
See also COSTS (Taxation).	
Negligence—Damages—Solicitor instructed to draft wills for two clients, man and woman, wishing to confer benefits on each other—Failure to advise clients in regard to revocation of wills on marriage—Marriage of clients after wills executed—Damage suffered by wife on death of husband intestate—Remoteness of damage—Measure of damages [HALL v. MEYRICK]	208
SOVEREIGN	
Foreign—Impleading. See CONSTITUTIONAL LAW (Foreign sovereign state—Immunity from suit).	
SPECIAL CONTRIBUTION	
Additional assessment—Limitation on time for making—Assessment on executors of taxpayer—Finance Act, 1948 (c. 49), s. 55 (1), (6)—Income Tax Act, 1918 (c. 40), s. 67 (2), s. 125 (2)—Finance Act, 1923 (c. 14), s. 29 (1), (3)—Special Contribution Regulations, 1948 (S.I. 1948 No. 2029), reg. 4, reg. 5, Schedule [BEAUCHAMP'S EXECUTORS v. INLAND REVENUE COMRS.]	788
STAMP DUTY	
Transfer of property from one associated company to another—Contract by original owner to sell freehold and leasehold properties to a company—Purchase price received but no conveyance or transfer executed by owner—Death of owner—Subsequent sale by company to associated company—Conveyance, transfer and assignment executed by deceased's personal representatives—Whether exempt from ad valorem stamp duty—Stamp Act, 1891 (c. 39), s. 54, s. 58 (4)—Finance Act, 1930 (c. 28), s. 42—Finance Act, 1938 (c. 46), s. 50 (1) (b) [ESCOIGNE PROPERTIES, LTD. v. INLAND REVENUE COMRS.]	291
STATUTE	
Construction—Preamble—Acts in pari materia—Ex post facto inconvenience or absurdity—Whether clear enacting words restricted—4 Anne c. 4 or 4 & 5 Anne c. 16 [ATTORNEY-GENERAL v. H.R.H. PRINCE ERNEST AUGUSTUS OF HANOVER]	49
Obsolescence—4 & 5 Anne c. 4 or c. 16 [ATTORNEY-GENERAL v. H.R.H. PRINCE ERNEST AUGUSTUS OF HANOVER]	49
STATUTORY TRIBUNAL	
Certiorari to quash decision—Error on face of award. See CERTIORARI.	
STREET TRAFFIC	
See ROAD TRAFFIC.	
SURTAX	
Investment company—Apportionment of income—In accordance with the respective interests of members—Apportionment in proportion to dividend rights—Redeemable preference shares—Whether additional interest from contributions to redemption fund—Finance Act, 1922 (c. 17), s. 21 (1), (8), Sch. 1, para. 3 [WIGRAM FAMILY SETTLED ESTATES, LTD. (IN LIQUIDATION) v. INLAND REVENUE COMRS.]	311
Undistributed income—Sums applied in repayment of share capital—Capital issued otherwise than for adequate consideration—Finance Act, 1922 (c. 17), s. 21 (1), as amended by Finance Act, 1927 (c. 10), s. 31 (1), and Finance Act, 1936 (c. 34), s. 19 (4) [INLAND REVENUE COMRS. v. THORNTON, KELLEY & CO., LTD.]	650

TAXATION	PAGE
Costs. <i>See</i> COSTS.	
TENANCY	
Mortgage, under. <i>See</i> MORTGAGE.	
New tenancy under Landlord and Tenant Act, 1954. <i>See</i> LANDLORD AND TENANT (New tenancy).	
THEATRE	
Licence for the performance of stage plays— <i>Renewal</i> — <i>Condition attached prohibiting theatre from selling intoxicating liquor or tobacco</i> — <i>Rules for ensuring order and decency</i> — <i>Proximity to theatre of a licensed house</i> — <i>Unconditional licence held for many years without complaint</i> — <i>Neighbouring theatre with conditional licence refused unconditional licence</i> — <i>Matters to be considered by and procedure of licensing authority on application to renew licence</i> — <i>Theatres Act, 1843 (c. 68), s. 5, s. 9 [R. v. COUNTY LICENSING (STAGE PLAYS) COMMITTEE OF FLINT COUNTY COUNCIL, Ex parte BARRETT]</i>	112
TIMBER	
Purchase of standing timber— <i>Whether capital expenditure. See</i> INCOME TAX (Deduction in computing profits— <i>Capital expenditure</i>).	
TOWAGE	
<i>See</i> SHIPPING.	
TOWN AND COUNTRY PLANNING	
Enforcement notice— <i>Persistent breach of notice</i> — <i>Convictions resulting in imprisonment in default of payment of fines</i> — <i>Injunction sought by Attorney-General to restrain breach—Jurisdiction—Town and Country Planning Act, 1947 (c. 51), s. 24 (3) [ATTORNEY-GENERAL (ON THE RELATION OF HORNBURCH URBAN DISTRICT COUNCIL) v. BASTOW]</i>	497
<i>Validity—Wrong factual basis—Development alleged to have been carried out without planning permission—Permission originally granted for a limited period, since expired—No appeal to justices against notice—Right to question validity in High Court—Town and Country Planning Act, 1947 (c. 51), s. 23 (2), (4) [FRANCIS v. YIEWSLEY AND WEST DRAYTON URBAN DISTRICT COUNCIL]</i>	825
TRADE	
Price maintenance. <i>See</i> RESTRICTIVE TRADE PRACTICES.	
TRADE DISPUTE	
<i>See</i> TRADE UNION.	
TRADE UNION	
Conspiracy— <i>Acts of local committee after ineffective resolution for expulsion of member—Local committee preventing member from obtaining employment—Whether dispute between member and committee a "trade dispute"—Whether committee's acts "in furtherance of a trade dispute"—Trade Disputes Act, 1906 (c. 47), s. 3, s. 5 (3) [HUNTLEY v. THORNTON]</i>	234
TRANSFER	
Action, of. <i>See</i> ADMINISTRATION OF ESTATES (Administration action).	
TRESPASS	
Adjoining owners— <i>Boundary—Registered land [LEE v. BARREY]</i>	191
TRIAL	
Costs. <i>See</i> COSTS.	
<i>See also</i> PRACTICE.	
TRUST AND TRUSTEE	
Acceleration of trust. <i>See</i> SETTLEMENT (Acceleration).	
Accumulation. <i>See</i> ACCUMULATION.	
Appointment of new trustees— <i>Appointment in place of person of unsound mind [PRACTICE DIRECTION]</i>	581
Invalid trust— <i>Trust for reform of alphabet—Whether effect could be given to directions of trust as empowering trustee to act on them [Re SHAW (decd.)]</i>	745
Powers of trustee— <i>Maintenance—Exclusion of power by direction to accumulate—Trustee Act, 1925 (c. 19), s. 31 (1) (ii), s. 69 (2) [Re RANSOME'S WILL TRUSTS]</i>	690
VALUE PAYMENT	
War Damage Act, 1943, under. <i>See</i> WAR DAMAGE.	
VENTILATION	
<i>See</i> COAL MINING (Statutory regulation of mines); FACTORY.	
VIBRATION	
Nuisance— <i>Public nuisance. See</i> NUISANCE (Public nuisance).	
VICTORIA	
<i>See</i> PRIVY COUNCIL (Australia).	
WALES	
Church. <i>See</i> ECCLESIASTICAL LAW (Church in Wales).	
WAR DAMAGE	
Cost of works— <i>"Making good war damage"—Reconstruction of several buildings as single new building—Whether cost of works payment payable—War Damage Act, 1943 (c. 21), s. 8 (3) [CITY OF LONDON REAL PROPERTY CO., LTD. v. WAR DAMAGE COMMISSION]</i>	519
Value payment— <i>Whether trading receipt for income tax purposes [LONDON INVESTMENT AND MORTGAGE CO., LTD. v. INLAND REVENUE COMRS., SAME v. WORTHINGTON (INSPECTOR OF TAXES)]</i>	277
WARRANTY	
Breach— <i>Sale of motor car—Date of first registration wrongly entered in registration book—Innocent misrepresentation—"Condition" and "warranty" distinguished [OSCAR CHESS, LTD. v. WILLIAMS]</i>	325
Implied— <i>Licence—Export licence—Nature of implied warranty to obtain export licence [PETER CASSIDY SEED CO., LTD. v. OSUUTUKKUKAUPPA I.L.]</i>	484
WIFE	
Property. <i>See</i> HUSBAND AND WIFE.	

WILL	PAGE
Charity. <i>See</i> CHARITY.	
Class gift— <i>Time of ascertainment of class—Gift to children of grandson living on the attainment of the age of twenty-one by the youngest of such children—Only one such child living at date of death of testatrix—Possibility of birth of further children—Rights of existing child</i> [Re RANSOME'S WILL TRUSTS]	690
Gift of residue to A. and " thereafter to her issue "— <i>Whether A. takes absolutely</i> [Re GOUK (<i>decd.</i>)]	469
Gift to issue— <i>Adopted child—Child adopted in British Columbia—Child and adoptive parent domiciled in British Columbia—Testator domiciled in England—Adoption of Children Act, 1926 (c. 29), s. 5 (2)</i> [Re MARSHALL (<i>decd.</i>)]	549
Legacy— <i>Amount of legacy—Legacy of such a sum as with moneys given inter vivos will amount to stated sum—Moneys given inter vivos liable to estate duty on death of testator</i> [Re DAWSON'S WILL TRUSTS]	177
Power of appointment. <i>See</i> POWER OF APPOINTMENT.	
Trust— <i>Invalid trust—Impersonal non-charitable trust for reform of alphabet—Whether effect could be given to trust as a power on which trustee might act</i> [Re SHAW (<i>decd.</i>)]	745
WINDING-UP	
Company, of. <i>See</i> COMPANY.	
WOODWORKING REGULATIONS	
<i>See</i> FACTORY (Dangerous machinery).	

STATUTES, ETC., REFERRED TO

PUBLIC GENERAL STATUTES

	PAGE
4 Anne c. 4 or 4 & 5 Anne c. 16	49
Acquisition of Land (Assessment of Compensation) Act, 1919 (c. 57), s. 2 (1), (5), (6) ..	504
Adoption Act, 1950 (c. 26), s. 3 (1) (c)	819
Adoption of Children Act, 1926 (c. 29), s. 5 (2)	549
Army Act, ss. 17, 190, as amended by the Army and Air Force (Annual) Act, 1951 (c. 24), s. 7 (a), (b), (4)	67
British Nationality Act, 1948 (c. 56), s. 12	49
Children and Young Persons Act, 1933 (c. 12), s. 76 (1), as substituted by Children Act, 1948 (c. 43), s. 5 (1)	398
Coal Mines Act, 1911 (c. 50), ss. 29 (1), 75	556
Criminal Evidence Act, 1898 (c. 36), s. 1 (f) (iii)	391
Criminal Justice Act, 1948 (c. 58), ss. 3 (1), 6 (3), Sch. 1, para. 3, proviso (a)	475
Customs and Excise Act, 1952 (c. 44), Sch. 7, para. 4	108
Debtors Act, 1869 (c. 62), s. 4	204
Defence Act, 1842 (c. 94), s. 19	480
Explosive Substances Act, 1883 (c. 3), s. 4 (1)	665
Factories Act, 1937 (c. 67)—	
s. 4 (1)	654, 776
s. 14 (1)	90, 470, 740
s. 24 (7)	457
s. 47 (1)	654
Finance Act, 1922 (c. 17)—	
s. 21 (1) (as amended by Finance Act, 1927 (c. 10), s. 31 (1) and Finance Act, 1936 (c. 34), s. 19 (4))	311, 650
(8), Sch. 1, para. 8	311
Finance Act, 1923 (c. 14), s. 29 (1), (3)	788
Finance Act, 1930 (c. 28), s. 42	291
Finance Act, 1937 (c. 54), Sch. 4, para. 11	727
Finance Act, 1938 (c. 46), s. 50 (1) (b)	291
Finance Act, 1946 (c. 64), s. 12	480
Finance Act, 1948 (c. 49), s. 55 (1), (6)	788
Finance Act, 1952 (c. 33), s. 34	727
Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 86	156
Furnished Houses (Rent Control) Act, 1946 (c. 34)—	
s. 2 (1)	352
(2), (3)	862
Guardianship of Infants Acts, 1886 and 1925	32
Housing Act, 1936 (c. 51), ss. 83 (1), 85 (5) (as substituted by Housing Act, 1949 (c. 60), s. 1, Sch. 1, s. 85 (6)	221
Income Tax Act, 1918 (c. 40)—	
ss. 67 (2), 125 (2)	788
Sch. D, para. 1, All Schedules Rules, r. 5	561
Case I	277
Income Tax Act, 1952 (c. 10), Sch. D, Case I	196, 336
Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g)	423
Land Registration Act, 1925 (c. 21), ss. 19, 69, 76	191
Landlord and Tenant Act, 1927 (c. 36), s. 19 (1) (a)	229
Landlord and Tenant Act, 1954 (c. 56)—	
s. 25 (1)	151
s. 80 (1) (f)	1, 148, 151
s. 83	1
Lands Tribunal Act, 1949 (c. 42), s. 3 (5), (6)	441
Larceny Act, 1916 (c. 50), s. 30	608
Law of Property Act, 1925 (c. 20)—	
s. 84 (2)	532
s. 99 (6)	603
s. 164 (1), (b)	690
s. 205 (1) (xxiii)	603
Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (1)	300
Legal Aid and Advice Act, 1949 (c. 51), s. 4 (3)	183
Limitation Act, 1939 (c. 21), ss. 2 (1) (d), 27 (1), (6)	669
Local Government Act, 1933 (c. 51), s. 151 (1), (3)	669
Magistrates' Courts Act, 1952 (c. 55)—	
s. 10	608
s. 87 (1)	391
Maritime Conventions Act, 1911 (c. 57), s. 1 (1)	641
Married Women's Property Act, 1882 (c. 75), s. 17	69, 357
Matrimonial Causes Act, 1950 (c. 25)—	
s. 1 (1) (b)	848
s. 4	914
(2)	720
proviso (iv)	909
s. 6	720, 929
s. 16 (1)	536
s. 18 (1)	929
(a)	570
(b)	720
s. 19 (1)	494, 792
s. 26 (1)	379, 490
s. 28 (3)	598
Merchant Shipping Act, 1894 (c. 60), s. 508 (1)	97
National Assistance Act, 1948 (c. 29), s. 44 (2)	509
National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 36 (3)	796
Patents Act, 1949 (c. 87), ss. 85 (1), 85 (2), (10)	227
Princess Sophia of Hanover Naturalisation Act, 1705 (4 Anne c. 4 or c. 16)	49
Railways Clauses Consolidation Act, 1845 (c. 20), s. 46	662
Rating and Valuation Act, 1925 (c. 90), s. 24 (1), (5)	700

PUBLIC GENERAL STATUTES—continued.

	PAGE
Rating and Valuation (Miscellaneous (Provisions) Act, 1955 (c. 9)—	
<i>s. 8 (1)</i>	407
<i>(a)</i>	681
<i>Sch. 4, para. 2 (1)</i>	394
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), <i>s. 3 (1)</i>	627
Restrictive Trade Practices Act, 1956 (c. 68), <i>s. 25 (1), (4)</i>	806
Road Traffic Act, 1930 (c. 43)—	
<i>s. 15 (1)</i>	433
<i>ss. 35 (1), 36 (1), 121</i>	125
Road Traffic Act, 1934 (c. 50), <i>s. 34</i>	206
Sale of Goods Act, 1893 (c. 71), <i>s. 50 (2), (3)</i>	809
Salmon and Freshwater Fisheries Act, 1923 (c. 16), <i>s. 30 (1)</i>	369
Stamp Act, 1891 (c. 39), <i>ss. 54, 58 (4)</i>	291
Summary Jurisdiction Act, 1857 (c. 43), <i>s. 6</i>	391
Summary Jurisdiction (Married Women) Act, 1895 (c. 39), <i>s. 4</i>	873
Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), <i>s. 25 (2)</i>	882
Theatres Act, 1843 (c. 68), <i>ss. 5, 9</i>	112
Town and Country Planning Act, 1947 (c. 51)—	
<i>s. 23 (2), (4)</i>	825
<i>s. 24 (3)</i>	497
Trade Disputes Act, 1906 (c. 47), <i>ss. 3, 5 (3)</i>	234
Trustees Act, 1925 (c. 19), <i>ss. 31 (1), (ii), 69 (2)</i>	690
War Damage Act, 1943 (c. 21)—	
<i>s. 8 (3)</i>	519
<i>s. 66 (1)</i>	277
War Damage (Public Utility Undertakings etc.) Act, 1949 (c. 36), <i>s. 28</i>	277
Welsh Church Act, 1914 (c. 91), <i>ss. 3, 23</i>	400
Welsh Church (Temporalities) Act, 1919 (c. 65), <i>s. 6</i>	400
Wills Act, 1837 (c. 26), <i>s. 27</i>	629

COMMONWEALTH AND DEPENDENCIES

Commonwealth Conciliation and Arbitration Act, 1904-1952, <i>ss. 13, 25</i>	923
Constitution of the Commonwealth of Australia, 1900 (c. 12, <i>s. 9</i>), <i>s. 109</i>	923
East African Court of Appeal Order in Council, 1950 (S.I. 1950 No. 1968), <i>ss. 16 (1), 18 (1)</i>	451
Eastern African Court of Appeal Rules, 1954 (Kenya Proclamations, Rules and Regulations, 1954, No. 33), <i>r. 41</i>	451
Factories and Shops (Long Service Leave) Act, 1953 (Victoria) (1953 No. 5706), <i>s. 7 (2) (c)</i>	923
FOREIGN	
United States Carriage of Goods by Sea Act, 1936 (Public Statutes No. 521), <i>ss. 3 (1), 4 (1), (2), 5, 13</i>	673

RULES

County Court Rules, <i>Ord. 37, r. 2</i>	321
Land Registration Rules, 1925 (S.R. & O. 1925 No. 1093), <i>r. 278</i>	191
Lands Tribunal Rules, 1949 (S.I. 1949 No. 2263), <i>r. 52</i>	441
Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940)—	
<i>r. 3 (3) proviso</i> (as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), <i>rr. 4, 16</i>)	860
<i>r. 4</i> (as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), <i>r. 5</i>)	860
<i>r. 4 (1) (d)</i> (substituted by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), <i>r. 5 (1)</i>)	860
<i>r. 9 (5)</i>	536
<i>r. 15</i> (as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), <i>rr. 4, 16</i>)	860
<i>r. 16 (1)</i>	914
<i>r. 19</i> (as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), <i>rr. 4, 16</i>)	860
<i>r. 28</i>	914
<i>r. 44 (1)</i> (as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), <i>rr. 4, 16</i>)	860
<i>r. 64 (3)</i>	478
Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), <i>r. 29</i>	576
R.S.C.—	
<i>Ord. 13, r. 2</i>	108
<i>Ord. 49, r. 5</i>	33
<i>Ord. 55A, r. 6</i>	32
<i>Ord. 58, r. 5</i>	90
<i>r. 18 (5)</i>	321

REGULATIONS

Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O. 1925 No. 904)—	
<i>Definitions</i>	760
<i>reg. 1</i>	760, 776
Legal Aid (Assessment of Resources) Regulations, 1950 (S.I. 1950 No. 1358), <i>reg. 2</i>	183
Special Contribution Regulations, 1948 (S.I. 1948 No. 2029), <i>regs. 4, 5, and Schedule</i>	788
Woodworking Machinery Regulations, 1922 (S.R. & O. 1922 No. 1196), <i>reg. 10 (c)</i>	90

ORDERS

Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480), <i>Schedule, class 4</i>	700
Solicitors' Remuneration (Registered Land) Order, 1925 (S.R. & O. 1925 No. 2), <i>art. 1 (D) (i), (H) and Schedule</i> (as substituted by the Solicitors' Remuneration (Registered Land) Order, 1953 (S.I. 1953 No. 118))	87, 427

MISCELLANEOUS

Generation, Transformation, Distribution and Use of Electrical Energy etc. (S.R. & O. 1908 No. 1312), <i>regs. 15, 18 (d)</i> (as substituted by the Electricity (Factories Act) Special Regulations, 1944 (S.R. & O. 1944 No. 739)), <i>24</i>	23
---	----

WORDS AND PHRASES

	PAGE
<i>Accumulation</i>	654
<i>Cause of action</i>	300
<i>Condition</i>	325
<i>Controlling interest</i>	727
<i>Default in payment of a sum of money</i>	204
<i>Drink</i>	433
<i>Drug</i>	433
<i>Exclusive occupation</i>	352
<i>Final</i>	796
<i>In full and final settlement of account</i>	362
<i>In furtherance of a trade dispute</i>	234
<i>Issue</i>	549
<i>Just cause</i>	848
<i>Knowingly</i> —"knowingly has in his possession . . . any explosive".	665
<i>Levied</i> —"Amount of rates actually levied".	394
<i>Loss or damage</i>	673
<i>Making good war damage</i>	519
<i>Negligence</i>	23
<i>Occupation. See "Exclusive occupation".</i>	
<i>Ordinary preferred stock or shares</i>	404
<i>Overhead travelling crane</i>	457
<i>Paying guest</i>	352
<i>Possession for sale</i>	369
<i>Practice and procedure</i>	451
<i>Preferred ordinary stock or shares</i>	404
<i>Reasonable charges</i>	221
<i>Reconstruct</i>	148
<i>Sale. See "Possession for sale".</i>	
<i>Service property.</i>	67
<i>Social welfare</i>	673
<i>Structure</i> —"In the nature of a building or structure"	700
<i>Thereafter to her issue</i>	469
<i>Trade dispute</i>	234
<i>Warranty</i>	325

CORRIGENDA

[1956] 3 All E.R.

- p. 429. *R. v. JENNINGS.* Counsel: for "*Dennis Lloyd*" read "*David A. Lloyd*".
- p. 594. *INLAND REVENUE COMRS. v. HOBHOUSE.* Counsel for the Crown: after "*Sir Reginald Hills*" add "*E. Blanshard Stamp*".
- p. 979. *R. v. CARR.* Counsel: for "*Dennis Lloyd*" read "*David A. Lloyd*".
- p. 981. *R. v. LINZEE.* Counsel: for "*Dennis Lloyd*" read "*David A. Lloyd*".

[1957] 1 All E.R.

- p. 553. *Re MARSHALL (dec'd.).* Line D.1: for the terms of s. 12 of R.S. 1936 c. 6 substitute "The word 'child' or 'issue', or its equivalent in a will, grant, or settlement shall include a child adopted by the testator, grantor, or settlor, unless the contrary plainly appears by the terms of the instrument". The enactment printed at p. 553, letter D, is s. 12 as amended by the Adoption Act Amendment Act, 1948, c. 1, and incorporated in the Revised Statutes of British Columbia, 1948.
- p. 695. *Re RANSOME'S WILL TRUSTS.* Line H. 4 and p. 696, line A. 6: for "*LORD PORTER*" read "*SIR ANDREW PORTER*". Page 697, line D. 1: for "*actually*" read "*ultimately*".
- p. 721. *LEVETT v. LEVETT.* Line 3 of Editorial Note: for "(p. 737, post)" read "(p. 929, post)".

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

BETTY'S CAFÉS, LTD. v. PHILLIPS FURNISHING STORES, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.JJ.), October 5, 8, 9, 10, 11, November 28, 1956.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to reconstruct premises on termination of current tenancy—Date at which fixed and genuine intention to reconstruct must exist—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (f).

Landlord and Tenant—New tenancy—Business premises—Duration of new tenancy—Regard had to terms of previous leases granted to tenant in respect of the premises—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 33.

Since 1925 the applicants, who carried on the business of a café proprietor and retail confectioner, had been the tenants of two adjoining shops under successive leases, none of which had exceeded a term of eight years and the last of which was for a term of eight years expiring on Dec. 31, 1953. In August, 1953, the respondent company (herein called the "landlord company") purchased the reversion (a term of 999 years from Jan. 1, 1806) of these premises and the purchase was completed on Mar. 1, 1954. On Sept. 23, 1953, the tenants were granted a new tenancy by the county court under the Leasehold Property (Temporary Provisions) Act, 1951, for twelve months from Jan. 1, 1954, and this tenancy was continued by virtue of s. 24 (1)* of the Landlord and Tenant Act, 1954. The landlord company's intention in regard to the property varied from time to time. In January, 1955, the company's architect surveyed the premises and estimated that the cost of reconstructing them so as to make them suitable for the company's own business would be £20,000. Negotiations then ensued for the sale of the reversion to the tenants. On June 17, 1955, the board of the landlord company decided to retain the reversion. On June 28, 1955, the tenants served notice requesting a new tenancy for fourteen years. On Aug. 15, 1955, the landlord company gave notice of opposition, relying on s. 30 (1) (f)† of the Landlord and Tenant Act, 1954 (i.e., on an intention to carry out substantial work of construction which it could not reasonably do without obtaining possession). On Oct. 27, 1955, the tenants commenced proceedings for the grant of a new tenancy by the court. On Nov. 25, 1955, the board of the landlord company approved expenditure of £15,000 on the premises based on a report that the architect had surveyed the premises and estimated the expense of reconstruction to be in the

* The terms of the sub-section are printed at p. 4, letter D, post.

† The terms of the paragraph are printed at p. 4, letter H, post.

region of £15,000. This resolution did not identify any particular works as being intended to be carried out. On Apr. 23, 1956, after the application to the court had been heard for four days, the board of the landlord company resolved (a) that, in the event of the company obtaining possession of the premises, the work specified in the architect's original estimates should be carried out forthwith and expenditure of £20,000 should be approved; and (b) that counsel appearing for the company at the hearing of the tenants' application should be authorised to give an undertaking to the court or the tenants that the work would be carried out as soon as practicable in the event of possession being obtained. The judge held that the landlord company's opposition under s. 30 (1) (f) of the Act of 1954 failed because the landlord company had not shown that at the material time, which in his judgment was the date of the service of the notice of opposition, the company intended at the termination of the tenancy to carry out the work of reconstruction. He granted to the tenants a new tenancy for fourteen years, the maximum term which could be granted under s. 33 of the Act. On appeal by the landlord company,

Held: (i) (LORD EVERSHED, M.R., dissenting) the relevant time at which the landlord company must have held the intention described in s. 30 (1) (f) of the Landlord and Tenant Act, 1954, if the ground of opposition provided by that paragraph were to be established, was the time of the court's decision at the hearing, not the date when notice of opposition was given; therefore the case would be remitted to the trial judge to determine whether, taking into consideration the resolution of Apr. 23, 1956, the landlord company had established at the hearing such an intention on the part of the company as satisfied s. 30 (1) (f).

(ii) if it were decided that a new tenancy should be granted, the term of the new tenancy should be five years, this shorter term being appropriate in view of the duration of the previous leases of the property and of s. 30 (1) (g) of the Landlord and Tenant Act, 1954 (see particularly p. 11, letter C, post).

Decision of DANCKWERTS, J. ([1956] 2 All E.R. 497) reversed on the law.

[**Editorial Note.** The decision of the majority of the Court of Appeal on point (i) above is not based on identical reasoning. BIRKETT, L.J., bases his conclusion largely on consideration of the paragraphs of s. 30 (1) of the Landlord and Tenant Act, 1954, and in his view the hearing is the critical point of time in relation to all grounds of opposition under s. 30 (1) (see p. 8, letter G; cf., p. 15, letter G, post). ROMER, L.J., primarily bases his decision on the view that the intention required to satisfy s. 30 (1) (f) must be not only fixed and definite but also genuine and not colourable (see p. 15, letter D, post), and that the Landlord and Tenant Act, 1954, nowhere clearly imposes the requirement that this intention must exist at a date earlier than the hearing (see p. 12, letters D to G, post). It is particularly material, therefore, to note that LORD EVERSHED, M.R., differs on the meaning of the word "intends" in s. 30 (1) (f) and does not accept that in every case the intention must have the full quality of fixity described by ASQUITH, L.J., in *Cunliffe v. Goodman* ([1950] 1 All E.R. 720); cf., p. 17, letter D, to p. 18, letter B, post. BIRKETT, L.J., does not discuss the quality of intention required (cf., p. 10, letter E, post), but it seems that he held the view that the intention must be a fixed and settled intention (see p. 9, letter B, post).

For the Landlord and Tenant Act, 1954, s. 24, s. 30, s. 33, see 34 HALSBURY'S STATUTES (2nd Edn.) 409, 414, 417.]

Cases referred to:

- (1) *Atkinson v. Bettison*, [1955] 3 All E.R. 340; 3rd Digest Supp.
- (2) *Smart (J. W.) (Modern Shoe Repairs), Ltd. v. Hinckley & Leicestershire Building Society*, [1952] 2 All E.R. 846; 3rd Digest Supp.
- (3) *Fisher v. Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. 78; [1956] 2 Q.B. 78.

- A (4) *Reohorn v. Barry Corpn.*, [1956] 2 All E.R. 742.
 (5) *X.L. Fisheries, Ltd. v. Leeds Corpn.*, [1955] 2 All E.R. 875; [1955] 2 Q.B. 636; 119 J.P. 519; 3rd Digest Supp.
 (6) *Cunliffe v. Goodman*, [1950] 1 All E.R. 720; [1950] 2 K.B. 237; 31 Digest (Repl.) 378, 5070.
 (7) *Fleet Electrics, Ltd. v. Jacey Investments, Ltd.*, [1956] 3 All E.R. 99.

B Appeal.

C This was an appeal by the landlord, Phillips Furnishing Stores, Ltd. (referred to hereinafter as "the landlord company"), from an order of DANCKWERTS, J., dated May 7, 1956, and reported [1956] 2 All E.R. 497, on an application by the tenants, Betty's Cafés, Ltd., for a new tenancy, under the Landlord and Tenant Act, 1954, of business premises known as 42 and 44, Darley Street, Bradford, for a period of fourteen years commencing on June 24, 1956. The application was opposed by the landlord company on the ground specified in s. 30 (1) (f) of the Act, namely, that on the termination of the current tenancy, the landlord company intended to reconstruct the premises comprised in the holding, or a substantial part of those premises, or to carry out substantial work of construction on the holding or part thereof, and that it could not reasonably do so without obtaining possession of the holding. DANCKWERTS, J., held that the landlord company had not shown the requisite intention at the material time, which was the date of the service of the notice of opposition, and, accordingly, he granted the tenants' application.

E The facts appear in the judgment of BIRKETT, L.J., and in the judgment of DANCKWERTS, J., [1956] 2 All E.R. at pp. 500 et seq. and are summarised in the headnote.

J. P. Widgery for the landlord company.

L. A. Blundell and *C. B. Priday* for the tenants.

Cur. adv. vult.

Nov. 28. The following judgments were read.

F **BIRKETT, L.J.:** This is an appeal from a decision of DANCKWERTS, J., given on May 7, 1956. He decided that a company known as Betty's Cafés, Ltd. was entitled to be granted a new lease of certain premises in Bradford, 42 and 44, Darley Street, under the provisions of the Landlord and Tenant Act, 1954. The landlord, Phillips Furnishing Stores, Ltd., appeals to this court against that decision.

G The relevant facts would appear to be as follows: Betty's Cafés, Ltd. [referred to hereinafter as "the tenants"] had carried on the business of café proprietors and retail confectioners in these premises since 1925. They had held the premises on a series of leases, none of which had ever exceeded a term of eight years, and the last lease, dated Apr. 29, 1946, was for a term of eight years expiring on Dec. 31, 1953. Since June 24, 1955, the tenants had been in possession of the whole of the premises, a portion formerly having been sub-let to William Timpson, Ltd. The premises were excellently situated in Bradford, and the tenants did a very substantial business there. They were naturally anxious to remain where they had carried on business for so long, and invoked the provisions of the Act of 1954 to enable them to do so. Phillips Furnishing Stores, Ltd. [referred to hereinafter as "the landlord company"] bought the property on Aug. 25, 1953, for £38,750. The interest which the landlord company acquired was the remainder of the term of 999 years from Jan. 1, 1806, at a ground rent of £15 6s., but completion did not take place until Mar. 1, 1954. The purchase in August, 1953, was made, no doubt, with the intention of opening a shop in Bradford when the lease to the tenants expired, and it was thought that a wise method of doing this would be to re-sell the property, and obtain from the purchaser a lease to the landlord company at a rent that would bring a return of six per cent. to the purchaser. The landlord company owned some sixty

shops in various parts of the country where they carried on the business of furniture dealers. On Sept. 23, 1953, that is, in the month following the acquisition of the property by the landlord company, the judge of the Bradford County Court made an order for a new tenancy of 42 and 44, Darley Street, for a period of twelve months from Jan. 1, 1954, under the provisions of the Leasehold Property (Temporary Provisions) Act, 1951. The new tenancy was to be at a rent of £2,000 and on the same terms as the existing lease.

The Landlord and Tenant Act, 1954, came into operation on Oct. 1, 1954. Part 2 of the Act is concerned with security of tenure for business, professional and other tenants. Section 23 defines the tenancies to which Part 2 of the Act applies, and s. 23 (1) says:

"Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

Section 24 provides for the continuation of tenancies to which Part 2 of the Act applies, and for the grant of new tenancies, the material words being in sub-s. (1):

"A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act."

The substance of the matter, therefore, so far as the present appeal is concerned, at this stage is that (i) subject to the provisions of the Act, Part 2 applies to any tenancy where the property comprised in the tenancy is occupied by the tenant for the purposes of a business, and that covers the property 42 and 44, Darley Street, Bradford; (ii) the tenancy of 42 and 44, Darley Street, will not come to an end at the expiration of the term unless terminated in accordance with the provisions of the Act; and subject to s. 29 of the Act, the tenants may apply to the court for a new tenancy if (a) the landlord company gives notice under s. 25 of the Act or (b) the tenants have requested a new tenancy under s. 26 of the Act.

On June 28, 1955, the tenants served a notice on the landlord company requesting a new tenancy, thus invoking s. 26 of the Act, and asked for a period of fourteen years at a rent of £2,500, the rest of the terms of the new tenancy to be the same as those in the lease of Apr. 29, 1946. On Aug. 15, 1955, notice was given by the landlord company that the company would oppose the application for a new tenancy, and this notice was signed by Mr. Jones, who was the secretary and a director of the company. The ground relied on in the notice was the ground set out in s. 30 (1) (f) of the Act of 1954, that

"... on the termination of the current tenancy [the company] intends to ... reconstruct the premises comprised in the holding ... and ... [the company] could not reasonably do so without obtaining possession of the holding."

This was in accordance with s. 26 (6) of the Act of 1954.

It is important to remember that by the provisions of s. 30 (1) (g) of the Act of 1954 a landlord can oppose an application by a tenant for a new tenancy if he establishes to the satisfaction of the court that at the termination of the current tenancy he intends to occupy the premises for the purposes of his own business, to be carried on in the premises, or as his own residence; but he is not allowed to set up this ground of opposition if his interest was created after the beginning of the period of five years which ends with the termination of the current tenancy and if at all times since the creation of the interest the premises had been held

A on a tenancy within s. 23 (1) of the Act of 1954*. The landlord company could not rely on the ground contained in s. 30 (1) (g), therefore, and relied solely on s. 30 (1) (f).

B In *Atkinson v. Bettison* (1) ([1955] 3 All E.R. 340), *J. W. Smart (Modern Shoe Repairs), Ltd. v. Hinckley & Leicestershire Building Society*† (2) ([1952] 2 All E.R. 846), and *Fisher v. Taylors Furnishing Stores, Ltd.* (3) ([1956] 2 All E.R. 78), the Court of Appeal discussed the grounds specified in s. 30 (1) (f) and (g) of the Act of 1954, and DANCKWERTS, J., examined them carefully in the court below. I do not think it necessary to discuss them further, for, while the decision in *Atkinson v. Bettison* (1) has been considered and explained in later cases, the position in this appeal is reasonably clear. Whether the proposed work on the premises satisfies the conditions laid down in s. 30 (1) (f) is a matter for the court to determine on the evidence produced before it. Section 30 (1) (f) reads:

C “that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.”

D In the present case DANCKWERTS, J., was satisfied that the work proposed by the landlord company did satisfy the conditions, and that finding was in accordance with the evidence. There was here “substantial work of construction”. The learned judge was also satisfied that possession of the premises was necessary for carrying out the works in question. The only remaining question, therefore, was whether the landlord company had established to the satisfaction of the court that it intended to carry out the works in question.

E DANCKWERTS, J., considered first what was the relevant time when the intention mentioned in s. 30 (1) (f) must exist. He held that the relevant time was at the date of the service of the notice by the landlord company, that is, on Aug. 15, 1955, and, further, that the company had failed to establish that it had any such intention on that date. He thereupon granted to the tenants a new tenancy of the premises under s. 33 and s. 34 of the Act of 1954. It was to be a tenancy for fourteen years, the maximum term permitted by s. 33, at a rent of £3,000 a year. The other terms of the tenancy were to be those of the lease of Apr. 29, 1946. The landlord company appeals against this decision and asks that the application by the tenants for a new tenancy should be dismissed. In the alternative, the landlord company says that, if the application is granted, the term of fourteen years is excessive and inequitable and that it should be reduced to three years.

F The first and most important question to be determined is: What is the relevant date at which the intention referred to in s. 30 (1) (f) must be shown to exist? It was submitted on behalf of the landlord company that the learned judge was wrong in deciding that the relevant date was the date of the landlord's notice, and it was said that the relevant date was the date of the hearing of the application in the court at the moment when judgment was given. This precise point has never been judicially determined. In *Rehorn v. Barry Corpn.* (4) ([1956] 2 All E.R. 742), DENNING, L.J., expressed the view (*ibid.*, at p. 745) that the relevant date was the date of the hearing, but the case did not raise the point and called for no decision. PARKER, L.J., reserved the point in the same case. DANCKWERTS, J., in the present case, was obviously much influenced by

* See s. 30 (2) of the Act.

† In this case the provision under consideration was the Leasehold Property (Temporary Provisions) Act, 1951, s. 12 (3), which was repealed by s. 68 (1) of and Sch. 7, Part 2, to the Act of 1954. Section 12 (3) provided: “The court shall not order the grant of a new tenancy if it is satisfied . . . (c) that the landlord reasonably requires possession in order that the premises the subject of the expiring tenancy, or a substantial part of those premises, may be demolished or reconstructed . . .”

some observations of SIR RAYMOND EVERSHED, M.R., in *X.L. Fisheries, Ltd. v. Leeds Corpn.* (5) ([1955] 2 All E.R. 875), where the Master of the Rolls said (*ibid.*, at p. 878):

"It is, in other words, I think quite plain that when the landlord comes to put in his notice of opposition, it is sufficient if at the time he puts it in he is in fact the landlord. It is, therefore, sufficient if he, having acquired the premises or the reversion since the date of the request, is able to say when he puts in his notice of opposition before the two months' period expires that he is the landlord and . . . that on the termination of the current tenancy he intends to reconstruct."

The point in that case, however, was not the point in this appeal, and it is, therefore, true to say that there is no authority which binds this court on the question what is the relevant date.

Two modes of procedure are laid down in the Act of 1954. The first is the termination of the tenancy by the landlord under s. 25, and by sub-s. (6) of that section the landlord's notice

". . . shall not have effect unless it states whether the landlord would oppose an application to the court under this Part of this Act for the grant of a new tenancy and, if so, also states on which of the grounds mentioned in s. 30 of this Act he would do so."

The second is the tenant's request for a new tenancy under s. 26 of the Act, and by sub-s. (6) of that section:

"Within two months of the making of a tenant's request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in s. 30 of this Act the landlord will oppose the application."

It is clear that the grant or refusal of a new tenancy is to be determined by the court, and, whether the landlord begins the proceedings under s. 25 or the tenant begins under s. 26, the landlord must state in the notice which he is bound to give, under either section, which of the grounds mentioned in s. 30 he relies on to defeat the tenant's claim. Section 30 (1), which sets out the grounds on which a landlord may oppose an application by the tenant for a new tenancy, says:

"The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord's notice under s. 25 of this Act or, as the case may be, under s. 26 (6) thereof, that is to say . . ."

The grounds are then set out in paras. (a), (b), (c), (d), (e), (f) and (g). In this appeal, the ground set out in s. 30 (1) (f) alone is relied on, but on the question whether the relevant date is the date of the landlord's notice or not, the other grounds set out in s. 30 (1) are not unimportant. Section 30 (1) (a) reads:

"where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations."

The language of s. 31 (1) is as follows:

"If the landlord opposes an application under s. 24 (1) of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy."

A With regard to s. 30 (1) (a), let it be supposed that at the date of the hearing of the application the state of repair was excellent and that the landlord could not possibly establish to the satisfaction of the court that any fault could be found with the state of repair then existing. Is the court then to decide the question: What was the state of repair when the landlord served the notice? If the tenant were to say: "It is true that the landlord had cause to complain when he served the notice, and I am very sorry about it, but it was due to a series of misfortunes which left me without the necessary labour to perform my covenants, as I would have wished; but happily that trouble is over and the property is in perfect condition and will be kept so", is the court to say: "It is too late; all the court can consider is what was the state of repair at the date of the notice"? That would be, in my view, to interpret s. 30 (1) (a) as though the words were "... in view of the state of repair of the holding at the date of the landlord's notice", and the Act refrains from using any such language. The notice is, in fact, saying: "This ground is the ground on which I shall oppose your application to the court when the matter comes to be determined".

Section 30 (1) (b) reads:

D "that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due."

This, again, is a paragraph which makes use of the words "ought not". This would seem to leave some discretion in the court which hears the application to decide whether the application ought or ought not to be granted. In practice, the court would look at the history of the payments and make its decision; but, if the tenant had some very good reasons to explain delays and very good grounds for assuring the court that the like situation would never arise again, it seems difficult to say that the court could not listen to evidence to show how completely the situation had changed at the date of the hearing, from what it was at the date of the notice, and that the court was prevented from taking the evidence into account in considering whether the landlord had established to the satisfaction of the court that the court "ought not" to grant the application.

F Section 30 (1) (c) reads:

"that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding."

G This, again, is a paragraph which uses the words "ought not". Suppose the breaches of obligation to have been made good between the date of the notice and the date of the hearing, or suppose the "reason connected with the tenant's use or management of the holding" to have vanished between the date of the notice and the date of the hearing, is the evidence inadmissible because the court can consider only the state of affairs existing at the date of the hearing? The words "ought not" imply that the court must see whether the landlord has established the ground on which he relies to the satisfaction of the court, and this must, in my judgment, permit the court to look at all relevant matters down to the actual hearing. In cases where the grounds specified in para. (a) or para. (b) or para. (c) are relied on, the court must exercise its discretion on the evidence given before the court at the hearing.

I Section 30 (1) (d) reads:

"that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding."

At the hearing of the application, the landlord must establish to the satisfaction of the court that he has fulfilled the various conditions laid down in the paragraph. He must, therefore, show that the alternative accommodation is available at the hearing, and must then be in the position to express his willingness to provide it or to secure its provision for the tenant. The time at which the alternative accommodation will be available must be suitable to the tenant's requirements, and the court must be satisfied on all these points. At the date of the notice, the landlord might very well be unable to offer the requisite alternative accommodation, although he was negotiating in order to be able to do so at the hearing. If at the hearing the landlord was able to fulfil all the conditions of s. 30 (1) (d), and established this to the satisfaction of the court, there would be no discretion left in the court to order the new tenancy; and, provided that the landlord had stated the ground in his notice, the mere fact that it was not possible at the date of the notice to fulfil all the requirements of s. 30 (1) (d) would not enable the court, in my judgment, to say that the landlord was debarred from establishing the ground at the hearing.

In the present appeal, the only ground relied on is that specified in s. 30 (1) (f), which I have already read. DANCKWERTS, J., said ([1956] 2 All E.R. at p. 508):

"It seems to me that this must be the vital moment, that at the date of the service of the notice of objection it must be true in fact that the landlord intends to carry out the work of reconstruction."

He held that the landlord company was quite unable to establish this intention to his satisfaction and he made an order for a new tenancy.

Two considerations must be kept in mind in considering what is the relevant date to which the court must look at the hearing: (i) that there will always be a considerable time between the notice and the hearing, and in that time great changes may take place; (ii) the wording of (a) s. 25 (6), "would oppose an application to the court"; (b) s. 26 (6), "he will oppose an application to the court", and "... such notice shall state on which of the grounds ... the landlord will oppose the application"; (c) s. 30 (1), "may oppose an application", "grounds as may be stated in the landlord's notice"; and (d) the whole of s. 31 (1). It is also to be observed that the grounds specified in paras. (d), (e) and (f) of s. 30 (1) are subject to special treatment under s. 31 (2) of the Act of 1954.

I am of opinion that the learned judge was wrong in holding that the relevant date for the consideration of the court was the date of the notice, and in my opinion the proper date is the date of the hearing before the court, when the landlord has to establish that ground, or those grounds, stated in his notice to the satisfaction of the court. The court is given a discretion under s. 30 (1) (a), (b), and (c), to decide whether the tenant ought to be granted a new tenancy, and that discretion must be exercised on the material then before the court at the date of the hearing; and with regard to s. 30 (1) (d), (e), and (f), the court must decide on the material before the court at the hearing, and not on what was the position at the date of the notice, although the whole history of the matter must be considered when deciding whether the requisite intention has been satisfactorily established. In the vast majority of cases, of course, the position at the date of the notice and at the date of the hearing will be exactly the same. The landlord is unlikely to put into his notice any ground on which he has no intention of relying; but, in view of the imperative duty to state his grounds in the notice if he is to be heard at the hearing before the court, the landlord may very well put in his notice a ground about which he has not fully made up his mind at the date of the notice because the decision rests on facts which have still to be made clear. The notice, in my opinion, is to be regarded as being in the nature of a pleading, giving notice to the tenant of the case which he will have to meet at the hearing, under any of the matters set out in s. 30 (1). Alternative accommodation, for example, may have been available at the date of the notice, and not available at the date of the hearing. It is the date of the

A hearing, in my view, which will determine that ground, for it could not be established to the satisfaction of the court if at the date of the hearing it was non-existent. If that were the only ground, the tenant's application would be unopposed, despite the fact that at the date of the notice every requirement of s. 30 (1) (d) had been fully met. Similarly, under s. 30 (1) (f), if at the date of the notice the intention could not be said to be a firm and settled intention because of special circumstances, but at the date of the hearing the intention (and the reasonable necessity for possession) required by law was established to the satisfaction of the court, the tenant's application would be defeated.

It becomes necessary, therefore, to consider whether the landlord company has established the grounds on which it relied, which were the grounds set out in s. 30 (1) (f) of the Act of 1954, on the footing that the judge ought to have considered the question as at the date of the hearing, and not, as he did, at the date of the notice. The learned judge reviewed the evidence with great care, and it is only necessary to mention the principal facts for the purpose of this judgment. It is clear that the intention of the landlord company varied a great deal from time to time. It may be taken that it bought the property for £38,750 with the intention of occupying it for the purpose of its furniture business. There was a time when the company thought of re-selling the premises and obtaining a lease from the purchasers; the company thought also of selling to the tenants and negotiated to that end; it contemplated making structural alterations so that it might get possession at the end of the existing term; it negotiated a second time with the tenants; and it had also thought of waiting until it could acquire the property under s. 30 (1) (g) of the Act of 1954. It cannot be doubted that from time to time the landlord company was in the greatest uncertainty as to what was best to be done with the property which the company had bought. On June 17, 1955, at a meeting of the board of directors of the company, it was resolved "to retain the property although the company would not obtain possession for some three years". The tenants received this decision with some justifiable surprise and resentment, for the negotiations to purchase the property had proceeded almost to the final stages. The tenants, thereupon, on June 28, 1955, served the notice requiring a new tenancy. On Aug. 15, 1955, the landlord company served the notice of opposition. This notice, which was in the form required by the statute, was signed by Mr. Jones, who was the secretary and a director of the company. In fact, there was no resolution of the board authorising this notice, and, as the authority of Mr. Jones in the earlier negotiations had been repudiated, the learned judge was doubtful, first of all, whether he should treat the notice as a valid notice ([1956] 2 All E.R. at p. 502). Treating it, however, as a valid notice, the learned judge found (*ibid.*, at p. 507) that the proposed works, which were explained in evidence, satisfied the conditions laid down in s. 30 (1) (f), and he held further that possession of the holding would be necessary for the carrying out of the works. The learned judge held, however, that the landlord company had not established to his satisfaction that it intended to reconstruct the premises within the meaning of s. 30 (1) (f). While stating that a company may exercise its functions through agents, and that a resolution of the board is not essential, he yet found on the particular facts of the case that the intention of the company could only be found in the resolutions of the board as recorded in the minutes. The company had repudiated the authority of Mr. Jones, Mr. Winstone (another director) and Mr. Buckle (an estate agent) to act on behalf of the company when the negotiations for sale were proceeding; Mr. Jones disclaimed any authority to bind the company without a meeting of the directors to confirm his actions; the affidavit for the purpose of opposing the tenant's application was sworn by the assistant secretary (Mr. Jones, the secretary, being ill); and no other director was called to give evidence.

The two material minutes on this matter are those of Nov. 25, 1955, and Apr. 23, 1956. The minute of Nov. 25, 1955, reads: A

"Mr. M. Winstone reported that the company's architect had surveyed the property and estimated that reconstruction would cost in the region of £15,000. It was decided to approve expenditure thereon up to that sum."

The minute of Apr. 23, 1956, reads: B

"Mr. Jones and Mr. Nicholson reported upon the case of Betty's Cafés, Ltd. versus the company now proceeding in the High Court . . ."

(the resolution which I am about to read was passed during the days when this case was actually being heard by DANCKWERTS, J.).

"It was resolved: (i) That in the event of the company obtaining possession of these premises from [the tenants] on the termination of [the tenants'] current tenancy thereof the works detailed in [the architect's] specification dated January, 1955, and plan numbered 45/2 be forthwith carried out and that expenditure of up to £20,000 upon such works be approved [the minute of November stating £15,000]. (ii) That counsel appearing for the company in the application by [the tenants] now proceeding in the Chancery Division be authorised to give an undertaking either to the court or to [the tenants] that the above-mentioned works will be carried out as soon as is practicable in the event of possession being so obtained." C

Much discussion took place before us on the nature of the intention required by s. 30 (1) (f), and the words of ASQUITH, L.J., in *Cunliffe v. Goodman* (6) ([1950] 1 All E.R. 720) were invoked, as were the judgments in *Reohorn v. Barry Corpn.* (4). DANCKWERTS, J., thought that the resolution of Apr. 23, 1956, passed when the case was actually being heard by the court and after the case had proceeded for some time, was too late for the landlord company to rely on it, and criticised its conditional character. It was, in my opinion, quite open to the landlord company to say, as it did, that its intention was to reconstruct; and the undertaking which counsel was instructed to give would seem to indicate that particular intention of the company. The learned judge, however, decided the case on the ground that the resolution of Apr. 23, 1956, was too late to be effective*, and without it, he said, the intention required by s. 30 (1) (f) was not established to his satisfaction. D

The conduct of the landlord company is open to severe criticism. There is no resolution of the board of the company before Apr. 23, 1956, recording an intention to carry out works of reconstruction at the end of the tenants' tenancy or at any other time. The resolution of Nov. 25, 1955, approved expenditure up to £15,000, although on Jan. 7, 1955, Mr. Ovenden, the company's architect, had written to say that he had surveyed the premises and estimated that the work of reconstruction to make the premises suitable for the company's business would be £20,000. In the light of the history of the company's vacillations and changes of policy, and particularly in view of the fact that no resolution was passed before Apr. 23, 1956, the learned judge had formed a view very adverse to the landlord company. E

The resolution of the board on Apr. 23, 1956, may be criticised as being tardy, but it is not inadmissible, in my view. If it is admissible, it is clearly very important on the question which the learned judge had to decide, for not only does it express the intention of the company, but it is linked with a resolution to empower the learned counsel for the company to give an undertaking to the court that the expressed intention will be carried out. In my opinion, the learned judge ought to have considered the effect of the resolution before deciding that the company had failed to establish the requisite intention to the satisfaction of F

* See per DANCKWERTS, J., [1956] 2 All E.R. at p. 508, letter H. G

A the court. It is quite within the bounds of possibility that, after considering the effect of the resolution of Apr. 23, 1956, the learned judge might still say, for good and sufficient reasons, if they are supported by the evidence, or if the evidence justifies the drawing of the necessary inferences, that the landlord company had failed to establish the requisite intention to the satisfaction of the court. I do not, however, think, in the view which I have formed as to the relevant date to be considered, that he was entitled to come to that decision without giving full consideration to the resolution of Apr. 23, 1956. I think that the case should go back to him for further consideration on the footing that the resolution of the board of the landlord company was not too late for it to receive consideration.

B The length of the new tenancy, if granted, should in my opinion be five years. The term of fourteen years granted by the learned judge was the maximum which the Act of 1954 allows, and, having regard to the previous terms and to the provisions of s. 30 (1) (g) of the Act of 1954, I would reduce the term from fourteen to five years and leave the other terms as suggested by the learned judge. I would allow the appeal and refer the case to the learned judge for further consideration.

C **ROMER, L.J.:** In pursuance of s. 26 of the Landlord and Tenant Act, 1954, Betty's Cafés, Ltd. served on their landlords, Phillips Furnishing Stores, Ltd., a request for a new fourteen-year lease of the premises 42 and 44, Darley Street, Bradford, to commence on June 24, 1956. The request was dated June 28, 1955, and on Aug. 15, 1955, the landlord company served on the tenants a counter-notice, under s. 26 (6) of the Act, stating that the company was not willing to grant a new tenancy of the premises. Paragraph 2 of this counter-notice stated:

D " . . . the grounds on which we shall oppose any application which you may make to the court for the grant of a new tenancy of the said property are that on the termination of the current tenancy we intend to reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that we could not reasonably do so without obtaining possession of the holding."

E The grounds of opposition stated in the counter-notice are those referred to in s. 30 (1) (f) of the Act and it is provided by s. 31 (1) that, if a landlord opposes a tenant's application on grounds on which he is entitled to oppose it in accordance with s. 30 and establishes any of those grounds to the satisfaction of the court, "the court shall not make an order for the grant of a new tenancy".

G In order that the landlord company in the present case should succeed in its opposition, it is in my opinion clear that the company must satisfy the court, when the tenants' application for a new tenancy is before it, that the company then entertains the intention indicated by its counter-notice. The principal question which was argued on the present appeal, however, is whether the landlord company must also satisfy the court that the relevant intention existed at some earlier point of time, and, in particular, that it existed when the landlord company served the counter-notice on the tenants. DANCKWERTS, J., has given an affirmative answer to this question, and my regret at expressing a different view is naturally increased by the fact that the learned judge's conclusion has commended itself also to LORD EVERSHERD, M.R.

H I There is no express authority on the point. In *Reohorn v. Barry Corpn.* (4) ([1956] 2 All E.R. 742), DENNING, L.J., expressed a provisional view (for the point did not arise for decision) that the relevant time for establishing the intention was the date of the hearing of the application. PARKER, L.J., in his judgment in the same case, expressly left the question open. In *Fleet Electrics, Ltd. v. Jacey Investments, Ltd.* (7) ([1956] 3 All E.R. 99) it appears from the judgment of LORD EVERSHERD, M.R. (ibid., at p. 104) that it was assumed by counsel on both sides (for the question was not in issue) that the requisite intention must exist in the landlord's mind when he serves his notice on the tenant

under s. 25 of the Act, and that it must continue up to the date of the hearing. Neither LORD EVERSEED, M.R., nor either of the other members of the court expressed any opinion on the matter. In *X.L. Fisheries, Ltd. v. Leeds Corpn.* (5) ([1955] 2 All E.R. 875 at p. 878) the Master of the Rolls made the observations to which DANCKWERTS, J., referred ([1956] 2 All E.R. at p. 508) in his judgment in the present case, but there again the question did not fall to be decided.

We have, accordingly, to approach the problem unassisted by authority. The same cannot, however, be said of the meaning which we should attribute to the word "intends" in the context in which it appears in s. 30 (1) (f) of the Act. ASQUITH, L.J., in *Cunliffe v. Goodman* (6) ([1950] 1 All E.R. 720), examined the precise signification of this word in connection with the provisions of s. 18 (1) of the Landlord and Tenant Act, 1927. I do not at the moment cite from this classic judgment; it is enough to note that, in the lord justice's view, "intend" imports a fixed and settled, as distinct from a provisional, purpose. The word "intend" does not, in fact, appear in s. 18 (1) of the Act of 1927, but the definition of it given by ASQUITH, L.J., has been adopted as applicable to its use in s. 30 of the Act of 1954: see *Fisher v. Taylors Furnishing Stores, Ltd.* (3) ([1956] 2 All E.R. 78), *Rehorn v. Barry Corpn.* (4), and *Fleet Electrics, Ltd. v. Jacey Investments, Ltd.* (7). It is, accordingly, quite clear, as I think, that if a lessor is to succeed in establishing the ground of opposition on which the landlord company relies in the present case, he must satisfy the court, when the tenant's application is before it, that his intention is of the quality which ASQUITH, L.J., described; and, indeed, that such intention is reasonably capable of being carried into effect. Is it, however, also necessary that he should be able to satisfy the court that an intention of this character was present to his mind when he served on the tenant a notice that he would oppose an application for a new tenancy? If the language of the Act unequivocally imposes this requirement, then effect must be given to it, even though the result might be, in some cases, both unexpected and inconvenient. On the other hand, if the intention of Parliament be expressed ambiguously, inconvenience or harshness might well afford a guide to its discovery. It cannot be said, in my judgment, that the legislature has made it plain that the intention of a landlord to demolish or reconstruct demised premises on the termination of the tenancy must be shown to have existed when he serves a counter-notice under s. 26 (6) of the Act or, indeed, at any other time prior to the hearing of the application to the court. Section 31 (1) shows, in my opinion, beyond question that the intention must exist at the hearing; for it would be nihil ad rem for a landlord to establish to the satisfaction of the court that he had intended some weeks or months previously to demolish or reconstruct on the termination of the tenancy if, in fact, he had abandoned that intention in the interval. The additional requirement that an earlier intention, in the strict sense of the word, must also be established cannot, however, be clearly derived, in my judgment, from the statutory language used which, if it imposes the requirement at all, does so in an equivocal and ambiguous manner. Accordingly, it is permissible to inquire whether the requirement would, on the one hand, be of advantage to the tenant and, on the other hand, would or might result in hardship or inconvenience to the landlord; for if it would be a disadvantage to the landlord without securing any corresponding benefit to the tenant, it is surely a legitimate inference that the legislature did not intend to impose it.

On this aspect of the matter, it is desirable to examine somewhat further than I have so far done the interpretation that authority which is binding on us has placed on the word "intends" in s. 30 (1) (f); for if Parliament envisaged that a landlord should intend, at two separate points of time, to reconstruct, it could hardly be suggested, in the absence of clear language to that effect, that there could be a variation in his state of mind at each point respectively—the requisite ingredients of intention must be present on both occasions. What then are these ingredients? In order to answer this, it is convenient in the first place to quote

A a few passages from the judgment of ASQUITH, L.J., in *Cunliffe v. Goodman* (6), for, as I have already said, the word "intends" in s. 30 (1) (f) falls to be construed in accordance with the lord justice's observations. He said ([1950] 1 All E.R. at p. 724):

B "If the landlord did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put) either that there was *no* evidence of a positive 'intention' or that the word 'intention' was incapable, as a matter of construction, of applying to anything so tentative and so indefinite. An 'intention', to my mind, connotes a state of affairs which the party 'intending'—I will call him X.—does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition . . . If there is a sufficiently formidable succession of fences to be surmounted before the result X. aims at can be achieved, it may well be unmeaning to say that X. 'intended' that result . . . Not merely is the term 'intention' unsatisfied if the person professing it has too many hurdles to overcome or too little control of events; it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while. A purpose so qualified and suspended does not, in my view, amount to an 'intention' or 'decision' within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision."

E At the end of his judgment, the lord justice made his oft-quoted remark with reference to moving "out of the zone of contemplation . . . into the valley of decision."

F I need, I think, make only one further citation. In *Fisher v. Taylors Furnishing Stores, Ltd.* (3) ([1956] 2 All E.R. at p. 80), DENNING, L.J., said, with reference to s. 30 (1) (f):

G "... the court must be satisfied that the intention to reconstruct is genuine and not colourable; that it is a firm and settled intention, not likely to be changed . . . It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention."

H If, then, landlords who rely on s. 30 (1) (f) have to prove that they had an intention to reconstruct or demolish when they serve counter-notices on their tenants, it will be of no avail for them to show that at that time they entertained a provisional or conditional intention; no intention will suffice that fails to conform to the criterion established by these judicial utterances. It appears to me that this uncompromising view of the landlord's position is open to considerable and grave objection. In the first place, I am unable, for my part, to see, and counsel I for the tenants was unable satisfactorily to explain, in what way it furthers a tenant's legitimate interests or affords him necessary protection that a landlord should have formed an inflexible and settled intention at the time when the counter-notice is served; or in what manner those interests would be prejudiced, or the tenant left unprotected, if at that time the landlord had formed no more than a provisional or qualified intention to reconstruct or demolish when the tenancy came to an end, or, indeed, had formed no intention about it one way or the other. A landlord who wishes to oppose his tenant's application for a new tenancy is bound by s. 26 (6) to state in his counter-notice which of the statutory

grounds of opposition he intends to rely on. The matter will ultimately come before the court, and it is obviously right that the tenant should know in advance what is the case that he will have to meet at the hearing. It is, in my judgment, the object of the counter-notice that the tenant should be given this information, but, in my opinion, the counter-notice has no further or other object. It is, I think, intended to be in the nature of a pleading and its function, as in the case of all pleadings, is to prevent the other party to the issue from being taken by surprise when the matter comes before the judge. Why the interests of justice should further require that the landlord's intention must be shown to have been a definite and settled intention at the time when the counter-notice is served, or why the tenant should be entitled to a new tenancy unless such an intention can be established, I find, for my part, difficult to comprehend. I am unable, therefore, to conclude that it was for any reason connected with the interests or protection of tenants that the suggested obligation was imposed by the Act on landlords, assuming that it was imposed at all.

The next question for consideration is whether the suggested requirement would lead to hardship or inconvenience on the part of a landlord. That it might very well be open to abuse at the instance of an unscrupulous tenant is reasonably plain when it is remembered that a landlord's counter-notice under s. 26 (6), if given at all, must be given within two months of the making of a tenant's request; for a tenant who deliberately put in his request when he knew that, for reasons of illness or otherwise, his landlord would be unable to form the requisite intention for a considerable time to come could deprive him at the outset of all hope of successful opposition. Further than this, however, the suggested requirement might well put landlords in many cases into a quite impossible position. It is provided by s. 26 (2) of the Act:

"A tenant's request for a new tenancy shall be for a tenancy beginning with such date, not more than twelve nor less than six months after the making of the request, as may be specified therein . . ."

If a tenant requests a new tenancy beginning twelve months later, the landlord would, if the tenants' argument is accepted, have to come to a fixed and definite decision at least ten months in advance of the date when he could put that decision into effect. If his intention at that time to reconstruct was conditional on his being able to raise the necessary finance, or on the building prices or cost of labour that might prevail ten months later, that would not suffice; for a conditional or provisional intention is not enough. In cases to which s. 31 (2) applies, it might, indeed, be necessary for a landlord to establish that he had formed the requisite intention a great deal longer than ten months previously to his being able to obtain possession of the demised premises; and, indeed, it seems to me that the provisions of this sub-section are in other ways difficult to reconcile with the tenants' contention.

For the above reasons, I am unable to accept the suggestion that a landlord cannot rely on s. 30 (1) (f) unless he can establish to the satisfaction of the court that he entertained, at the date of his counter-notice, a settled and fixed intention to demolish or reconstruct at the termination of the current tenancy. It is to be observed that under s. 4 and s. 12 (1) (a) of the Act of 1954 a landlord who desires to terminate a tenancy to which Part 1 of the Act applies, in order to reconstruct the premises, need only state in his notice that he "proposes" so to do; and it is not clear to me why a fixed intention at the date of the notice should be required under Part 2 of the Act while a bare proposal is sufficient under Part 1.

As alternative to the date of the landlord's counter-notice it has been suggested that he must, at least, have formed an intention of the requisite quality by the time that he puts in his answer, if the tenant's application is to the county court, or by the time that the originating summons is before the master if the application is appropriate to and is brought in the High Court. While appreciating the attractiveness of the suggestion, I do not, for my part, find sufficient in the Act

- A to support it. Moreover, the procedural machinery for these applications, whether in the county court or in the High Court, had not, for obvious reasons, been established or defined when the Act of 1954 passed into law. Further considerations which are relevant to this suggestion are involved in the question, which I must now consider, whether the landlord must have formed the necessary intention under s. 30 (1) (f) by the time when the tenant's application is called
- B on for hearing before the judge or whether he can succeed in his opposition provided that such intention becomes established in his mind at any time previous to the making of the order. As to this, the court is precluded (see s. 31 (1) and s. 37 (1) of the Act) from making an order for the grant of a new tenancy if a landlord "establishes any of those grounds"—that is to say, the grounds specified in s. 30 (1)—"to the satisfaction of the court". On that language
- C it appears to me that it is open to a landlord who rests his opposition on s. 30 (1) (f) to prove that he has the intention therein mentioned at any stage of the hearing and while the court is still seised of the matter. The tenant's application is before the judge right down to the time when the court divests itself of further jurisdiction by making an order allowing or dismissing the application, as the case may be. In the face of the prohibition clearly imposed by s. 31 (1), I cannot
- D think that it is open to the court to make an order for a new tenancy if it has become satisfied, before the time has come for the making of the order, that the requisite intention exists in the landlord's mind. The intention must, however, be not only fixed and definite, but also "genuine and not colourable": see *Fisher v. Taylors Furnishing Stores, Ltd.* (3) ([1956] 2 All E.R. at p. 80); and it may very well be that a landlord would find it no easy matter to persuade the
- E judge of the genuineness of an intention at which he had not firmly arrived until after the hearing of the tenant's application had begun. The landlord would, indeed, encounter a similar difficulty, although in less degree, if it transpired that he had formed no definite intention to reconstruct when he put in his answer to the proceedings. In other words, the belatedness of a landlord's intention would be highly relevant to its genuineness, but, provided that it
- F exists by the time the hearing is closed, it is not, in my judgment, fatal to him in point of time.

- I am, for the above reasons, unable to agree with the conclusion at which DANCHEWERTS, J., arrived that the landlord company cannot succeed by reason of the fact that the company had not formed the requisite intention when it served the counter-notice on the tenants. Counsel for the tenants sought to
- G support that view by a reference to paras. (a) to (e) of s. 30 (1) and said that it was clear that, if a landlord desired to rely on any of the grounds therein mentioned, he must establish that they existed at the date of the counter-notice. It is, of course, very unlikely that a landlord would rely on any of these grounds of opposition unless they, in fact, existed when he served his counter-notice, but I should have thought it reasonably plain that subsequent events would be
- H relevant and admissible in relation to the tenant's repairing obligations, payments of rent and so on. In any event, s. 30 (1) (f) gives rise, in my judgment, to considerations peculiar to itself, whatever the position may be under paras. (a) to (e) of the sub-section.

- I It remains to consider whether, on the footing that the resolution passed by the directors of the landlord company on Apr. 23, 1956, could constitute an intention by the company to reconstruct notwithstanding that the resolution was so belated, the intention embodied therein, and supported by the offer of an undertaking to the court, was a sufficiently "settled" intention and whether it also possessed the requisite quality of genuineness. On the question whether the intention in fact existed, the learned judge said ([1956] 2 All E.R. at p. 507):

"The works will not be carried out unless the respondent company acquires possession against the request and application of the applicants for a new tenancy. The respondent company has stated this frankly, and

the resolution of Apr. 23, 1956, is expressed in those terms. Therefore the intention, if it existed or exists, is conditional on the applicants' application being defeated and possession being obtained forthwith by the respondent company. It is questionable whether an intention which is dependent on a condition of this kind, which is not within the sole volition of the respondent company, is such a firm and settled intention as is required by the terms of s. 30 (1) (f)."

I do not, for my part, share the doubt expressed by the learned judge; for, inasmuch as no demolitions and few reconstructions could ever be carried out by landlords unless they obtained possession of the premises concerned, s. 30 (1) (f) would be rendered almost nugatory as a ground of effective opposition. Whether, apart from the doubt which the learned judge indicated on that point, he would have held that the company had established a sufficiently settled intention, I am not altogether sure, and it does not seem to me that we have the necessary material before us to arrive at a satisfactory conclusion on the matter ourselves. Apart, however, from the fixity of the intention, the question of its genuineness also has to be considered. That an intention must not only be fixed and definite, but must also be a genuine intention, sufficiently appears from the cases to which I have earlier referred; and the judgment of PARKER, L.J., in *Fisher v. Taylors Furnishing Stores, Ltd.* (3) is of particular assistance on this aspect. If a man establishes to the satisfaction of the court that he has arrived at an unqualified decision to do some particular act, it might be thought that the very fixity of his determination was sufficient evidence of its genuineness. In cases such as the present, however, where a landlord is unable to rely on s. 30 (1) (g) of the Act and founds himself on s. 30 (1) (f), this is not necessarily so. Such a landlord might form an entirely definite intention to reconstruct the demised premises if he could obtain possession of them for himself; but if, for example, such reconstruction were shown to be unnecessary for the landlord's own residential occupation, or for the purposes of his business, his decision to carry out the work would presumably be regarded by the court as a mere blind, formed only for the purpose of overcoming his inability to rely on s. 30 (1) (g). In view of the learned judge's decision that the resolution of Apr. 23 was too late, it was not necessary for him to arrive at any definite conclusion on this question, and I am not satisfied that he did so. It is true that he said ([1956] 2 All E.R. at p. 507):

"... the intention to reconstruct in the present case is obviously wholly ancillary to the object of the respondent company to obtain possession of the property for its business."

If, however, that was intended by the learned judge to be a definite finding that the resolution was, in truth, a sham, it was unnecessary for him to proceed to what he described as "an even more important question", namely, the relevant time for the formation of the relevant intention. In any case, however, I am not at all sure that the learned judge was considering whether the intention which was evinced by the resolution of April, 1956, was a "genuine" intention in the sense which I have indicated; for an intention may still be genuine, as well as fixed and settled, even although it is ancillary to some other intention. I would, accordingly, allow the appeal and remit the case to DANCKWERTS, J., for his determination whether the intention at which the landlord company arrived on Apr. 23, 1956, possessed the necessary qualities of fixity and genuineness. In the event of his arriving at a decision adverse to the landlord company and ordering that a new tenancy be granted to the tenants, I agree with BIRKETT, L.J., that, for the reasons which he has stated, such new tenancy should be for a term of five, and not fourteen, years.

A LORD EVERSHED, M.R.: I have the misfortune on the difficult question of construction of the Landlord and Tenant Act, 1954 (which has been the main subject of debate on this appeal) to differ from the conclusion of my brethren; for I agree with DANCKWERTS, J., in thinking that the "relevant date" (as it has been called), that is, the date by reference to which the landlord, who has opposed the tenant's application for a new tenancy on the ground specified

B in s. 30 (1) (f) of the Landlord and Tenant Act, 1954, must prove the existence of the alleged intention, is the date of the landlord's notice given, in such a case as the present, under s. 26 (6) of that Act. Alternatively, I think that the "relevant date" should be taken as the date on which (according to the relevant practice or procedure in the High Court or the county court, as the case may be) the landlord must state, in the proceedings instituted by the tenant, whether

C he does or does not oppose the relief which the tenant seeks. In my judgment, with all respect to the contrary opinion of my brethren, the proposition that a landlord can form the requisite intention at any time before judgment is given in the High Court or the county court (for I do not understand that the proposition would extend the time until judgment in this court) is irrational and stultifies the elaborate machinery otherwise provided by the Act, and ought,

D accordingly, to be rejected.

I can state my reasons shortly for the view which I have formed. First, however, I should like to say something of the language used by ASQUITH, L.J., in *Cunliffe v. Goodman* (6) ([1950] 1 All E.R. 720) which has since been applied by way of exposition of the word "intends" in s. 30 (1) (f), for example, in *Reohorn v. Barry Corpn.* (4) ([1956] 2 All E.R. 742) and *Fleet Electrics, Ltd. v. Jacey Investments, Ltd.* (7) ([1956] 3 All E.R. 99). The learned lord justice was not concerned to construe a section of an Act of Parliament in which the word "intend" or "intention" in fact appeared at all. He was merely illustrating in characteristically forceful language what these words as ordinary English words in an ordinary context imported. More particularly, he was showing how the word "intention" in such a context differed in signification from mere idea or

F aspiration. In *Reohorn v. Barry Corpn.* (4) the corporation had expressed their desire to develop the land there in question: but in order that such a proposal should be carried into effect by the corporation, it would be necessary for them (among many other things) to take steps to obtain authority to raise a very large capital sum. It was proved that none of these steps had been taken, nor was it clear by any means what the result of taking them would be. In those

G circumstances—and there were others of the same kind—the court invoked the language of ASQUITH, L.J., by way of support and emphasis for the view that the proposition for developing the land, although favourably entertained by Barry Corporation, could not fairly be said to have been the subject of an "intention", i.e., something on which they could seriously be said in truth and in fact to have resolved. In my judgment, the adoption of the language of ASQUITH, L.J., by

H this court in the later cases cannot be treated as having, in effect, substituted for the word "intends" in s. 30 (1) (f) (as in s. 30 (1) (g)) the words "is ready and able", so as to impose on the landlord the onus of proving that, at whatever be the proper date, he has not only finally determined on the course proposed, but has also taken all necessary steps for the satisfaction of any requisite conditions to which the course proposed is subject. The relevant word is "intends",

I a simple English word of well-understood meaning. The question whether the intention is at the relevant date proved has, in my judgment, to be answered by the ordinary standards of common sense. If there are conditions to which the course proposed is subject, and if the landlord has no reason to suppose that there will be difficulty in their fulfilment, then *prima facie*, in my view, the landlord would not fail to prove intention within the meaning of s. 30 (1) (f) merely because he could not prove at the date in question that all steps had been taken to satisfy the conditions. It might well be otherwise, however, if the

course proposed were conditional on other things being done which were by no means matters of course, for example, the successful raising of large sums of money not presently available to him. In such a case the proposed course, although it might well have been adopted as one to be aimed at and, if possible, attained, could not, or could not easily, be said to be "intended" in the sense of having been finally resolved on. After reading the judgments in this court in which the language of *Asquith, L.J.*, has been invoked and re-reading my own judgment in *Fleet Electrics, Ltd. v. Jacey Investments, Ltd.* (7), I have reached the conclusion, that this court is not now bound to construe the word "intends" otherwise than as I have tried to express.

I have spent some time on this matter since it is said with force on behalf of the landlord company in the present case that the limit of two months after the tenant has made his request (which he could make at any time and to suit entirely his own convenience) imposed by s. 26 (6) of the Act puts, if the view of the tenants is right, an unreasonable burden on the landlord if, by the time of giving his notice, he must have taken all the steps to procure that all conditions should and would be satisfied by him—so unreasonable, indeed, that the court should not, in the absence of clear and compelling language, indorse it. In my judgment, this criticism largely disappears if the word "intends" is given no more than its ordinary meaning.

I turn to the general scheme of this part, Part 2, of the Act. Briefly, the scheme is that a tenancy of the kind to which Part 2 of the Act applies, continues (after the date of its expiry under the contract of tenancy) indefinitely until the requisite step is taken either by the landlord to put an end to it or by the tenant to obtain a new tenancy for a fixed term. The case of the tenant determining his tenancy in order to abandon his occupation of the property can, for present purposes, be omitted from consideration. In the former case, the landlord must, under s. 25 (6), specify in his notice of determination on which of the grounds set forth in s. 30 (1) he "would" rely by way of opposition to the tenant's application to the court for a new tenancy, if the tenant is unwilling to comply with the landlord's notice: for, if he is so unwilling, then his inevitable course is to make an application for a new tenancy. In the case of the tenant taking the first step to put an end to the existing or continuing tenancy by requesting the grant of a new term, the landlord, if unwilling to grant the new term, must, by his notice in answer (see s. 26 (6)), similarly specify, in the event of the tenant's application to the court, which of the grounds in s. 30 (1) he "will" invoke. It is not, as I understand, in dispute that for the purpose of determining the "relevant date" there is no difference between a landlord's notice under s. 25 and a landlord's notice under s. 26 (6). It is to be observed, however, that, in the case where the landlord makes the first move, the practical effect of the requirement as to his notice is that the ground selected from s. 30 (1) is made the basis for the exercise of his power of determination. Moreover, according to the scheme of the Act (whatever may be, in nine cases out of ten, the likely course of events), it is not certain that the tenant will, in fact, make any application to the court for a new tenancy.

In other words, the first and obvious purpose of the landlord's notice is, in my judgment, clearly to indicate to the tenant what the landlord says his case would be in the event of court proceedings. In face of that notice, the tenant makes up his mind whether he will incur the risk of invoking the court's jurisdiction with the obvious possibility that, if he loses, he will have to pay the costs. It is said that the specification of the selected ground or grounds by the landlord's notice is a kind of pleading. But, if so, why is it necessary for him to make his final selection before, and it may be some considerable time before, proceedings of any kind are initiated? If all that was intended by these sections was to indicate the grounds on which, at the hearing, a landlord should be enabled successfully to resist the tenant's application, it would have been both natural and simple

A merely to provide that, in case the tenant applied for a new tenancy (either on his own initiative or by way of answer to the landlord's notice to quit), the court should reject such application if the landlord established at the hearing any one of the grounds set out in s. 30 (1) to the court's satisfaction. I agree, of course, that the question must ultimately depend on the language of s. 30 (1) itself, properly interpreted in its context. To my mind, however, the elaborate provisions of these sections, which require the exclusive selection of one or more specific grounds by the landlord at this early stage, point very strongly indeed to the conclusion that the landlord is bound at this stage to assert what his case then is; and that what he must thereafter establish is the truth of the case so asserted. In my judgment, it is neither sensible nor logical to require that the landlord will make a kind of proleptic choice of the grounds on which he will rely at some future date, perhaps months ahead, hoping that in the meantime the facts will have occurred which will support his selection.

Reference was made in the course of the argument to the somewhat corresponding provisions in Part 1 of the Landlord and Tenant Act, 1954, relating to tenancies of dwelling-houses to which the provisions of the Rent Acts would have applied, had not the rent been below the level requisite for their application. D Section 12 of the Landlord and Tenant Act, 1954, specifies the grounds on which a landlord may apply to the court for possession of the premises comprised in such a tenancy. The first ground, specified in s. 12 (1) (a), is that for the purposes of redevelopment the landlord "proposes to demolish or reconstruct" the premises. Under s. 12 (1) (b) the landlord may rely on any of the grounds specified in Sch. 3 to the Act which correspond, with the necessary modifications, E to the grounds on which a court may make an order for possession under the Rent Acts. In my judgment, no assistance can be derived towards the solution of the present problem from the language of s. 12. That language is, of course, quite different from the language in s. 30 (1). More important, s. 12 is dealing in these cases with the right of a landlord, otherwise entitled according to the common law to possession, to apply to the court for an order for possession. Thus, F s. 12 (1) (b) brings in all the grounds which in similar circumstances may be invoked by a landlord applying for possession under the Rent Acts: and there is no doubt that, generally speaking, it suffices for the landlord to establish one or other of such grounds as existing at the date of the hearing. By analogy it may suffice, although it is unnecessary in the present case to decide the point, that the "proposal" indicated in s. 12 (1) (a) is established as existing at any G time before judgment. The scheme, however, of s. 12 and the other material sections in Part 1 seems to me to be substantially different from the scheme of Part 2. In the former, the Act is only concerned to specify the limitations on the landlord's right, on his starting to make application to the court, to obtain an order for possession to which, apart from the legislation, he would otherwise be entitled.

H It was strenuously argued for the landlord company that, according to the natural and grammatical construction of the notice which the landlord must give (in a form, be it observed, prescribed by the statute*), the selected grounds alleged need have no existence at any earlier date than the hearing. I am, for my part, wholly unable to agree. ROMER, L.J., has set out at the beginning of his judgment the form of the notice served in the present case, which I do not I repeat. If I am told by my landlord that he will oppose any application that I may make on the ground that on the termination of my tenancy he "intends to reconstruct" the demised premises, I confess that I should assume without hesitation that he so intended when he gave me the notice.

In my judgment, the effect of the language of s. 30 (1) is the same. Seven grounds are specified, in paras. (a) to (g) inclusive. The question with which we are concerned arises equally under para. (f) and para. (g): but it is, in my

* See the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107).

judgment, tolerably clear that the state of facts alleged which forms the basis of each of the remaining five paragraphs is a state of facts which must exist at the date of the notice itself, or, at least, at a date long before the hearing or its conclusion. I do not, of course, doubt that the question whether the tenant ought or ought not to be granted a new tenancy (see s. 30 (1) (a), (b), and (c)) is one that must and can only be determined at the hearing: and I do not say that events occurring up to the date of the hearing are irrelevant to the exercise of the court's powers. In my judgment, however, the state of repair of the building, the persistent delay in payment of rent, the breaches by the tenant of his obligations under the tenancy, on the basis of which the court is to be invited by the landlord to say that no new tenancy ought to be granted, must sensibly be referable to the date of the notice which alleges them, or, at least, to the date of the landlord's actual opposition to the tenant's application. It seems to me inconceivable to suppose that Parliament contemplated that a landlord would specify as the ground on which he would oppose the tenant's application (if made) a state of affairs which not only then did not exist, but which would be found to have come into existence for the first time during the hearing itself. Section 30 (1) (d) appears to me to be a still stronger example of the same general conclusion. Applying the language of this paragraph to the form of the statutory notice, the landlord says thereby that he would oppose an application by the tenant on the ground that "he has offered and is willing to provide" alternative accommodation. As a matter of English it is, in my view, impossible and quite illegitimate to translate the words "has offered" into "will at the date of the hearing have offered". Counsel for the landlord company did not in the end (as I understood him) argue on this paragraph to the contrary.

If I am right in my interpretation of s. 30 (1) (a) to (e) inclusive, then corresponding effect ought, in my judgment, to be given to paras. (f) and (g) of the sub-section, for it would be in the highest degree unlikely that there should be a different "relevant date" contemplated by Parliament for these two paragraphs alone. The view which I take is also, to my mind, more in conformity with the general scheme of the section and the elaborate provisions as to notices to which I have earlier referred and which I do not now repeat. Nor does it seem to me that any difficulty is created by the use of the words "would" and "will" in s. 25 (6) and s. 26 (6) respectively, or by the use of the word "establishes" in s. 31 (1) on which the landlord company somewhat relied. Whatever is the landlord's case, it is not in doubt that he must "establish" it at the hearing. There is no other possible occasion on which he can do so. The question is: What is the case, what are the facts, which he must then prove? Similarly, the words "would" and "will" are, in my judgment, used, and appropriately used (as sufficiently appears from the form of the notice itself), to indicate what, on a future occasion, the landlord will state his case to be. The question remains: What is that case?

If, however, I am wrong in thinking that the date of the notice is the relevant date, then, alternatively, I would take the date to be the date when, after the launching of his application by the tenant, the landlord must state whether or not he opposes. An application under the Act may be made either in the High Court or in the county court, according to the value of the property in question*. In the former case, the procedure will be governed by the terms of R.S.C., Ord. 53D and in the latter by the County Court Rules: see particularly the County Court Rules, 1936, Ord. 40, r. 8†. In each case the landlord will have, at an early stage in the proceedings, to state whether he opposes the application. In the present case he did so, pursuant to R.S.C., Ord. 53D, r. 5 (3), by filing an affidavit. In each case he will be limited to an opposition based on the notice previously given. It may be said that the words "would" and "will" in

* See s. 63 (2), (3) of the Act; 34 HALSBURY'S STATUTES (2nd Edn.) 440.

† The present Ord. 40 of the County Court Rules was substituted by S.I. 1954 No. 1394.

A s. 25 (6) and s. 26 (6), respectively, lend, according to their natural sense, some support to this view. The view appears, in effect, to have been assumed by PARKER, L.J., in *Reohorn v. Barry Corpn.* (4), although it is fair to say that the point was not necessary for his decision and not directly considered by him. He said ([1956] 2 All E.R. at p. 749): "I have assumed that the relevant time to be considered is the time of the application." The alternative view has, also, the practical advantage, as regards a case under s. 30 (1) (f) and, perhaps, under s. 30 (1) (g), of giving the landlord a longer time in which finally to make up his mind and get his tackle in order.

B It cannot be doubted that, whatever be the correct answer to the present problem, some difficulties and anomalies may remain. Notwithstanding the elaboration of the relevant sections, Parliament appears not to have considered exhaustively their practical or procedural implications. Thus, it was strongly contended that only one point of time, on any view, appears to be contemplated as the point of time at which the alleged intention must be proved to exist. Difficulties arise particularly under s. 30 (1) (d), if the words "has offered and is willing" are referable, as prima facie on the language they are, to the same point of time. These difficulties were not found capable of satisfactory solution during the arguments, as I understood them, and may on some future occasion have to be solved by the court.

C It is said, however, that the difficulties are far greater on the view, or either of the views, which commend themselves to me than on the view which has appealed to my brethren. It is said, indeed, that the results of the former would work real hardship on the landlord, with no compensating advantages to the tenant. With all possible respect, I am unable to agree. I have already given my reasons for not attributing to the language of ASQUITH, L.J., the far-reaching effect which might, I agree, be an undue embarrassment to the landlord. It has to be remembered what is the subject-matter to which it is contemplated that this Part of the Act applies, namely, a tenancy which is liable already to have expired according to its terms, and which, unless some step is taken by one side or the other, will automatically and indefinitely continue. If, in such cases, a landlord contemplates a reconstruction, or substantial reconstruction, of the premises either on the expiry of the term or at some later date, it seems to me, as a practical matter, in the highest degree unlikely that he will not have given, at the least, very serious consideration to the matter before he is stirred to activity for the first time by the tenant's request for a new tenancy. Then it is said that, if the view of the learned judge is right, it will suffice that the landlord should have, in fact, formed the fixed intention at the date of his notice (or, alternatively, of his opposition) even though he has wholly changed or abandoned it by the date of the hearing: for the terms of s. 31 (1) are categorical—if the landlord establishes a ground of opposition, then the court cannot make any order in the tenant's favour. This is, no doubt, at first sight a serious consideration; but, in my judgment, the practical answer is that the court would be in the highest degree unlikely to find, as a fact, that the landlord had formed bona fide a fixed and settled intention at the earlier date if it appeared that he no longer entertained it at the hearing. And I observe that the tenant would have no remedy, on the landlord company's view, if the landlord bona fide changed his intention immediately after the judgment.

I These difficulties, however, must be set against the consequences of the opposite view. The result of that view must be that it would be open to a landlord to specify any or all of the grounds in s. 30 (1) in his notice (and as a matter of prudence he might formally specify them all) and the tenant would have, in deciding whether to make application to the court, to take the risk of not knowing what case to meet or even of having any case to meet until the matter had (as

in the present case) been already for some days before the trial judge. One of the matters of fact which s. 30 (1) (f) involves is the question whether the reconstruction proposed is substantial; another, whether possession is reasonably required for it. Both these questions are matters on which, plainly, the tenant would require, and should be given, opportunity for investigation and, possibly, expert advice. This opportunity would be denied him if the landlord could wait until the trial opened before his proposals were formulated or disclosed at all. For reasons which I do not repeat, such a conclusion seems to me inconsistent with the scheme of the relevant sections, the elaborate provisions of which are thereby rendered largely otiose or futile. The Act is, after all (as the terms of its long title expressly indicate), one for the benefit of tenants. I have, for my part, been unable to accept as conformable to the purpose and language of the Act the result in the present case which might enable the landlord company to defeat the tenants' application on a ground which was set out in the company's notice of August, 1955, but which was shown to have no existence in fact until, at best, the case had been for several days before the learned judge eight months later. With every respect, therefore, to the contrary opinions of BIRKETT, L.J., and ROMER, L.J., I would, if the matter rested with me, dismiss the appeal on this ground. Having regard to the judgments of the majority of the court, it becomes also necessary for us to consider the other questions raised. On all these other matters (including that of the length of the tenancy if granted), I entirely agree with the judgments which my brethren have delivered, and I do not desire to add any reasons of my own. In the circumstances, the order must be as formulated by ROMER, L.J., at the conclusion of his judgment, namely, that the appeal should be allowed and the case remitted to DANCKWERTS, J., "for his determination whether the intention at which the landlord company arrived on Apr. 23, 1956, possessed the necessary qualities of fixity and genuineness."

Appeal allowed. Case remitted.

Solicitors: *Clifford-Turner & Co.* (for the landlord company); *Ward, Bowie & Co.*, agents for *Booth & Co.*, Leeds (for the tenants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

A MURFIN v. UNITED STEEL COMPANIES, LTD. (POWER GAS CORPORATION, LTD. Third Party).

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), November 15, 16, 19, 20, December 6, 1956.]

B *Factory—Electricity regulations—Insulating stands or screens—Duty to provide even in place set apart for switchboards having bare conductors—Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy etc. (S.R. & O. 1908 No. 1312), regs. 15, 24.*

C *Indemnity—Factory building contract—Indemnity against every “claim . . . under any statute or at common law . . . arising . . . from any cause other than negligence”—Whether “negligence” included breach of statutory duty.*

Factory—Electricity regulations—Absolute duty—Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy etc. (S.R. & O. 1908 No. 1312), reg. 18 (d), as substituted by the Electricity (Factories Act) Special Regulations, 1944 (S.R. & O. 1944 No. 739).

D A written contract between the occupiers of a factory and main contractors provided for the execution of building work at the factory and that the contractors should indemnify the occupiers “against every claim against [the occupiers] under any statute or at common law for . . . (b) death . . . arising out of or in connection with the carrying out of the contractor’s work and from any cause other than the negligence of [the occupiers] or [their] employees”. An employee of sub-contractors, who was an experienced electrician, was working on a panel switchboard two feet wide. He was removing nuts from the panel at a height three feet five inches above floor level. The panel was disconnected from electric current but close to it were two other panels which were not disconnected and carried bare conductors so exposed that they might be touched. These panels were in the contactor room which was a place set apart, to which only authorised persons were allowed access in accordance with reg. 15* of the Regulations for the Generation etc. of Electrical Energy, 1908. While at this work the employee came into contact with one of the bare conductors and was killed. No portable insulating screens were provided or used, although by reg. 24† such screens should be provided “when necessary adequately to prevent danger”; if they had been provided and used the danger would have been prevented. The deceased’s widow claimed damages against the occupiers for breach of statutory duty under reg. 24, and the occupiers denied liability but claimed indemnity, if they were liable, from the main contractors under the indemnity clause, quoted above.

E **Held:** (i) the occupiers were liable in damages for breach of reg. 24 because the duty to provide screens, imposed by reg. 24, applied even in a place set apart pursuant to reg. 15, and on the facts screens were necessary to prevent danger.

I (ii) the occupiers were entitled to be indemnified by the contractors against liability for breach of statutory duty, because what was excepted from the indemnity clause by the word “negligence” in the passage “any cause other than the negligence of . . .” meant negligence in the ordinary sense; the word “negligence” in that context did not include breach of statutory duty, since if “negligence” were read as including breach of statutory duty, the exception would destroy the indemnity almost wholly, and since (per SINGLETON, L.J., JENKINS, L.J., concurring) the distinction between statute and common law drawn previously in the words “claim . . . under any statute or at common law” would be disregarded.

* Regulation 15 is printed as a footnote at p. 25, post.

† Regulation 24 is set out at p. 26, letter E, post.

Hosking v. De Havilland Aircraft Co., Ltd. ([1949] 1 All E.R. 540) approved; *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* ([1934] A.C. 1) distinguished.

Per PARKER, L.J.: regulation 18 (d) imposes an absolute obligation to take precautions on the basis that high pressure switchboards are always dangerous, whereas in regard to other switchboards precautions are only required [under reg. 24] "when necessary . . . to prevent danger" (see p. 30, letter F, post).

Appeals dismissed.

[For Regulations for the Generation etc. of Electrical Energy, 1908, heads "Duties", "Definitions", and regs. 15, 24, see 8 HALSBURY'S STATUTORY INSTRUMENTS 87, 92, 93.]

As to the construction of exception clauses excepting a party to a contract from liability for negligence, see 11 HALSBURY'S LAWS (3rd Edn.) 393, para. 641, text and notes (d) and (e).]

Cases referred to:

- (1) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463; Digest Supp.
- (2) *Bryers v. Canadian Pacific Steamships, Ltd.*, [1956] 3 All E.R. 242.
- (3) *London Passenger Transport Board v. Upson*, [1949] 1 All E.R. 60; [1949] A.C. 155; [1949] L.J.R. 238; 2nd Digest Supp.
- (4) *Hosking v. De Havilland Aircraft Co., Ltd.*, [1949] 1 All E.R. 540; 2nd Digest Supp.

Appeal.

The defendants (the occupiers) and the third party (the contractors) appealed against a decision of FINNEMORE, J., at Lincoln Assizes, dated June 5, 1956, awarding the plaintiff £7,045 10s. 3d. damages and costs against the occupiers, and further holding that the occupiers were entitled to be indemnified by the contractors. The facts appear in the judgment of SINGLETON, L.J.

G. R. Swanwick, Q.C., and *Elizabeth K. Lane* for the defendants, the occupiers.
H. I. Nelson, Q.C., and *Bernard Caulfield* for the third party, the contractors.
Fenton Atkinson, Q.C., and *A. E. James* for the plaintiff, the widow.

Cur. adv. vult.

Dec. 6. The following judgments were read.

SINGLETON, L.J.: For a considerable time prior to Mar. 11, 1954, building works or extensions were being carried out at the works of the defendants, United Steel Companies, Ltd., at Scunthorpe. The main contractors for the work were the third party, Power Gas Corporation, Ltd. There were a number of sub-contractors, among them W. H. Smith & Co., Ltd., who were carrying out certain electrical work. The last-mentioned company had in their employ one Gerald Murfin, the deceased, who was a foreman electrician. Some furnaces and electrical equipment had been completed and were in use, but there was much still to be done. On Mar. 11 something went wrong: there was a burning out of a motor. The work had not been taken over: the contractors' and sub-contractors' men were still working on the site and, as was usual, the employees of contractors or of sub-contractors attended to the fault, with the help, so far as was necessary, of the occupiers' men. The fault was discovered and it was decided to replace an overload trip unit on a switchboard control panel in the control house by a unit brought from another place. It was the deceased's task to disconnect the burnt out unit on No. 3 panel. That involved taking off a number of nuts. He had just unscrewed the sixth, and last, nut when he was electrocuted. He died at once. His widow, the plaintiff (who is administratrix of his estate) brought this action against the defendants, United Steel Companies, Ltd. [who were the occupiers of the factory and are hereinafter

A referred to as "the occupiers"], alleging that the death of her husband was caused by breach of statutory duty or negligence on their part. The occupiers denied liability and brought in, as third party, Power Gas Corporation, Ltd., [who were the main contractors and are hereinafter referred to as "the contractors"] claiming that, in the event of the occupiers being liable to the plaintiff, they were entitled to be indemnified by the contractors against that liability.

B The action was heard by FINNEMORE, J., at Lincoln Assizes, and on June 5, 1956, the learned judge gave judgment for the plaintiff against the occupiers for £7,045 10s. 3d. damages and costs, and he further held that the occupiers were entitled to be indemnified by the contractors. The basis of the judgment against the defendants was that they, as occupiers of the factory, were in breach of reg. 24 of the Regulations for the Generation etc. of Electrical Energy, 1908, C and that that was the cause of the death of the deceased. The judge did not find that there was any negligence under the common law proved against the occupiers.

Before I come to the regulations, I must say a little more on the facts. The deceased was an experienced electrician. The room in which he was working at the time of his death was known as the contactor room. The switchboard had bare conductors, so exposed that they might be touched. The room was a place set apart to comply with reg. 15*, and only authorised persons were allowed access to it. In the room there were a number of panels and the work of the deceased was at the back of No. 3 panel, which is shown on the plan and on the photographs. Each of the panels has live conductors: the position of those on No. 4 panel is indicated on the plan. No. 3 panel is two feet wide: the position of the nuts which the deceased had removed is shown as around three feet five inches above floor level. A witness called on behalf of the occupiers was one Ashton, their foreman shift electrician. He met, outside the room, the site electrical engineer of the contractors, one Caine. Mr. Caine had already located the trouble and it was he who asked the deceased to disconnect the burnt out unit on No. 3 panel. Mr. Caine was not called as a witness. No. 3 panel was isolated: both D switches were in the out position. Thus there was no danger from No. 3 panel itself; but it was close to No. 4 panel and to No. 2 panel, neither of which was isolated. The point on No. 3 panel at which the deceased was last seen working was not more than eighteen inches from the live conductors on No. 4 panel (which are usually spoken of as busbars, as appears from the evidence). Mr. Caine left to obtain the replacement unit. Mr. Ashton watched the deceased for a moment E and then turned away. His attention was called by another electrician who had entered the room, and he saw that the deceased was in a crouched position, with his forehead against the busbars on No. 4 panel. He was either dead or dying. The photographs show a trunking (a kind of box) on the floor in front of each panel and they also show an upright metal bar between the panels. If some other part of the deceased's body came into contact with one of the metal bars, H or with one of the trunkings, at the time his forehead came against the busbars, a fatal shock was likely to be the result. No one knows precisely what happened. He may have slipped, overbalanced or fallen; he may have stooped to one side inadvertently; he may have been trying to catch, or to find, a nut which was found later behind the trunking.

I It had not been thought desirable or necessary to switch the current off panels 2 and 4: that would have interfered to some extent with the working of the factory. A screen between panels 3 and 4, and another between panels 2 and 3, would have avoided risk, as appeared from the evidence of Mr. Gardener†.

* Regulation 15 requires that every such switchboard "shall, if not located in an area or areas set apart for the purposes thereof, where necessary be suitably placed or enclosed. No person except an authorised person, or a person acting under his immediate supervision, shall for the purpose of carrying out his duties have access to any part of an area so set apart."

† Mr. Gardener was the expert witness called on behalf of the plaintiff.

It is claimed in this action that the failure of the occupiers to provide portable insulating screens and to see that they were used was a breach of their statutory duty and was the cause of the death of the deceased. A

I now come to the Regulations of 1908. The preamble is as follows:

"Whereas the generation, transformation, distribution, and use of electrical energy in any factory or workshop, or any place to which the provisions of s. 79 of the Factory and Workshop Act, 1901, are applied by that Act*, have been certified in pursuance of the said section to be dangerous: I hereby, in pursuance of the powers conferred upon me by that Act, make the following regulations, and direct that they shall apply in all places before mentioned". B

Then under "Duties": C

"It shall be the duty of the occupier to comply with these regulations. And it shall be the duty of all agents, workmen, and persons employed to conduct their work in accordance with these regulations".

Under the definition part of the regulations there is a definition of "insulating screen", which D

"means a screen of such size, quality, and construction according to the circumstances of the use thereof, that a person is thereby adequately protected from danger".

Regulation 24 provides:

"Portable insulating stands, screens, boots, gloves, or other suitable means shall be provided and used when necessary adequately to prevent danger, and shall be periodically examined by an authorised person". E

It is clear that there was danger to a man working in the position in which the deceased was. That appears from the evidence of Mr. Rogers, the expert witness called on behalf of the occupiers. Mr. Gardener, the expert witness called on behalf of the plaintiff, said: F

"This man was undertaking work and if it was necessary to have the adjacent panels alive, then to prevent danger I say that screens really were necessary".

The provision and use of insulating screens would have prevented danger to a man working in that place. Was it necessary that screens should be used "adequately to prevent danger"? It seems to me that there is only one answer to this question. The work the deceased had to do was close to live busbars. There was a risk of injury to him unless precautions were taken. The precaution laid down in reg. 24 would have been sufficient to prevent danger to the deceased; it was necessary adequately to prevent danger—and it was simple. G

I give certain questions addressed to, and answers of, Mr. Ashton when he was cross-examined by Mr. James who appeared for the plaintiff: H

"Q.—Would you agree that the busbars, when live, are dangerous to any person who might slip or stumble or overbalance? A.—Yes. If you slipped, they would be dangerous. Q.—If you stumbled? A.—Yes. Q.—Or if you overbalanced? A.—Yes. Q.—It would be quite a simple and inexpensive protection to put a screen in front of a live panel when you are working on a dead one next door? A.—To completely cover it it would be an expensive job. Q.—It would be a simple and inexpensive protection to put a screen in front of Nos. 2 and 4 panels? A.—Yes, you could. Q.—As I understand it, you have had experience of screens used in the premises? A.—Yes. Q.—There is no reason at all, is there, why a screen should not have been I

* By the Factories Act, 1937, s. 159 (1) proviso, regulations made under the Factory and Workshop Act, 1901, were continued in force as if made under the Act of 1937.

A put in front of Nos. 2 and 4 panels while Mr. Murfin worked on No. 3?
A.—No ”.

B So far as the evidence shows, insulating screens were not provided by the occupiers. A letter of Jan. 31, 1956, from the occupiers' solicitors to the plaintiff's solicitors (in amplification of an answer to an interrogatory) says “ a screen or shield was not provided for erection ”. There were none provided at the time of Mr. Gardener's inspection in February, 1955.

C The answer of the occupiers is that reg. 24 does not apply, and that screens were not necessary or usual. The room in which the deceased was working was a place set apart under reg. 15* and only authorised persons were allowed in it. It is claimed that in such circumstances, there is no call for any of the safety devices required by reg. 24†. I cannot accept this argument. There is just as much risk of an experienced man falling or slipping when he is working as there is of an inexperienced man doing so. The position is sufficiently shown in the evidence of the occupiers' expert witness Mr. Rogers, and in that of Mr. Ashton. The occupiers further draw attention to the precautions called for when work is done on any switchboard for high pressure (reg. 18 (d)) and say that if reg. 24 applies to this case the same precautions are required when work is done on a switchboard for low pressure (which was this case). I am not satisfied that that is right, nor am I satisfied that, if it were so, it would dispose of the necessity of complying with reg. 24. I regard reg. 24 as a general, or sweeping up, provision in order to avoid danger and to prevent an accident such as happened in this case. The duty laid on occupiers of a factory by reg. 24 is in the first place to provide portable insulating screens, etc., in the second place to see that they are used when necessary adequately to prevent danger, and in the third place to see that they are periodically examined by an authorised person. There is no evidence to show that they were provided: indeed, the evidence was to the contrary.

E In my opinion, reg. 24 applies to the facts of this case. The occupiers were in breach of it and the death of the deceased resulted from the breach. The appeal of the occupiers against the judgment of FINNEMORE, J., should be dismissed.

F I must now deal with the appeal of the third party, the contractors, Power Gas Corporation, Ltd., against the determination of the learned judge that they should indemnify the occupiers in respect of their liability under the judgment.

G The contractors were the main contractors. There was a number of sub-contractors. Work had been going on for some two years when the accident happened. The claim to an indemnity is based on a clause in the contract between the occupiers and the contractors. It is in these terms:

“ When work is carried out on or goods delivered to the company's premises or any other site or place specified by the company the contractor shall be liable for and shall indemnify the company against every claim against the company under any statute or at common law for (a) damage to property, (b) death and (c) personal injury, arising out of or in connection with the carrying out of the contractor's work and from any cause other than the negligence of the company or its employee.

I “ The contractor shall effect a policy of insurance against all liability as aforesaid and shall continue such insurance during the whole of the time that any persons are employed by him on the company's premises or on any other site or place specified by the company and shall when required produce to the company such policy of insurance and the receipt for the payment of the current premium ”.

The occupiers claim that on the finding of the judge the death of the deceased was caused by breach of statutory duty on their part and that there was no negligence on their part: thus, they say, they are entitled to be indemnified by the

* Regulation 15 is printed as a footnote on p. 25, ante.

† Regulation 24 is printed at p. 26, letter E, ante.

contractors. Counsel on behalf of the contractors submitted that the word "negligence" in the last line of the indemnity included breach of statutory duty, and that the occupiers could not recover on the clause as they had been guilty of negligence in that sense. A

No evidence was called on the hearing for the contractors. Counsel appearing for them joined the occupiers in an out and out effort to defeat the plaintiff's claim. I draw attention to some of the questions addressed to Mr. Ashton by counsel for the contractors, Mr. Caulfield: B

"Q.—And the very last thing that you or Appleby Frodingham* furnace staff wanted was for the furnace to be shut down? A.—Yes. Q.—Is not that right? A.—That is correct. Q.—Quite honestly, as far as you are concerned, you had no intention of shutting down the furnace for this small job, had you? A.—I had not. Q.—Let us get this absolutely plain. Before you could shut down the furnace and stop production, would you not have to seek the permission of the furnace manager? A.—I should. Q.—You did not even see the furnace manager to raise the question with him? A.—No. Q.—As far as Appleby Frodingham* were concerned, it never entered your head that the furnace should be shut down. Is not that right? A.—Exactly. Q.—If you yourself had no authority—as you had not, had you, to close down the furnace? A.—I had not. Q.—— certainly a stranger like Mr. Caine would have no authority to shut it down, would he? A.—No. Q.—As far as you and your staff were concerned, this job could be done in safety—this was your opinion—without isolating either No. 2 or No. 4 panel. Is that not the position? A.—Exactly. Q.—I have no doubt that frequently in your career you have worked on a similar panel with live panels on either side, as in this particular case? A.—I have. Q.—And in spite of this accident will you go on working at such a panel with live panels on either side? A.—Yes." C D E

It would appear clear that those in control of the contractors' activities on the site did not ask that portable screens should be provided, nor did they think that they were necessary. Now they claim that the occupiers were negligent in not providing them and in not seeing that they were used. However, the question to be determined depends on the construction of the clause. F

The term "negligence" is wide enough to cover breach of statutory duty. In *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (1) ([1934] A.C. 1), LORD MACMILLAN said (*ibid.*, at p. 18): G

"Where two persons stand in such a relation to each other that the law imposes on one of these persons a duty to take precautions for the safety of the other person, then, if the person on whom that duty is imposed fails to take the proper precautions and the other person is in consequence injured, a clear case of negligence arises. That is exactly the case here alleged. Such negligence is in my opinion 'personal negligence' within the meaning of the Workmen's Compensation Act. It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute." H

LORD WRIGHT said (*ibid.*, at pp. 21, 23, 25):

"Thus an employer may be 'personally' negligent in respect of the acts and omissions of himself; but he may also, I think, be described as personally negligent in respect of breach of a duty imposed on him by law and of such a character that he is debarred from avoiding responsibility by delegating its performance, or by invoking the doctrine of common employment . . . Hence the breach of such a duty as that in question has been, I I

* "Appleby Frodingham" refers to the branch of the occupiers' company which operated the works where the accident occurred.

A think, correctly described as statutory negligence. In my judgment, therefore,
 such a claim as that in question can fairly and properly be described as based
 upon a case of negligence, and of personal negligence, since it attaches to the
 employer personally . . . But in my opinion the breach of the statutory
 duty does per se constitute the 'personal negligence of the employer', quite
 independently of the following words on which in such a case the workman
 B has accordingly no need to rely. In strict legal analysis, negligence means
 more than heedless or careless conduct, whether in omission or commission:
 it properly connotes the complex concept of duty, breach, and damage
 thereby suffered by the person to whom the duty was owing: on all this the
 liability depends, and if this liability is attached by law formally to the em-
 ployer, as happens in the case of a breach of the statutory duty, the whole
 C position is I apprehend correctly described as 'personal negligence of the
 employer'."

Does it follow from this that the claim to an indemnity must fail? Negligence
 and breach of statutory duty are usually treated as two separate causes of action
 from a pleading point of view. The present case is an instance of this. Particu-
 D lars of each are given in the statement of claim. In many appeals in this court a
 plaintiff fails on the issue of negligence, though he may succeed on the ground
 of breach of statutory duty, or vice versa. It appears to me that the wording of
 the indemnity clause* "every claim against the company under any statute
 or at common law" is intended to cover both types of claim. The use of the
 word "statute" is designed to that end: it is unnecessary for the purpose of
 E covering a claim under an Act such as Lord Campbell's Act (as counsel for the
 contractors suggested), for that is covered by the word "death" which appears
 later. Now, in the exception clause which follows, the word "negligence"
 appears alone. In other words, there is a distinction between the indemnity and
 the exception clause. Breach of statutory duty may be negligence—but here
 they are treated as two different things. There may be a breach of statutory
 F duty without any negligence in the sense in which that word is normally used.
 The present case is one such case on the finding of the judge, who said:

"The only other question I have to deal with is the question of negligence
 at common law. I confess on that I think the plaintiff's position is much
 more difficult. It is one thing to find that employers, or occupiers to be
 quite correct, are in breach of their statutory duty, which has been laid
 G down as an absolute obligation, and to say they are also, because of that,
 guilty of common law negligence. Here I think that the occupier is entitled
 to consider the particular sort of person he is dealing with, and it is not
 necessarily negligence on his part, I think, to fail to do what the statutory
 duty places on his shoulders. I confess I would not feel able in this case to
 say that the occupiers have been guilty of ordinary common law negligence,
 I although I am satisfied they were guilty of a breach of statutory duty."

Though the contractors, in para. 6 of their defence, pleaded that the occupiers
 were negligent, they did not give any evidence in support of the allegation:
 rather, they adopted the defence of the occupiers. If the answer set up by them
 to the claim to an indemnity is right, it appears to me that virtually the indemnity
 [has no value. It is included for some purpose. The common-sense way to treat
 it is to regard it as an indemnity against claims for breach of statutory duty, by
 whomsoever committed, so long as there is no negligence, in the ordinary sense
 in which that word is used, on the part of the company.

I would dismiss the appeal of the contractors.

JENKINS, L.J.: I agree that the appeals of the occupiers and the con-
 tractors in this case both fail and should be dismissed. I find nothing I can

* The clause is printed at p. 27, letters G to I, ante.

usefully add to the reasons given by SINGLETON, L.J., in the judgment he has just delivered, and to those given by PARKER, L.J., in the judgment he is about to deliver, which I have had the advantage of reading in advance.

PARKER, L.J.: I have come to the same conclusion.

Dealing first with the occupiers' appeal, counsel for the occupiers before the learned judge contended, inter alia, that the deceased was not a person of a class for whose benefit the regulations were made, but having regard to the recent decision of this court in *Bryers v. Canadian Pacific Steamships, Ltd.* (2) ([1956] 3 All E.R. 242) he did not persist in this contention. He accordingly limited his argument to two points, as did counsel for the contractors: (i) that reg. 24* does not apply to screening against the possibility of someone touching bare conductors, if they are in a place set apart pursuant to reg. 15†; (ii) that reg. 24* requires screening to be used only "when necessary . . . to prevent danger", and that in the circumstances of this case such user was not necessary.

As regards the first point, it is said that regs. 14-18 form a self-contained code in regard to switchboards. In particular, it is pointed out that reg. 15† permits bare conductors to remain so exposed that they can be touched. Is there anything, it is asked, in reg. 24* which withdraws that permission? Regulation 15†, however, is clearly directed to the safety of employees generally, other than authorised persons and persons working under their direct supervision. If the argument is right, no statutory duty is imposed in regard to such persons whatever the nature of the work on which they are engaged. For myself I can see nothing inconsistent between reg. 24* and reg. 15†. Regulation 24* comes within a group of regulations of general application (regs. 21-26), all of which, except possibly reg. 23, are, I think, additional precautions which apply generally in the factory, even in cases, such as this, where specific precautions have been laid down. Nor do I think that reg. 18 (d), dealing with switchboards for high pressure and extra high pressure, points to a different conclusion. It is said that this provision suggests that no screening is necessary when work is being done other than on a high pressure switchboard. I do not, however, think that that is a fair inference. The provision imposes an absolute obligation to take precautions on the basis that high pressure switchboards are always dangerous, whereas in regard to other switchboards precautions are only required "when necessary . . . to prevent danger."

The second point turns on the meaning to be given to the words in reg. 24 "and used when necessary . . . to prevent danger". I have omitted the word "adequately" as I do not think that it is material to this argument. It is descriptive of the precautions if such are "necessary to prevent danger". The answer to the question "Is there a danger?" is clearly "Yes". Bare conductors are undoubtedly a danger. That being so, "are steps necessary to prevent the danger?" The answer is surely "Yes, if someone is to work in close proximity thereto". It is said that even so, if the only person who is going to work in close proximity to such conductors is an authorised person or someone under his immediate supervision, the danger is so well known that no precautions are necessary. But as it appears to me it is not merely the absence of knowledge which makes precautions necessary, but the fact that any workman, however knowledgeable and skilled he is, may slip or faint, or, indeed, be guilty of some casual act of inadvertence.

So far as the facts of the present case are concerned, the equipment being dismantled was on the right of No. 3 panel and the deceased had to stoop in order to unscrew a nut with his left hand. That being so, he would be on the extreme right hand edge of the panel, and his body would be bound to come close to the bare conductors which were in the middle of No. 4 panel, the width of which was

* Regulation 24 is printed at p. 26, letter E, ante.

† Regulation 15 is printed as a footnote to p. 25, ante.

A only two feet three inches. Though the evidence was that in general it is not usual in such circumstances to have screens, it seems to me that that practice, if it be a practice, ignores the fact that even the most skilled and knowledgeable workman, taking reasonable care for his own safety, may inadvertently come in contact with the bare conductors. In my judgment, once the possibility of a slip or a stumble or a casual act of inadvertence is taken into consideration—acts
B which may result in injury ranging from burns to death—it is impossible to say that precautions were not necessary.

I agree with the learned judge when he said:

C “It seems to me he was working in a position which was obviously and inherently dangerous in itself, because a slight movement to one side or the other, a small slip, a small stumble or over-balance, would put him, as it did, in mortal danger. Also we have to remember that the law, while making workmen take proper precautions for their own safety—and it is most important that they should—says that people may be inadvertent, may make slips in the doing of their work, and that is the very reason why statutory duties of one kind or another are laid down to make it incumbent upon the employer to prevent, as far as possible, the very sort of accident which happened
D in the present case.”

Exactly how the deceased met his death is not clear, but the evidence of the expert called by the plaintiff was that screens would have afforded complete protection. Indeed, assuming a breach, causation was not disputed. Accordingly, I think that the learned judge was right in holding that liability was
E established.

The contractors' appeal raises a more difficult question. It turns on the meaning to be given to the words in the indemnity clause “other than the negligence of the company or its employees”. Does negligence there include a breach of statutory duty as well as a breach of duty at common law? That a breach of a duty laid down by statute which results in damage can properly be described as negligence is clear. Thus in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (1) ([1934] A.C. 1), it was held that the words “personal negligence” in s. 29 (1) of the Workmen's Compensation Act, 1925, included a breach of statutory duty. Passages from the speeches in that case have been cited by SINGLETON, L.J., and I do not repeat them*.

Nevertheless, the meaning of the words must depend on the context. Indeed, in that case LORD WRIGHT said (*ibid.*, at p. 24):

G “. . . but the meaning of the words in the section must, I think, be ascertained by having regard to the context in the sense I have stated. In the same way in certain cases negligence or common law negligence has been contrasted as being different from statutory liability, though in each case the claim is a claim at common law.”

H LORD WRIGHT went on to point out that to decide otherwise in that case would be to deprive a workman of an important right of action—a thing which could only be done by clear words.

I In other contexts I think that “negligence” may have the narrower meaning of common law negligence. Thus, for the purpose of pleading, negligence and breach of statutory duty are considered as separate causes of action (see LORD WRIGHT in *London Passenger Transport Board v. Upson* (3), [1949] 1 All E.R. 60 at pp. 67, 68). Indeed, the legislature itself has pointed out the distinction (see the definition of “fault” in s. 4 of the Law Reform (Contributory Negligence) Act, 1945).

Turning to the clause in question in the present case, I think that it is impossible to read the word negligence in the exception in its widest sense. The effect would be to destroy entirely, or almost entirely, the indemnity given by the preceding

* These passages are printed at p. 28, letter G, to p. 29, letter C, ante.

words. Indeed, this was the view of LEWIS, J., in considering a somewhat similar indemnity clause in *Hosking v. De Havilland Aircraft Co., Ltd.* (4) ([1949] 1 All E.R. 540 at p. 542). On the other hand, if "negligence" is interpreted as common law negligence, it not only gives some effect to the indemnity, but an effect which is commercially reasonable. When, as here, legislation has placed duties, and in some cases absolute duties, on the occupier, regardless of the fact that he may, by reason of the presence of the contractors and sub-contractors have no real control, an indemnity against claims for breach of such duties, as opposed to a breach of common law duty, is just what one would expect to be demanded of and given by the contractors, who are in effective control until the work is handed over to the occupier.

Accordingly, I would dismiss both appeals.

Appeals dismissed. Leave to the contractors to appeal to the House of Lords granted.

Solicitors: *Corbin, Greener & Cook*, agents for *Raworth, Lomas-Walker & Co.*, Harrogate (for the defendants, the occupiers); *Carpenters*, agents for *G. Keogh & Co.*, Nottingham (for the third party, the contractors); *Rowley, Ashworth & Co.*, Manchester (for the plaintiff, the widow).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

CHANCERY DIVISION.

PRACTICE DIRECTION.

Infant—Guardianship of Infants Acts—Appeals from county courts or justices—Applications in regard to two or more children of same parents—Guardianship of Infants Acts, 1886 and 1925—R.S.C., Ord. 55A, r. 6.

In cases in which applications under the above Acts have been made with regard to two or more infant children of the same parents, and such applications have been heard together or have been heard on the same day and by the same tribunal, one originating notice of motion only under R.S.C., Ord. 55A, r. 6, is to be issued by way of appeal, whether or not separate orders in respect of each infant have been drawn up by the court below. The originating notice of motion should, if necessary, refer in separate paragraphs to the order made with regard to each infant.

By direction of ROXBURGH, J.

W. S. JONES,
Chief Registrar.

December 7, 1956.

Re CAPELOVITCH'S ESTATE AND WILL TRUSTS.
SANDELSON *v.* CAPELOVITCH AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), December 4, 1956.]

Administration of Estates—Administration action—Transfer of action commenced in Queen's Bench Division—Plaintiff in transferred action not served with notice of administration order or of order transferring his action—Whether plaintiff entitled to apply for order of transfer to be discharged—R.S.C., Ord. 49, r. 5.

In 1950 S., an executor of a testator's will, commenced an action in the Chancery Division of the High Court against another executor for the administration of the testator's estate and in 1952 an administration order was made. In 1953 G., who was not a party to the administration action and had not been served with a copy of the order of 1952, commenced an action against the executors in the Queen's Bench Division. This action was due to be heard about the beginning of December, 1956. On Nov. 19, 1956, on an ex parte application by S. in the administration action, an order was made transferring the action commenced by G. to the Chancery Division, under R.S.C., Ord. 49, r. 5*. G. was not served with a copy of this order. On an application by G. to have the order discharged, it was contended by the executors that he had no locus standi to make the application.

Held: although G. was not a party to the administration proceedings, he was entitled to make an application for the discharge of the order made under R.S.C., Ord. 49, r. 5, transferring his action to the Chancery Division.

[As to transfer of proceedings against a personal representative after an order for administration has been made, see 16 HALSBURY'S LAWS (3rd Edn.) 439, para. 861; and for cases on this subject, see 24 DIGEST 773, 8020-8032, and cf., 10 DIGEST (Repl.) 1028, 1029, 7108-7114.]

Cases referred to:

- (1) *Re United Kingdom Electric Telegraph Co., Ltd.*, (1881), 29 W.R. 332; 10 Digest (Repl.) 1029, 7111.
- (2) *Field v. Field*, [1877] W.N. 98; 24 Digest 773, 8028.
- (3) *Re Pimm, Malkin v. Pimm, Steward v. Sharpe* (No. 2), [1916] W.N. 202; Digest (Pleading) 145, 1310.

Motion.

The applicant, Mark Ginsberg, applied to the court to discharge an order made by Master HOLLOWAY on Nov. 19, 1956, on an ex parte application by Dennis Leon Sandelson, an executor of the will of Harris Capelovitch, deceased, whereby an action commenced by Mr. Ginsberg in the Leeds District Registry of the Queen's Bench Division, against Mr. Sandelson and Eric Charles Glen-Smith, also an executor of the will of Harris Capelovitch, was transferred to the Chancery Division of the High Court of Justice.

In 1950 Mr. Sandelson commenced an action by originating summons against Nathan Capelovitch and Mr. Glen-Smith for the administration of the estate of Harris Capelovitch, and in 1952 an administration order was made. On June 9, 1953, Mr. Ginsberg, who had not been served with notice of the administration order, issued a writ in the Leeds District Registry of the Queen's Bench Division against Mr. Sandelson and Mr. Glen-Smith personally and in their capacity as executors of Harris Capelovitch, for an alleged breach of an under-

* R.S.C., Ord. 49, r. 5, reads: "When an order has been made by any judge of the Chancery Division . . . for the administration of the assets of any testator or intestate, the judge in whose court such . . . administration shall be pending shall have power, without any further consent, to order the transfer to such judge of any cause or matter pending in any other court or division brought or continued . . . by or against the executors or administrators of the testator or intestate whose assets are being so administered . . ."

taking given by the defendants to repair certain cinema premises in Leeds. A After the statement of claim had been delivered on July 8, 1953, negotiations took place between the parties but were unsuccessful. On Apr. 30, 1956, on a summons for directions in the common law action, an order was made that the action should be tried by a judge at Leeds. Until the delivery of the defences in the common law action on Sept. 29, 1956, neither Mr. Ginsberg nor his solicitors knew of the administration order. The common law action was to come on at the Leeds Assizes on or about Dec. 3, 1956. On Nov. 22, 1956, Mr. Ginsberg's solicitors heard that the trial would not take place because the action had been transferred to the Chancery Division, and, after making inquiries, they obtained a copy of the order made by Master HOLLOWAY in the administration action on Nov. 19, 1956. Counsel for Mr. Ginsberg now moved in the administration action that the order of Nov. 19, 1956, be discharged. B C

B. J. H. Clauson for the applicant, Mark Ginsberg.

A. C. Sparrow for D. L. Sandelson, the plaintiff in the administration action.

Arthur Bagnall for E. C. Glen-Smith, the second defendant in the administration action.

The first defendant, Nathan Capelovitch, did not appear. D

UPJOHN, J., stated the facts, and said: The sole question which I can determine today is whether the applicant, Mr. Ginsberg, who has not been served with the notice of the order of administration, has any locus standi to move this court to discharge the order of Nov. 19, 1956, made under R.S.C., Ord. 49, r. 5, transferring to the Chancery Division the action which the applicant had started in the Queen's Bench Division. I am not concerned with the merits of the application at this stage, because the executors, quite properly, have not allowed the applicant to see the evidence which, they say, explains the extraordinary delay that has taken place. Orders transferring actions where an administration order has been made are commonly made ex parte, for the very good reason that normally they go as of course; but there may be circumstances in which it is not convenient to transfer the action. Counsel for the applicant drew my attention to the authorities: *Re United Kingdom Electric Telegraph Co., Ltd.* (1) ((1881), 29 W.R. 332); *Field v. Field* (2) ([1877] W.N. 98); and *Re Pimm* (3) ([1916] W.N. 202). Those authorities make it plain that the court does entertain applications such as this. I, therefore, propose to hold that the applicant has a locus standi to make this application. I must, therefore, stand the matter over in order that evidence which the applicant is now entitled to see may be put in, and then the matter can be considered on its merits. E F G

[Dec. 7. His LORDSHIP heard a summons for directions in the administration action in chambers and indicated later in open court that it would be in the interest of all parties that the common law action should be heard in the Chancery Division. On the motion no order was made, except that its costs were reserved.]

Solicitors: *Lieberman, Leigh & Co.*, agents for *Saffman & Co.*, Leeds (for the applicant); *Waterhouse & Co.* (for the plaintiff in the administration action); *Ward, Bowie & Co.* (for the second defendant in the administration action).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A ASHDOWN v. SAMUEL WILLIAMS & SONS, LTD.
AND ANOTHER.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.JJ.), October 22, 23, 29, November 26, 1956.]

B *Licensee—Negligence—Licensor excluding liability—Notice on land purporting to exclude liability—Knowledge of licensee of existence of notice but allegation of ignorance of most of its terms—Whether liability of licensor for negligence excluded—Whether conditions sufficiently brought to licensee's notice—Construction of licence—Whether exclusion of liability limited to static condition of the land.*

C *Master and Servant—Duty of master—Access to place of work over private land of another person—Whether master under duty to provide reasonably safe route of access or to warn servant of dangers on authorised route.*

The first defendants owned and controlled a large dock estate, part of which was occupied by the second defendants under a lease granted to them by the first defendants in 1927. As access to the second defendants' premises could be obtained only across land retained and occupied by the first defendants, the second defendants, by the lease, were granted a right of way for all purposes over a specified route across the first defendants' land. The lease also contained a covenant by the first defendants to haul, at least once a day, railway wagons between the second defendants' premises and the railway station as the second defendants should require. Over a long period, to the knowledge of the first defendants and without any objection on their part, the second defendants' employees had used not only the route over which the right of way had been granted (referred to hereinafter as the "long route"), but also a shorter route, which crossed a curving railway track near the side entrance to the second defendants' premises.

D In various parts of the dock estate, including a point visible from the short route, the first defendants had put up notices stating, *inter alia**, that every person on the estate "is there entirely at his own risk and must be deemed to take the said property with everything thereon as he finds it with notice of the nature, condition and state thereof" and should have no claim against the first defendants for injury or damage "howsoever . . . occasioned . . . whether or not . . . in any way whatsoever due to any negligent act, breach of duty and/or omission". From April, 1948, to Sept. 8, 1948, the plaintiff was employed by the second defendants as a canteen worker. When she was engaged, the second defendants' manager showed her the short route and told her that she could use it. Thereafter she used sometimes one route and sometimes the other. She had seen one of the warning notices put up by the first defendants but had read only the first few lines of it. On the morning of Sept. 8, as the plaintiff was proceeding to her work by way of the short route, she saw three trucks standing on the railway track near the second defendants' premises. Fly-shunting operations were being carried out by the first defendants' employees, but the plaintiff did not realise that, as, owing to the curve in the railway track, she could not see the engine. As the plaintiff was about to cross the track the shunters negligently caused a truck to knock her down and injure her seriously. On appeal against findings that the first defendants were exempted from liability to the plaintiff by the terms of their notice, but that the second defendants were liable to her for failure to warn her of the dangers of the "short route",

* The full terms of the relevant notice are set out at pp. 39, 40, post.

Held: (i) the first defendants (the occupiers of the railway lines) were not liable to the plaintiff because (a) the conditions on which the plaintiff was allowed, as licensee of the first defendants, to be on the "short route" had been sufficiently brought to her notice, and, having read enough of the notice to know that she was on the "short route" at her own risk, she was bound by the terms of the notice, although she had not read the whole of it, and (b) the words of the notice excluded liability not only for dangers of the property in its static condition but also for negligent shunting.

Principle of *Parker v. South Eastern Ry. Co.* ((1877), 2 C.P.D. 416) applied; observations of SCOTT and TUCKER, L.JJ., in *Henson v. London & North Eastern Ry. Co.* ([1946] 1 All E.R. at pp. 656, 661) explained.

(ii) the second defendants (the plaintiff's employers) were not liable to her because (per SINGLETON, L.J.) no breach of the common law duty of an employer not to expose his employee to unnecessary risk had been established or (per JENKINS and PARKER, L.JJ.) the second defendants had provided the plaintiff with a reasonably safe route, viz., the "long route", and, even if the second defendants were under a duty to warn her of the dangers of the "short route", their breach of this duty was not shown to have contributed to her injuries, particularly in view of the fact that she was warned by the notice put up by the first defendants.

Per PARKER, L.J.: I can see no difference in principle between the case of a contract and a licence subject to conditions. In both cases the person claiming exemption must show that he did all that was reasonable in the circumstances to bring the conditions to the other party's notice (see p. 46, letter F, post).

Decision of HAVERS, J. ([1956] 2 All E.R. 384) reversed in part.

[As to occupiers' duties to licensees, see 23 HALSBURY'S LAWS (2nd Edn.) 609-612, paras. 859-863; and for cases on the subject, see 36 DIGEST (Repl.) 63-69, 345-374.]

As to the liability of a master for accident to his servant, see 22 HALSBURY'S LAWS (2nd Edn.) 187-189, paras. 313, 314.]

Cases referred to:

- (1) *Parker v. South Eastern Ry. Co.*, *Gabell v. South Eastern Ry. Co.*, (1877), 2 C.P.D. 416; 46 L.J.Q.B. 768; 36 L.T. 540; 41 J.P. 644; 8 Digest (Repl.) 141, 909.
- (2) *Wilkie v. London Passenger Transport Board*, [1947] 1 All E.R. 258; [1947] L.J.R. 864; 177 L.T. 71; 111 J.P. 98; 2nd Digest Supp.
- (3) *Henson v. London & North Eastern Ry. Co. & Coote & Warren, Ltd.*, [1946] 1 All E.R. 653; 175 L.T. 76; 2nd Digest Supp.
- (4) *Gallagher v. Humphrey*, (1862), 6 L.T. 684; 27 J.P. 5; 36 Digest (Repl.) 66, 357.
- (5) *McCawley v. Furness Ry. Co.*, (1872), L.R. 8 Q.B. 57; 42 L.J.Q.B. 4; 27 L.T. 485; 37 J.P. 358; 8 Digest (Repl.) 111, 718.
- (6) *Rutter v. Palmer*, [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419; Digest Supp.

Appeal.

The plaintiff, an employee of the second defendants and a licensee on the premises of the first defendants, appealed against the decision of HAVERS, J. dated Apr. 18, 1956, and reported [1956] 2 All E.R. 384, that the first defendants were not liable to her for injuries suffered by her as a result of the negligence of their servants. The second defendants appealed against HAVERS, J.'s decision in the same case that they were liable to the plaintiff for failure to warn her of

A the danger which caused the injuries. The facts appear in the judgment of SINGLETON, L.J.

Marven Everett, Q.C., and G. R. F. Morris for the second defendants, the employers.

R. F. Levy, Q.C., and N. N. McKinnon for the plaintiff.

B *Montague Berryman, Q.C., and D. P. Croom-Johnson* for the first defendants, the licensors.

Cur. adv. vult.

Nov. 26. The following judgments were read.

C SINGLETON, L.J.: Samuel Williams & Sons, Ltd., the first defendants, have an estate of some three hundred acres close to the docks at Dagenham and in the neighbourhood of Dagenham Dock railway station. They retain in their own hands, and are occupiers of, a coal yard which is to the east of the station, and they maintain a system of railway lines for shunting purposes throughout their property. A considerable part of the estate is leased to others. The general lay-out is shown on the smaller of the two plans before us. One of their lessees is Wagon Repairs, Ltd., the second defendants. The lease to Wagon Repairs, Ltd., is dated July 8, 1927 and is for a period of forty-two years from Mar. 25, 1927. The lease grants a right of way not less than eight feet wide over the private road of the first defendants called Chequers Lane (now a public highway) and the way leading therefrom to the land which was the subject-matter of the lease. The right of way and the main entrance to the premises of the second defendants are shown on photograph 5 before us.

E The plan attached to the lease also shows the railway and shunting lines which existed at that time. The other plan to which I have referred shows various holdings as they existed in 1948, by which time there had been considerable increase in the shunting facilities. In cl. 15 (b) of the lease there is a covenant that the lessors will during ordinary working hours at least once in a day when the lessees shall reasonably require haul railway wagons and rail tank cars from and to the London Midland and Scottish Railway. No doubt there was a like provision for other lessees, for the first defendants retained control of the railway lines.

F The normal way to the premises of the second defendants was across the main line by Dagenham Dock Station, down Chequers Lane, turn to the left along the cinder track, which was the right of way granted by the lease, and so to the main entry. There was another way (known as the short route), which was regularly used by employees of the second defendants. This way was to turn left at a point marked "A" on the plan and to pass through the coal yard which the first defendants retained in their hands, and to cross railway lines and waste ground to a side entry to the second defendants' premises. Whichever way one went one had to cross railway lines. The last set of railway lines on either H way was that which is marked No. 10 Rail Road on the plan—a single line opposite the side entry, across which there was a pathway. The journey along the cinder track involved crossing the same line, which had there become a double line, and there was a level crossing just outside the main entry. It is not said that the way along the cinder track was other than a proper or a reasonably safe way on a dock estate. At the point marked "A", which is the entry to the I first defendants' coal yard, there is a notice which I shall read in a moment. How far the notice is intended to extend, or to what property, is by no means clear. No point is made on that.

In April, 1948, Mrs. Ashdown, the plaintiff, was sent from the labour exchange to the second defendants and she was engaged by them to work in their canteen. I take a passage from the judgment which shows the position then:

"She was not able to find her way to the second defendants' offices, and she asked somebody to direct her as to the way. She had come on this

occasion in a bus over the level-crossing, down Chequers Lane; and the way she had pointed out to her was the way we have called 'the long route'. In the offices of the second defendants she had an interview with Mr. Dear, the manager of the second defendants, and the result of that interview was that he agreed to employ her on the terms which I have already indicated—to clean in the offices and to serve in the canteen. Her story was that at the conclusion of the interview she was preparing to go back by the long route—the way by which she had come, and, indeed, the only route which she then knew—when Mr. Dear said: 'Come this way; it is a short cut. We always use this way. You can use it as well'. He said that the employees of his company had used it for over twenty years; and then he took her by the route which we have called 'the short route'—that is to say, out of the side entrance; across the railway lines, crossing sidings 104 and 105; and so through the coal yard to Chequers Lane. In cross-examination she said that Mr. Dear said: 'Don't go that way. We use this way'. She said it was obvious to her it was shorter, and she said that Mr. Dear added, 'You can use this way: we have used it for twenty years'. The plaintiff said: 'I did not think Mr. Dear had given me an instruction to use this one way only'.

"Mr. Dear gave his version of that, and, really, there is not a very great deal of difference between his evidence and that of the plaintiff. He said what happened was this, that he and the plaintiff left the premises together. He had occasion to go to the station because his telephone was out of order; he told the plaintiff that he was going to the station, and he said: 'You can come with me, if you like'. Then he took her across by the short route, and said: 'You can come this way, as all our other people do. Even our own customers and chiefs come this way from Dagenham Dock Station'. He said that he could not remember if he mentioned the long route to her, but she said she did use the long route. Perhaps it was a little surprising that he said in the course of his evidence that he did not know that the long route was one which had been demised to his company by this lease. He said that these two routes—the long and the short one—were regarded as alternative routes; that their employees were entitled to use either of them as they pleased.

"After her appointment the plaintiff used the long route if she had occasion to take a bus which went down Chequers Lane. On the other hand she sometimes—and, perhaps, more often—came by a bus which stopped by the Chequers public house, which abutted on the high road, from which a road led down to the railway crossing. If she came on this bus she used to walk down this road to the railway crossing, cross the railway crossing, and take the short route to the side entrance of the second defendants' premises. It was entirely a matter for her discretion—according to the method of transport which she happened to use—which of these two particular routes she took on any particular day."

Many other persons who have duties on different parts of the estate use the short route.

On Sept. 8, 1948, the plaintiff was on her way to work and was using the short route. She passed through the first defendants' coal yard, and crossed some lines of rails and a piece of waste ground. There were three rail trucks on No. 10 Rail Road opposite the side entry of the premises of the second defendants. Just as she was crossing the line two other trucks struck the three trucks and pushed them forward so that she was knocked down, and she suffered severe injuries to her right foot and to her right hand. Shunting operations were being carried

A out by the first defendants' servants, who were negligent. They took no precautions to see whether the line was clear, and no warning was given by whistle or otherwise.

On Sept. 6, 1954, this action was commenced by the plaintiff against both defendants, and in it she alleged that the first defendants were negligent. As against her employers, the second defendants, she alleged that they expressly or impliedly assented to the use by her of the near cut, the dangers of which B ought to have been known to them, and further that they failed to provide for use by their servants a safe route to their premises.

The action was heard by HAVERS, J., in April this year, and on Apr. 18 he gave judgment for the first defendants, and judgment for the plaintiff against her employers, the second defendants. The second defendants appeal to this C court against the judgment and the plaintiff appeals, by way of cross notice, against the judgment in favour of the first defendants.

In dealing with the claim against the employers, HAVERS, J., considered that he could interpret the statement of claim

D "as meaning that the plaintiff is alleging the second defendants expressly assented to the use by the plaintiff of this route, the dangers whereof were or ought to have been known to them, without giving a warning to the plaintiff of such dangers, and I interpret it accordingly."

He concluded that there was a duty on Mr. Dear, having pointed out to the plaintiff the shorter route as one which she was authorised and permitted to use, to warn her of the dangers of using that route. He found that the second E defendants were negligent, in that they did not give her any warning, and that their negligence was one of the causes of the accident. He also held that the plaintiff herself was guilty of contributory negligence; he placed her responsibility at one-fifth and that of the second defendants at four-fifths, and he reduced the damages from £3,333, which he would otherwise have awarded, to £2,666.

The duty of employers to their workpeople is to take reasonable care to see F that the workpeople are not subjected to unnecessary risk. I cannot see that any breach of that duty was proved. The plaintiff knew from the first time she went to the premises that there were rails to be crossed. She knew that shunting operations were carried on there. She must have seen them taking place many a time during the five or six months she was working in the canteen. She was a woman around fifty years of age. A warning to her that it was more dangerous G to go by the short-cut than by the longer route—if it was so—would not have been of any help to her. At the time of her accident she had only the one last set of rails to cross and she would have had to cross the same set if she had taken the longer route. Moreover, she had seen, and read part of, the notice at the entrance to the coal yard, to which I shall refer later.

H In my judgment there was no basis on which the second defendants could be found liable for negligence, and their appeal should be allowed.

The claim against the first defendants gives rise to much greater difficulty. The accident arose through negligence on the part of their employees, as the learned judge found, and that finding is not challenged. The judge held, however, that the first defendants were absolved from liability by reason of the notice I which was posted at point "A", the entrance to the coal yard. It is possible on first reading the notice to form the impression that it relates only to that which has been described as the static condition of the property. If one examines the notice it becomes clear that it refers to something more than that. I read it. It is headed "Notice and Warning".

"This property is private property. Every person, whether an invitee or otherwise, whilst on the said property is there entirely at his own risk and must be deemed to take the said property with everything thereon as he

finds it with notice of the nature, condition and state thereof and he shall not have or make any claim for injury or damage against Messrs. Samuel Williams & Sons, Ltd. howsoever such injury and/or damage may be occasioned, or any of their assigns, or their respective lessees or tenants, or their respective servants agents or workmen whether or not such injury or damage is in any way whatsoever due to any negligent act, breach of duty, default and/or omission on the part of Messrs. Samuel Williams & Sons, Ltd. and/or any of their assigns or their respective lessees or tenants or their respective servants agents or workmen. All persons are only allowed to be on the said property upon the distinct understanding that they do so entirely at their own risk. Samuel Williams & Sons, Ltd. W. J. Crafter, Secretary."

The learned judge based his decision largely on *Parker v. South Eastern Ry. Co.* (1) ((1877), 2 C.P.D. 416), in which case there was a contract between the plaintiff and the railway company. It was submitted by counsel for the plaintiff that there was a difference between that case and the present case in that there was no contract in the present case. In *Wilkie v. London Passenger Transport Board* (2) ([1947] 1 All E.R. 258), the court held that the pass which the plaintiff held was a mere licence and not a contract, and that the condition on the pass operated to exonerate the defendants from liability.

The only effective notice for the purposes of this appeal is that which was posted at "A", and which I have read. The plaintiff saw this notice; she read the first few lines of it; she knew that she went on the first defendants' premises at her own risk; she knew that the first defendants carried on shunting operations from time to time. We are bound to hold that she entered on the premises by licence from the first defendants and on the conditions contained in the notice.

In *Henson v. London & North Eastern Ry. Co. & Coote & Warren, Ltd.* (3) ([1946] 1 All E.R. 653) the plaintiff succeeded on the ground that the railway company failed to show that the delivery of the pass to the plaintiff took place in such circumstances as to amount to reasonable notice that the writing on the pass contained conditions. SCOTT, L.J., said (*ibid.*, at p. 656):

"The pass is certainly not a written contract. With extrinsic oral evidence it might possibly have been regarded as containing a part of the term of an oral contract; but the plea alleged no oral contract and there was no evidence to that effect. Still less was there either plea or evidence that Coote & Warrens* received it from the defendant company in the capacity of agent for the plaintiff to make such a contract, or, if they did, that they had his authority so to do or that they purported so to act, so as to permit of ratification by the plaintiff. To me the very notion of imputing all these legal notions to the non-legal mind of an ordinary working man trained in wagon repairing but not law is repugnant. But even if the document were treated as comparable to a cloak-room ticket, which it is not, as in those cases there is always indubitably some contract, the question of fact preliminary to the attempt of the defendant to rely on special conditions of immunity must always be 'Did the defendant company take all reasonable steps to make the plaintiff realise that there were such conditions attaching to the defendants' offer'? To the question in this case whether the plaintiff, a workman employed by Coote & Warrens and not by the railway company, was contracting himself, and his widow and children if he was killed, out of all rights of action against the railway company, I am satisfied that a jury would certainly answer 'No!' If so, even if a contract could be spelt out of the pass, barring the plaintiff's claim, that defence would fail.

"Theoretically it might be within para. 5 of the defence to argue alternatively that the plaintiff was an invitee, who had accepted an invitation to

* Coote & Warrens, Ltd., were the employers of the plaintiff Henson.

A enter and be upon the defendant company's premises on an express condition, brought home to his mind that if he was hurt by the invitor's negligence he would have no right of action. But to this plea, the answer would be the same, namely, that the defendant company had not taken all the steps reasonably necessary to bring that astonishing surrender of his elementary rights home to his mind."

B TUCKER, L.J., said (*ibid.*, at p. 661):

C "In my opinion, therefore, the railway company having failed to prove actual knowledge of the existence of conditions on the pass have not established the existence of circumstances which compels the court to infer such knowledge, in other words that in the circumstances of this case they have not proved that they gave reasonable notice to the plaintiff of the existence of the condition on which they rely. The trial judge did not decide this point as in his view the defendant company were not entitled for other reasons to rely on the walking pass."

D It appears to have been assumed in that case that if the conditions had been brought sufficiently to the notice of the plaintiff he would not have succeeded in his claim. In the present case the conditions were brought sufficiently to the notice of the plaintiff. She read part of the notice: she might have read all of it. She knew she went on to the land at her own risk. The difficulty which arises here is in the interpretation of the notice. It is primarily directed to the

E "nature, condition and state" of the property to which the licence is related, but the word "property" is followed by the words "with everything thereon as he finds it". There were railway lines and trucks on the property, and shunting took place, as the plaintiff knew. She took the risk of an engine or a truck being in her way. By later words in the notice she could not have a claim against the occupiers for injury or damage howsoever occasioned whether it was in any way whatsoever due to any negligent act, default or omission, on the part of the

F first defendants or their servants. These are wide words. I am unable to read them as applicable only to the static condition of the property: the presence of the lines of railway is sufficient to indicate that there will at times be movement of engines and trucks on them, and the plaintiff knew that from the first time she went on the property. In these circumstances, I cannot see that it is right to read the words "howsoever such injury and damage may be occasioned"

G as limited to the condition of the ground. I should feel more difficulty if we had to consider a claim arising from negligence in the driving by the defendants' servants of a motor car and damage arising therefrom. The danger arising from shunting operations was one which must have been present to the mind of everyone who went on the property, and the words of the notice were intended to relieve the defendants from liability for negligence during that operation. We

H ought so to read them and to hold that her claim against the occupiers is barred.

I do not regard the notice which was posted at "B" further down Chequers Lane as relevant. The plaintiff said she did not see it. I do not think that it had been brought sufficiently clearly to her notice, and she is not bound by it. This does not matter if her claim is defeated by the notice at "A".

I It appears to me that the notice posted at "A" contains adequate words to convey to the plaintiff the conditions on which her licence to cross the premises of the first defendants was granted.

In my judgment her appeal should be dismissed.

JENKINS, L.J.: I agree. Inasmuch as the "short cut" over the first defendants' land had been used by employees of the second defendants with the knowledge and acquiescence of the first defendants for a matter of twenty years, I think the learned judge was clearly right in holding that the plaintiff, when she met with her accident, was on the first defendants' land as their licensee

and not as a trespasser; and the contrary was not argued before us by counsel for the first defendants. A

It follows that if the plaintiff's licence had been free from special conditions, so that the respective rights and duties of the plaintiff as licensee and the first defendants as occupiers fell to be determined simply by the general law, the plaintiff's claim in damages against the first defendants for the injuries which she sustained through the negligence of the first defendants' servants in carrying out their shunting operations would have been unanswerable; for, apart from his liability in relation to traps or concealed dangers of which he knows but against which he omits to give warning to his licensee, B

"the occupier is also liable if he or his servants do any act of positive misfeasance by which the licensee suffers harm, as by negligently driving over a person whom he has permitted to use a private way. The licence is granted subject to existing dangers, but no further act must be done by the grantor or his servants to endanger the safety of the person to whom it was given": C

See SALMOND ON TORTS (11th Edn.), p. 573, citing *Gallagher v. Humphrey* (4) ((1862), 6 L.T. at pp. 684, 685). D

However, it is contended on the part of the first defendants that the licence granted to the plaintiff was subject to special conditions, imposed by them as occupiers, by which the plaintiff was bound if she chose to use the "short cut", and which on their true construction precluded her from making any claim against the first defendants in respect of the negligent shunting operations of their servants. E

It is not in dispute that it is competent to an occupier of land to restrict or exclude any liability he might otherwise be under to any licensee of his, including liability for his own or his servants' negligence, by conditions aptly framed and adequately made known to the licensee. It is contended on the plaintiff's behalf that the conditions on which the first defendants rely were not framed in terms apt to absolve them from liability for a negligent operation by their servants, such as the negligent shunting operation in the present case, and that, even if such conditions were framed in terms apt so to absolve the first defendants, the conditions, or at all events the parts of them directed to the negligence of the first defendants' servants, were not sufficiently made known to the plaintiff. F

The conditions relied on by the first defendants are those set out on the notice boards placed at points "A" and "B" respectively on the plan. The learned judge, applying the principle of *Parker v. South Eastern Ry. Co.* (1) ((1877), 2 C.P.D. 416) held the plaintiff bound by both notices, although in his view it was enough for the first defendants' purpose that she should be held bound by the notice at "A". As to the notice at "B" the learned judge said this ([1956] 2 All E.R. at p. 390): G

"With regard to the notice at 'B', I am not satisfied that the plaintiff actually saw that notice. On the other hand, applying the principle of *Parker v. South Eastern Ry. Co.* (1), as I am satisfied that the notice was there and was plainly visible to anybody who kept his eyes open, I think that the first defendants did what was reasonably sufficient to give the plaintiff notice of the terms contained in that notice. For that reason I hold that she was also bound by the terms contained in the notice at 'B'." H I

With all respect to the learned judge, I cannot agree with his conclusion regarding the notice at "B". If the plaintiff did not actually see that notice, I do not think there is any sufficient reason for holding her constructively bound by the conditions set out thereon as conditions applicable to her licence to use the "short cut". Even if she saw the notice at "B" simply as a notice board, and did not read the conditions set out thereon, I do not think it should be

A presumed against her that she knew or ought to have known that they were conditions relating to the "short cut". The conditions obviously applicable to the "short cut" were those on the notice at "A". The notice at "B" was less appropriately sited for the purpose of displaying conditions intended to be applicable to the "short cut", and, to my mind, knowledge that any conditions set out on that notice were intended to apply to the "short cut" cannot fairly

B be imputed to the plaintiff.

There remains the notice at "A". [HIS LORDSHIP then read the words of the notice which are set out at pp. 39, 40, ante, and continued:] This notice is somewhat verbose, but I think it would be clear to any reasonable person reading the whole of it that it was intended to convey to any person who might choose to go on the land to which it related that such person, whilst on such land,

C would be there entirely at his own risk, and was not to have any claim against the first defendants for injury or damage howsoever occasioned, and whether or not due to any negligent act or omission on the part of the first defendants or their servants.

If this degree of knowledge of the terms of the notice at "A" is to be imputed to the plaintiff, I think her case against the first defendants must fail.

D Counsel for the plaintiff argued that this was not so, because on the true construction of the terms of the notice at "A", read from beginning to end, they only exonerated the first defendants from liability with respect to negligent acts or omissions affecting the static condition of the property itself, as distinct from activities, such as shunting, negligently carried on on the land. I think the language used is plainly wide enough to include negligent shunting on the

E part of the first defendants' servants, and I therefore reject this branch of counsel's argument. But counsel for the plaintiff went on to submit that, whatever the true construction of the whole of the notice may have been, the plaintiff was only bound by what she actually read, and that what she actually read was confined to the static condition of the property itself.

The plaintiff's evidence as to what she actually read is as follows. In her

F examination-in-chief she was asked:

"Q.—Coming in at the main entrance did you at any time notice a board that was standing near there with some writing on it? A.—Yes. Q.—Was that a board headed: 'Notice and Warning' or 'Warning and Notice'? A.—Yes. Q.—Was this board on a stand or structure? A.—Yes. Q.—Did you notice about what height it was? A.—No, I never took that much notice. It was too high. Q.—I know you did not measure it, but in relation to yourself was it on a level with you or above you, or what? A.—It was above me. Q.—And what was its condition? Was it clean or easily readable? A.—No, it was not. Q.—Did you ever read it in fact? A.—I read a part of it, but I took not much notice of it because you could not discern the writing on it much; it was in such a dirty condition. Q.—Do you know about how much of it you may have read when you say you read a part of it? There may be twenty or twenty-five lines of it. Did you read one or two or six or a dozen or what? A.—Not many—three or four. I was not able to read many. HAVERS, J.: Three or four lines at most, I gather? A.—Yes. Mr. Levy: You think that you read three or four lines, and you could not read any more because it was so dirty. But did you understand the three or four lines which you did read? A.—No."

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Later, in cross-examination, she was asked:

"Q.—Let me ask you about the first notice which you did see. You read the first three or four lines of it? A.—Yes. Q.—Did you manage to read this, first of all that it said: 'Notice and Warning'? A.—Yes. Q.—Did you think that that might be directed to you? (No answer). Q.—Did you think that that notice and warning might have been directed

to you? A.—No. Q.—Why not? A.—It would be directed to anyone. Q.—Yes, but you were going right past it and into the coal yard which it faced, were you not? A.—Yes. Q.—Let us see how far you read. Did you manage to read this in the first three or four lines: ‘This property is private property’? A.—Yes. Q.—It was plain to you that that referred to the property behind the notice, was it not? A.—Yes. Q.—Did you read this: ‘Every person, whether an invitee or otherwise, whilst on the said property is there entirely at his own risk’? A.—No. Q.—That was in the first three or four lines, was it not? A.—I never studied it all that amount. Q.—I am not talking about studying it. You certainly agree that you noticed it, did you not—you saw it? A.—Yes. Q.—And you agree that you attempted to read it? A.—Yes. Q.—And you agree that you succeeded in reading the first three or four lines, do you not? A.—Yes.”

Then, after several further questions which I can pass over, the plaintiff was asked:

“Cannot you answer that question? A.—It said I would be there at my own risk, and that is as far as I looked at it. I just skipped the words. I did not take them all in properly. Q.—You could have read the rest of it if you had wanted to, could you not? A.—Yes, I suppose I could.”

Later she agreed that the property had on it a multiplicity of railway tracks of one sort or another, which were described by counsel as “running all over the place, are they not?” and the plaintiff said “Yes”.

Basing himself on this evidence, counsel for the plaintiff took as the “three or four lines” actually read by the plaintiff the part of the notice ending with “as he finds it” or, alternatively, “state thereof”,* and contended that if the notice had in fact ended at that point it would on its true construction have been confined to the static condition of the property. I cannot agree. It seems to me that even if the notice is treated as in fact ending with “state thereof” it lays down two distinct conditions concerning any person coming on the land, namely, (a) that whilst on the property he is there entirely at his own risk, and (b) that he must be deemed to take the said property with everything thereon as he finds it with notice of the nature, condition and state thereof. I see no sufficient reason for limiting the first of these two conditions to matters covered by the second. If so limited it would be superfluous, and if not so limited I think that it extends to negligence, and indeed cannot be referable to anything else; see *McCawley v. Furness Ry. Co.* (5) ((1872), L.R. 8 Q.B. 57); *Rutter v. Palmer* (6) ([1922] 2 K.B. 87). It should be noted that, as appears from the plaintiff’s answer in cross-examination, she did at all events appreciate that the notice said she would be there at her own risk†.

Accordingly, even if the notice at “A” should for the present purpose be treated as ending with the words “and state thereof”, and as actually known to the plaintiff to that extent, and that extent only, I think it suffices to defeat the plaintiff’s claim against the first defendants.

I should, however, briefly state my view as to the extent of the knowledge of the terms of this notice which ought in the circumstances to be imputed to the plaintiff. On her own evidence she saw the notice at “A”, read the heading “Notice and Warning”, and some three or four lines in addition, appreciated that it said she would be there at her own risk, but did not trouble to read further. It is clear beyond argument that these facts suffice to bring the case well within the principle of *Parker v. South Eastern Ry. Co.* (1) on which the learned judge relied, and according to that principle to justify the imputation to the plaintiff of knowledge of the whole contents of the notice.

* For the terms of the notice see pp. 39, 40, ante.

† This answer is set out at letter B, supra; cf. p. 43, letter H, ante.

A It is, however, pointed out that *Parker v. South Eastern Ry. Co.* (1) was a case in contract, whereas the present case is a case in tort, to which, so it is said, different considerations apply. I see no reason in principle for holding that something more is needed to give a mere non-contractual licensee constructive knowledge of a condition restricting or excluding his ordinary right to be treated with reasonable care while on the land to which the licence relates, than is required to give a party to a contract constructive knowledge of a term restricting or excluding some right of action he would or might otherwise have under the general law. Counsel for the plaintiff relied on *Henson v. London & North Eastern Ry. Co.* (3) ([1946] 1 All E.R. 653) as showing that actual knowledge of every word of the excluding or restricting condition must be brought home to the non-contractual licensee before he can be held bound by it. I do not think C that SCOTT and TUCKER, L.J.J., intended to go as far as that in *Henson's* case (3). Here the plaintiff saw and partly read the notice, knew from what she read that the notice was a warning, and knew that it said she would be on the land at her own risk; but chose not to read the rest of it, although she could have read it had she chosen to do so. In these circumstances, I think she should be treated as if she had read it all.

D As to the claim against the second defendants for breach of their common law duty to the plaintiff as their employee, I do not think the learned judge's decision in favour of the plaintiff can be supported. I do not accept the view, put forward by counsel for the second defendants, that an employer can never in any circumstances be liable as such for the safety of his employee while on his way to the premises where he is employed. Each case must in my view depend on its own facts. E

On the facts of this case, I do not think that the plaintiff makes out her case of negligence at common law against the second defendants as her employers. It is not suggested that the right of way granted by the lease of July 8, 1927, by the first to the second defendants was not reasonably safe. Accordingly the second defendants must be taken to have provided the plaintiff with a reasonably F safe way of going to work so far as it was necessary for her to traverse the first defendants' premises. It is said, however, that the "short cut" was not reasonably safe, and that the second defendants, by their manager Mr. Dear, were in breach of their duty of reasonable care to the plaintiff, in that Mr. Dear showed her the "short cut" and told her that everyone used it and that she could do so too. I find it unnecessary to consider what the position might have G been on the footing that the second defendants knew or ought to have known that the "short cut" was not reasonably safe. In fact it had been used for a matter of twenty years by the second defendants' employees generally, and for a matter of five months by the plaintiff herself, before the accident; and, so far as is known, this was the first accident that had ever happened to anyone using the "short cut". Accordingly, I find it impossible to hold that the "short cut" was not a H reasonably safe way. In any case the second defendants could not well forbid the plaintiff to use it, or indeed do anything more than warn her of the danger such as it was, and a warning had already been provided by the first defendants in the shape of the notice at "A".

For these reasons, I regretfully conclude that the second defendants' appeal from the judgment against them in favour of the plaintiff must succeed, while I the plaintiff's appeal from the dismissal of her action as against the first defendants must fail.

PARKER, L.J.: I have come to the same conclusion, and I will deal first with the plaintiff's appeal against that part of the judgment which was in favour of the first defendants. The learned judge held that these defendants, by their servants, were negligent in and about the shunting operation which caused the plaintiff's injuries, and that finding was not contested in this court. He held, however, that the plaintiff came on the land under the conditions contained in

a notice, notice "A",* and that those conditions absolved the first defendants from liability for such negligence. A

It is clear that in granting a licence to enter on land the occupier can impose conditions whereby he is absolved from all or some liability which he would otherwise be under at common law. If authority were needed, it is to be found in *Wilkie v. London Passenger Transport Board* (2) ([1947] 1 All E.R. 258), a decision of this court and binding on us. That was a case of a licence to travel on the defendants' vehicles, but it decided that conditions could be attached to such a licence cutting down the common law rights which the licensee would otherwise have. Two questions accordingly arise: (1) Was the plaintiff in the present case bound by the conditions set out in notice "A"? (2) Are these conditions adequate to protect the first defendants from liability for the negligence found by the learned judge? If the answer to both questions is "Yes", then the plaintiff in entering on the land must be taken to have agreed that she had no claim in respect of such negligence. B C

As regards the first question, the learned judge found that the plaintiff read the first few lines of the notice. That notice was then in a different form, and it is probable that she read down to the end of the words "with notice of the nature, condition and state thereof". The plaintiff gave evidence that the rest was illegible, but the learned judge held that she was wrong and that the rest of the wording was clearly legible. He also found that the plaintiff knew that the notice contained conditions which affected her. Those findings are not contested, and I think it is clear that if the plaintiff was entering on the land under a contract she would be fixed with the knowledge of all the contents of the notice (see *Parker v. South Eastern Ry. Co.* (1) (1877), 2 C.P.D. 416). The first defendants had taken all reasonable steps to bring the conditions to her notice. It is, however, said that the plaintiff did not enter under a contract but merely as a licensee, and that in those circumstances she is only bound by what she in fact read. D E

In *Wilkie v. London Passenger Transport Board* (2) ([1947] 1 All E.R. 258), it was held that the plaintiff boarded the defendants' bus not under a contract but under a licence subject to conditions, but the further question whether the licensee was bound by conditions he had not read did not arise. I can see no difference in principle between the case of a contract and a licence subject to conditions. In both cases the person claiming exemption must show that he did all that was reasonable in the circumstances to bring the conditions to the other party's notice. Once that is proved it cannot, in my judgment, make any difference that the other party acted unreasonably or deliberately in not reading the conditions. F G

It is said, however, that the judgments in *Henson v. London & North Eastern Ry. Co.* (3) ([1946] 1 All E.R. 653) suggest that a licensee is only bound by conditions of which he has actual knowledge. I do not, however, read them in that way. TUCKER, L.J., actually applied the principle of constructive notice. Thus he says (*ibid.*, at p. 660): H

"However this may be, the defendant company clearly failed to establish actual knowledge of the conditions on the ticket and are forced to rely upon what really amounts to constructive notice namely that they took all reasonable steps to give him notice that the pass contained conditions."

He then cites a passage from *Parker v. South Eastern Ry. Co.* (1) (2 C.P.D. at p. 422) and goes on ([1946] 1 All E.R. at p. 661): I

"The circumstances in which 'people in general would in fact, and naturally, draw that inference' must greatly vary in different cases. The inference to be drawn in the case of a person taking a railway or cloakroom ticket and who is thereby entering into a contractual relationship may be

* The terms of this notice are set out at pp. 39, 40, ante.

A very different from that to be drawn in the case of a workman who is sent by his employers in the course of his ordinary employment to do work on the premises of a third party and to whom a pass is issued to enable him to proceed to the place where he has to work. I can see no reason which compels me to infer that in such a case the workman must understand that the writing on the pass contains words which will put him in a contractual relationship with the person on whose premises he is going to work which may deprive him of his common law rights. It does not seem to me that it would be right to say that business cannot be carried on unless such an inference must be drawn. In my opinion, therefore, the railway company, having failed to prove actual knowledge of the existence of conditions on the pass, have not established the existence of circumstances which compels the court to infer such knowledge, in other words that in the circumstances of this case they have not proved that they gave reasonable notice to the plaintiff of the existence of the condition on which they rely."

D It is true that SCOTT, L.J., emphasised that the plaintiff in that case was not in any contractual relationship with the defendants, but he does not indicate what, if any, difference that made. He merely goes on to hold that, even if there were a contract, the defendants had not taken all reasonable steps to bring the condition to the plaintiff's notice. Accordingly, in my judgment, the plaintiff in the present case is bound by the contents of the whole notice, and, accordingly, it becomes unnecessary to consider what the position would be if she were only bound by what she had actually read.

E The second and more difficult question is whether the words of the notice are adequate to protect the defendants. Counsel for the plaintiff submits that they are not. He invites the court to read the notice as dealing solely with what may be called the static condition of the land. On this view the negligence referred to is negligence in failing to make the land reasonably safe or in failing to warn. The wording, he said, is not adequate to cover supervening negligence of the kind which caused the plaintiff's injuries. At any rate, he says, the wording is ambiguous. I do not think, however, that it is possible on a literal interpretation to read the notice as confined in this way. The reference to taking the "property with everything thereon as he finds it" and the phrase

G "whether or not such injury or damage is in any way whatsoever due to any negligent act, breach of duty, default and/or omission"

G make the condition, read literally, wide enough to cover the negligence in question. It is, however, necessary to look beyond the literal interpretation.

In *Rutter v. Palmer* (6) ([1922] 2 K.B. 87), SCRUTTON, L.J., said (at p. 92):

H "In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used . . ."

I It is true that he was there considering a general exemption clause which contained no reference to negligence, but, in my judgment, the principle there laid down applies equally in a case where, though negligence is specifically referred to, it may take several forms. Each case must depend on its own facts, and in particular on what the licensee knows as to the user of the land. Where, for instance, an occupier of land used as a shooting school desires to exclude liability for negligent shooting, he may well have to bring to the knowledge of the proposed licensee that the land is so used. A mere reference to negligence without a warning as to the user of the land might well be insufficient. In the present case, however, the plaintiff knew that the land was intersected by railway lines even before she saw the notice—she had walked out that way on her first visit. Moreover, by the time of the accident she knew full well that shunting operations took place, and, indeed, that these were conducted by the first defendants. Accordingly she knew

the user of the land just as well as if the notice itself had said "Beware of shunting operations", followed by an exemption of negligence. A

In these circumstances I have reluctantly come to the conclusion that the first defendants have succeeded in excluding liability for the negligent shunting. I say "reluctantly" because I doubt whether the notice was designed or intended to apply to anything but the coal yard itself. It is placed at the entrance of that yard, and is to be compared with notice "B", which is dealing with Chequers Lane and all the land south of the station. When, however, this point was referred to in the course of the argument, counsel for the plaintiff expressly disclaimed any intention to rely on it. He had not taken it in the court below, and he refused to take it in this court. In these circumstances I do not pursue it. B

Finally, as regards notice "B", in my judgment it cannot be said that these defendants took all reasonable steps to bring the conditions in that notice to the plaintiff's attention. It was not placed at the entrance to the "short route", and, accordingly, was not seen by the plaintiff. Moreover, she had seen notice "A", and thought it applied to her. Even if she had seen notice "B" there was no reason to think that it applied in addition to or in substitution for notice "A". Accordingly, in my judgment the plaintiff is not bound by the conditions in notice "B". C

As to the second defendants' appeal against that part of the judgment which found them liable to the plaintiff at common law, I think that it must succeed. Counsel for the second defendants contended that an employer could never be under any duty arising out of such relationship until the employee arrived at the employer's premises. For myself I doubt whether the proposition in that wide form can be supported. So far as the present case is concerned, however, the second defendants did provide a way which was reasonably safe, namely, the long route over the cinder track. However, it is said on behalf of the plaintiff that there was a duty on the second defendants, who may be said to have encouraged the plaintiff to use the short route, to warn the plaintiff of the dangers involved in crossing the railway lines. Inasmuch, however, as the dangers were patent and well known to the plaintiff, I cannot think that there was any such duty. I think that this is really conceded, and that the contention accordingly is that the second defendants should have warned the plaintiff of the particular danger in question, namely, that a shunting operation might be conducted in such a way as not to be seen or heard—in itself an unlikely event. Bearing in mind that the short route had been used by their employees for some twenty years, and that there had been no accident, I cannot think that the second defendants should have foreseen this danger. Finally, I am not satisfied that, even if there was a duty to warn, the breach of such duty contributed in any way to the plaintiff's injuries. D

Appeal of the second defendants allowed. Appeal of the plaintiff dismissed.

Solicitors: *Blount, Petre & Co.* (for the second defendants, the employers); *Douglas Wiseman & Co.*, Barking (for the plaintiff); *Gardiner & Co.* (for the first defendants, the licensors). E

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.] F

G

A ATTORNEY-GENERAL v. H.R.H. PRINCE ERNEST AUGUSTUS
OF HANOVER.

[HOUSE OF LORDS (Viscount Simonds, Lord Normand, Lord Morton of Henryton, Lord Tucker and Lord Somervell of Harrow), October 22, 23, 24, 25, 29, 30, December 5, 1956.]

B *Alien—British nationality—Lineal descendant of Electress Sophia—4 Anne c. 4 or 4 & 5 Anne c. 16—British Nationality Act, 1948 (11 & 12 Geo. 6 c. 56), s. 12.*

Statute—Construction—Preamble—Acts in pari materia—Ex post facto inconvenience or absurdity—Whether clear enacting words restricted—4 Anne c. 4 or 4 & 5 Anne c. 16.

C The statute 4 Anne c. 4* (1705), intituled "An Act for the Naturalization of the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of her Body" by its preamble recited that "... to the End the said Princess . . . and the Issue of Her Body and all Persons lineally descending from Her may be encouraged to become acquainted with the Laws and Constitutions of this Realm it is just and highly reasonable that they in Your Majesties Life time . . . should be naturalized and be deemed taken and esteemed natural born Subjects of England . . ."

D The Act provided: "... the said Princess . . . and the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born be and shall be . . . deemed . . . natural born Subjects of this Kingdom . . ." The statute was repealed by the British Nationality Act, 1948, s. 34 (3), but by s. 12 a person who was a British subject immediately before the commencement of that Act (Jan. 1, 1949) became a citizen of the United Kingdom and Colonies. The respondent, who was born in 1914 in or near Hanover and was a member of the German army during the late war, was lineally descended from the Electress Sophia and claimed a declaration that he was a British subject. About four hundred lineal descendants of the Electress Sophia were living in November, 1955, and they included members of the royal families of most of the European countries.

E **Held:** the respondent was a British subject immediately before Jan. 1, 1949, since he was within the clear enacting words of the statute 4 Anne c. 4, which should be given their natural meaning, extending naturalisation to lineal descendants of the Princess Sophia whenever born, and were not restricted either (a) by the preamble, for it was ambiguous, or (per VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and LORD TUCKER) (b) by any absurdity or inconvenience of the result, for there was no inherent absurdity in the conception at the time when the statute was passed, or (c) by consideration of the words of the earlier statute 4 Anne c. 1 for the scope of the statute 4 Anne c. 4 was in any view wider than that of the statute 4 Anne c. 1.

F Decision of the COURT OF APPEAL (sub nom. *H.R.H. Prince Ernest Augustus of Hanover v. A.-G.*) ([1955] 3 All E.R. 647) affirmed.

G [As to statutory rights not lapsing because of non-user, see 31 HALSBURY'S LAWS (2nd Edn.) 560, para. 757; and for cases on the subject, see 42 DIGEST 772, 773, 2004-2008.]

H As to a preamble restraining enacting words, see 31 HALSBURY'S LAWS (2nd Edn.) 462, para. 558, note (i); and for cases on the subject, see 42 DIGEST 652-654, 599-629.

I For the statute 4 Anne c. 4 or 4 & 5 Anne c. 16, see 4 HALSBURY'S STATUTES (2nd Edn.) 165; and for the British Nationality Act, 1948, s. 12, see 28 HALSBURY'S STATUTES (2nd Edn.) 146.]

* This Act bears the chapter number c. 16 in the STATUTES OF THE REALM; cf. [1955] 3 All E.R. 647. The full terms of this Act are set out at pp. 52, 53, post.

Cases referred to:

- (1) *Powell v. Kempton Park Racecourse Co., Ltd.*, [1899] A.C. 143; 68 L.J.Q.B. 392; 80 L.T. 538; 63 J.P. 260; 42 Digest 652, 595.
- (2) *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cas. 358; 42 Digest 666, 765.
- (3) *Ormond Investment Co. v. Betts*, [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400; 42 Digest 735, 1584.
- (4) *Brett v. Brett*, (1826), 3 Add. 210 (162 E.R. 456); *affd.*, (1827), 3 Russ. 437 n. (38 E.R. 640); 42 Digest 647, 529.
- (5) *Crespigny v. Wittenoom*, (1792), 4 Term Rep. 790; 100 E.R. 1304; 42 Digest 653, 604.

Appeal.

Appeal by the Crown from an order of the Court of Appeal, dated Nov. 16, 1955, and reported sub nom. *H.R.H. Prince Ernest Augustus of Hanover v. A.-G.*, [1955] 3 All E.R. 647, reversing an order of VAISEY, J., dated Mar. 1, 1955, and reported [1955] 1 All E.R. 746. The respondent, H.R.H. Prince Ernest Augustus of Hanover, claimed a declaration that immediately before the coming into force (on Jan. 1, 1949) of the British Nationality Act, 1948, he was a British subject, and that he was by virtue of that Act a British subject. The respondent based his claim on the statute 4 Anne c. 4, otherwise 4 & 5 Anne c. 16. The appellant denied that the respondent was a British subject immediately prior to the coming into force of the Act of 1948, and contended that the Act of Anne applied only to persons who, being lineally descended from the Princess Sophia, were born during the lifetime of her late Majesty Queen Anne. VAISEY, J., held that, although the enacting provision of the Statute of Anne was unqualified and plain in its meaning, yet its words, taken alone, were of such character and led to such consequences as showed that the legislature must have intended that some limitation should be put on their operation, that this limitation was supplied by the preamble which indicated that the purpose of the statute was to be effected in the lifetime of Queen Anne, and that, accordingly, the respondent was not a British subject.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), and *B. J. H. Clauson* for the appellant, the Crown.

R. O. Wilberforce, Q.C., and *J. L. Knox* for the respondent.

The House took time for consideration.

Dec. 5. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the Court of Appeal has declared that H.R.H. Prince Ernest Augustus of Hanover was, immediately before the coming into force of the British Nationality Act, 1948, a British subject and that, by virtue of the provisions of that Act, he is now a British subject. From this decision, which is said to affect a number of other persons who may, or may not, want to share the privileges or obligations of that status, the Attorney-General has appealed to your Lordships' House. The question is to be answered on a consideration of a statute passed just 250 years ago, the statute of 4 Anne c. 4 of 1705, but, before I look at its provisions, I will state the relevant facts which are not in dispute.

The respondent is a lineal descendant of Princess Sophia, Electress and Duchess Dowager of Hanover and grand-daughter of King James I. He is not a papist and does not profess the popish religion—I use the language of the statute in mentioning a fact which is otherwise irrelevant. Inasmuch as the statute must be regarded as in some measure complementary to the Bill of Rights and the Act of Settlement, it is proper to remind your Lordships, that, the little Duke of Gloucester, Queen Anne's son, having died in 1700, the joint effect of those two Acts was that, on the death of Queen Anne without heritable issue, the Crown of England would descend on the Electress Sophia and the heirs of

A her body being Protestants. And it is not to be doubted that, though in 1705 the Queen was but forty years of age, at least the possibility of her early death was not absent from the minds of her subjects, whether they supported the Hanoverian succession or inclined openly or covertly to James Edward, now called "the old Pretender". In the same year there were living six lineal descendants of the Electress, her eldest son, who became King George 1, her second son Maximilian William, her third son Ernest Augustus Duke of York, her grandchildren, the children of George 1, George who became George 2, and Sophia Dorothea, and her grandson Frederick William, the son of her daughter Sophia Charlotte and Frederick 1 King of Prussia.

C It is proper, too, to have in mind what was the state of the law in regard to naturalisation in 1705. By the common law, only those persons who were born on English soil were subjects of the English Crown, nor was there, until a much later date, viz., the passing of the Aliens Act, 1844, any general Act enabling aliens to be naturalised. But from early times, apart from denization by letters patent with which we are not here concerned, special Acts of Parliament were passed conferring the status of natural born subjects on individuals, or more or less closely defined classes of individuals. Of the later Acts, an example D may be found in the statute of 15 Charles 2 c. 15, which enabled all aliens setting up certain specified trades in this country to enjoy all privileges whatsoever as the natural born subjects of the realm. No Act was brought to the notice of the House which purported to confer such status on persons as yet unborn, whether or not they were born on English soil or took the oath of allegiance to the Crown of England.

E I will refer to one other aspect of the historical background, and I do so because particular reliance was placed on it by the Attorney-General. By an Act, 7 James 1 c. 2 of 1609 entitled:

"An Act that all such as are to be naturalized, or restored in Blood, shall first receive the Sacrament of the Lord's Supper, and the Oath of Allegiance and the Oath of Supremacy"

F it was provided as follows:

"Forasmuch as the Naturalizing of Strangers, and restoring to Blood of Persons attainted, have been ever reputed Matters of mere Grace and Favour, which are not fit to be bestowed upon any others than such as are of the Religion now established in this Realm; Be it therefore enacted by G the King's most Excellent Majesty, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, That no Person or Persons, of what Quality, Condition or Place soever, being of the Age of Eighteen Years or above, shall be naturalized or restored in Blood, unless the said Person or Persons have received the Sacrament of the Lord's Supper within One Month next before any Bill exhibited for that Purpose, and H also shall take the Oath of Supremacy, and the Oath of Allegiance, in the Parliament House, before his or her Bill be twice read: And for the better effecting of the Premises, Be it further enacted by the Authority aforesaid, That the Lord Chancellor of England, or Lord Keeper of the Great Seal for the Time being, if the Bill begin in the Upper House, and the Speaker of the Commons House of Parliament for the Time being, if the Bill begin I there, shall have Authority at all Times during the Session of Parliament, to minister such Oath and Oaths, and to such Person and Persons, as by the true Intent of this Statute is to be ministered. This Act to take place from and after the End of this present Session of Parliament."

It was the existence of this Act, whose purpose was plain on its face, that made it necessary to pass an Act preliminary to that which we have to consider. It was an Act of 4 Anne c. 1 of 1705, and was entitled

"An Act for exhibiting a Bill in this present Parliament for naturalizing

the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body."

I set it out in full:

"An Act for exhibiting a Bill in this present Parliament for naturalizing the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of her Body.

"WHEREAS the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body are to be naturalized and by reason of their being beyond the Seas they cannot qualify themselves in order thereto according to the Act made in the seventh Year of the Reign of King James the First which requires every Person to receive the Sacrament of the Lord's Supper within one Month before any Bill for Naturalization be exhibited and also take the Oaths of Supremacy and Allegiance in the Parliament House before His or Her Bill be twice read: Be it enacted by the Queen's most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal and the Commons in this present Parliament assembled and by the Authority of the same That a Bill for the Naturalization of the said most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body shall and may be exhibited and brought into this present Parliament and twice read; any Law, Statute, Matter or Thing whatsoever to the contrary notwithstanding."

Two expressions in this Act deserve notice. First, the expression "the Issue of Her Body", that is of the body of the Princess Sophia, is used once in the title, once in the preamble and once in the enacting part. Secondly, in the preamble, the reason for the Act is stated in the words "by reason of their being beyond the Seas". If it was our task, as it is not, to construe this Act, it might well be that the generality of the words "Issue of Her Body" would be held to be limited to those who were at the date of the Act "beyond the Seas" and not to include persons then unborn. On this I express no opinion, for, whatever might be the intention of Parliament to be gleaned from the earlier Act, it is clear that a different and wider intention inspired the later one, and it is only from the consideration of its language that it can be determined how different and how much wider was its intention.

So I come to the statute 4 Anne c. 4, and for convenience set it out in full:

"An Act for the Naturalization of the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body.

"WHEREAS the Imperial Crown and Dignity of the Realms of England France and Ireland and the Dominions thereto belonging after the Demise and Death of Your Majesty our most gracious Sovereign without issue of Your Body is limited by Act of Parliament to the most Excellent Princess Sophia Electress and Dutchess Dowager of Hanover Granddaughter of the late King James the First and the Heirs of Her Body being Protestants And whereas Your Majesty by your Royal Care and Concern for the Happiness of these Kingdoms reigns in the Hearts and Affections of all Your People to their great Comfort and Satisfaction and will be a glorious Example to Your Royal Successors in future Ages And to the End the said Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body and all Persons lineally descending from Her may be encouraged to become acquainted with the Laws and Constitutions of this Realm it is just and highly reasonable that they in Your Majesties Life time (whom God long preserve) should be naturalized and be deemed taken and esteemed natural born Subjects of England: We Your Majesties most dutiful and loyal Subjects the Lords Spiritual and Temporal and Commons in Parliament assembled do most humbly beseech Your Majesty that it may be enacted and therefore be it enacted by the Queen's most Excellent

A Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal and the Commons in this present Parliament assembled and by the Authority of the same That the said Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born be and shall be to all Intents and Purposes whatsoever deemed taken and esteemed natural
 B born Subjects of this Kingdom as if the said Princess and the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born had been born within this Realm of England Any Law Statute Matter or Thing whatsoever to the contrary notwithstanding

“ Provided always and be it further enacted and declared by the Authority
 C aforesaid That every Person and Persons who shall be naturalized by virtue of this Act of Parliament and shall become a Papist or profess the Popish Religion shall not enjoy any Benefit or Advantage of a natural born Subject of England but every such Person shall be adjudged and taken as an Alien born out of the Allegiance of the Queen of England to all Intents and Purposes whatsoever Any thing herein contained to the contrary notwithstanding.”

D The Act having been set out in full, the rival contentions may now be stated. For the respondent, it is contended that he is a person answering to the description “ issue of the body of the Princess Sophia ”, a person lineally descending from her and “ hereafter born ”, that is, born after the passing of the Act, and that he is, therefore, within the scope of the enacting provision and is entitled to be deemed, taken and esteemed a “ natural born subject of this Kingdom ”.

E It cannot be denied that this contention accords with the *prima facie* meaning of the enacting words. For the Attorney-General, on the other hand, it was contended that the generality of those words must be restricted to persons born in the lifetime of Queen Anne, such a restriction being imposed as a matter of construction of the statute by a consideration of the context in which the words were found. And by “ context ” he meant both the historical and
 F political background to which I have referred, and the state of the relevant law as well as the verbal context of the Act itself, including its preamble. In particular, he relied on the purpose of the Act, as stated in the preamble, that the persons to be naturalised should be encouraged to become acquainted with the laws and constitutions of the realm and, most strongly, on the conjunction (also in the preamble) of the words “ they ” and “ in Your Majesties Life time ”.
 G Here, it was urged, was an expression of the intent of Parliament clear enough to restrict the generality of the enacting words.

My Lords, the contention of the Attorney-General was, in the first place, met by the bald general proposition that, where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble*, and a large part of the time which the hearing of this case occupied was spent in discussing
 H authorities which were said to support that proposition. I wish, at the outset, to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I
 I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.

Since a large and ever increasing amount of the time of the courts has, during the last three hundred years, been spent in the interpretation and exposition

* See p. 52, letters G to I, ante.

of statutes, it is natural enough that, in a matter so complex, the guiding principles should be stated in different language and with such varying emphasis on different aspects of the problem that support of high authority may be found for general and apparently irreconcilable propositions. I shall endeavour not to add to their number, though I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word.

An important branch of the Attorney-General's argument rested on the alleged absurdity and inconvenience which must result if no restriction is imposed on the general words—a result, he said, which must be presumed to have been foreseen in 1705. This is dangerous ground. A double assumption is made, the first, that Parliament foresaw the possibility of what has, in fact, happened, the second, that, foreseeing it, they would have thought it inconvenient or absurd. On the Attorney-General's own interpretation, in addition to the six descendants of the Princess Sophia, including the Crown Prince of Prussia, living at the date of the Act, an unknown number might be born in the lifetime of Queen Anne who would be naturalised under it. However absurd we today may think an interpretation which would lead to most of the royal families of Europe being British subjects, I cannot say that, in 1705, there was such manifest absurdity as to entitle one to reject it. Nor can I say that, in those years of religious, dynastic and political conflict, Parliament would not have enacted it at the risk of its seeming absurd. Nor do I see any reason for limiting the general words to persons who, on the Queen's death, would, under the Act of Settlement, immediately succeed to the throne of England.

I reject, therefore, the argument in favour of restricting the meaning of the enacting words so far as it is based on any consideration other than that of the words of the statute itself. I turn, then, to the preamble. As I have already said, apart from the reason for the statute which is there stated, the argument rests on nothing more than the conjunction of the words "they" and "in Your Majesties Life time". It is urged that only those could be naturalised in Queen Anne's lifetime who were born in her lifetime, and this is a self-evident proposition, at least, if the word "naturalised" means the same thing as the words which follow—"and be deemed taken and esteemed natural born Subjects of England". But, my Lords, before I reach these words I have already learned from the earlier part of the preamble that I am concerned with the Princess Sophia and the issue of her body and all persons lineally descending from her. I know that at least some persons then unborn are to be naturalised by the Act and I proceed to the enacting part with a doubt already implanted in my mind that the expression "they in Your Majesties Life time should be naturalized" is a clumsy one, which may mean no more than that "an Act should be passed in Your Majesties Life time for naturalizing them". I read on, and find not only the same general words repeated, but emphasis lent to them by the addition of the words "born or hereafter to be born". Nor can I ignore that the omission of any restricting words is of great significance. Now, I do not suggest that it is impossible that words of this generality should be restricted by their context. But, if I may do so without adding to the number of conflicting generalisations, I would say that, for such restriction, a compelling reason must be found. Perhaps an obvious example may be found outside an Act in a principle of comity which confines its operation within the territorial jurisdiction of the enacting state; or it may be found in a repugnancy between the immediate enacting provisions and other provisions of the same Act. But, where it is in the preamble that the reason for restriction is to be found, the difficulty is far greater. For, as has so often been said, Parliament may well intend the remedy to extend beyond the immediate mischief. The single fact, therefore, that the enacting words are more general than the preamble would suggest is not enough.

A Something more is needed, and here lies the heart of the problem. On the one hand, the proposition can be accepted that

“ . . . it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.”

B I quote the words of CHITTY, L.J., which were cordially approved by LORD DAVEY in *Powell v. Kempton Park Racecourse Co., Ltd.* (1) ([1899] A.C. 143 at p. 185). On the other hand, it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that

C the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so, he is not entitled to say that it, or any part of it, is clear and unambiguous. To say then that you may not call in aid the preamble in order to create an ambiguity in effect means very little, and, with great respect to those who have from time to time invoked this rule, I would suggest that it is better stated by saying that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it. And I do not propose to define that expression except negatively by saying (as I have said before) that it is not to be found merely in the fact that the enacting words go further than the preamble has indicated. Still less can the preamble affect the meaning of the enacting words when its own meaning is in doubt.

E With these principles, if they can be called principles, in mind, I turn once more to the statute we have to consider, and I find, first, that it is only the narrower scope of the objective as stated in the preamble which is relied on to restrict the emphatic generality of the enacting words, and, secondly, that it is at least a matter of doubt what is the scope of the preamble itself. For, as I

F have already indicated, the clumsy phrase “they in Your Majesties Life time . . . should be naturalized” is susceptible of meaning that an Act should be passed in the lifetime of the Queen for the naturalisation of her descendants born and unborn. In these circumstances, I must reject also the argument of the Attorney-General which is based on the context of the preamble, and give to the enacting words “the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born” their *prima facie* and literal meaning.

G I ought to mention, because the Attorney-General attached a modest weight to it, an Act of the fourth year of George 3, whereby the then Prince of Brunswick Luneburg was naturalised as a British subject. He was, in fact, a lineal descendant of the Princess Sophia and the Act was unnecessary if the respondent's construction of the Act of 4 Anne is right, for he would be already a British

H subject. But I cannot allow this matter to weigh with me at all. I do not know why the Act was passed, whether because the earlier Act had, after sixty years, been forgotten, or because a doubt had been expressed and *ex majore cautela* it was desired to pass a special Act, or because Parliament flatly misinterpreted the earlier Act. I cannot regard it as a legislative interpretation of the earlier Act operating to give it a meaning which it would not otherwise bear.

I Finally, I must refer to a question which has caused me some embarrassment. It is natural that this case, with its striking and unusual features, should arouse much public interest, and it happens that in the consequent discussion of it a point has been taken which was not debated in the courts below. It is that, whatever might have been the result if the question remained as it was before the union of England and Scotland, an Act of the English Parliament passed in 1705 could not be effective to confer the status of a British subject on a person born on foreign soil after the Act of Union. This point, which I state perhaps

baldly and imperfectly, I thought it right to bring to the notice of the Attorney-General and of counsel for the respondent. The Attorney-General, having considered the point, came to the conclusion that it was not a good one. He briefly explained his reasons and, in effect, declined, as he was well entitled to do, to press it on your Lordships. In those circumstances, it was clearly not possible to pursue the matter further, and counsel for the respondent was not invited to deal with it. There it must rest. The House makes no pronouncement on it. A
B

In the result, I am of opinion that the appeal should be dismissed and I move your Lordships accordingly.

LORD NORMAND: My Lords, the only question for adjudication in this appeal is whether the effect of the Act 4 Anne c. 4 was to naturalise, subject to the exclusion provided for by the second section, those children and lineal descendants of the Electress Sophia who were alive at the passing of the Act and those who were born thereafter but before the death of Queen Anne, or whether the effect was to naturalise, subject to the same exclusion, all persons lineally descending from the Electress alive at the passing of the Act or born at any time thereafter. The question is one of interpretation, and it is not in doubt that the Act must be construed as it would have been construed immediately after it became law. C
D

The Act itself and the related Acts, 7 James 1 c. 2 and 4 Anne c. 1, have already been brought sufficiently to the notice of the House, and I need not recite them here. On either of the constructions put forward the effect of the Act, both intended and actual, was to confer the privileges and obligations of naturalisation on persons neither resident within nor expected to reside within the realm without their having any voice on the matter and without requiring that they should take the oath of allegiance. On the other hand, naturalisation was conferred only on persons who might in conceivable circumstances succeed to the throne under the Act of Settlement. The Act is unique in these respects and the scope of its operation must not, in my opinion, be extended beyond those who are manifestly covered by the enacting words. In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light on its meaning, and of the factual context, such as the mischief to be remedied, and those circumstances which Parliament had in view, including, in this case, the death of the last of Queen Anne's children and the state of the family of the Princess Sophia. It is the merest commonplace to say that words abstracted from context may be meaningless or misleading. E
F
G

The issue in the appeal is whether the words "the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born" are capable of suffering a limitation of time which might have been expressed by adding to them such words as "during the life of Queen Anne". The issue may be more closely defined. Much of the argument of the Attorney-General rested on the basis that the enacting words were general, and that general words are more susceptible of control by context than specific words, and he cited authorities in support of this proposition. If the words in the present case had been "the Issue of Her Body and all Persons lineally descending from her" alone, the authorities which the Attorney-General referred to it would have been material. Here, however, it is the words qualifying these general words by reference to the time of birth that are important, and it is their meaning that we have to ascertain. H
I

Before attempting to solve this question, it will be proper to consider the reasons, derived from the context of attendant circumstances or of law, which on the Attorney-General's argument are relevant to influence the construction of the enacting words. The Attorney-General maintained that the naturalising of all future descendants of the Princess Sophia was inherently so absurd that Parliament cannot be supposed to have intended it. I can dispose of this point

- A at once by saying that I agree with the observations on it of ROMER, L.J., in the Court of Appeal*. The Attorney-General then relied on the terms of the Act 4 Anne c. 1, which paved the way for the Act now under construction, and provided for the introduction of a Bill naturalising the Princess Sophia and the issue of her body alive at its date only. I think that the Act 4 Anne c. 1 does not assist the Attorney-General, for the reasons stated by ROMER, L.J.
- B The lack of issue of Queen Anne and the state of the family of the Princess Sophia throw no light on construction. It is true that, if the Act naturalised only those descendants born before Queen Anne's death, the successor to Queen Anne and the successor to her successor would probably have been among those naturalised, but Parliament might well have intended to go further and to naturalise all who, under the Act of Settlement, might, in certain events, probable or not, succeed
- C to the throne.

The Attorney-General placed the main weight of his argument on the preamble of the Act 4 Anne c. 4. The preamble is, however, itself in need of construction. After a reference to the Act of Settlement and some compliments addressed to Queen Anne, it continues:

- D "And to the End the said Princess Sophia . . . and the Issue of Her Body and all Persons lineally descending from Her may be encouraged to become acquainted with the Laws and Constitutions of this Realm it is just and highly reasonable that they in Your Majesties Life time . . . should be naturalized and be deemed taken and esteemed natural born Subjects of England."

- E It is to be noted that the parties agreed that the sentence beginning "and be deemed" and ending with "Subjects of England" is merely a description in common form of the status conferred by naturalisation. The important words are "they in Your Majesties Life time . . . should be naturalized". These words seem, on the face of them, to be a clumsy inversion of the words "they should be naturalized in Your Majesties Life time", and so far there is nothing to suggest
- F that "naturalised" has not its ordinary meaning, viz., "admitted to the rights of a natural born subject". Such an interpretation receives some support from the expressed motive that the persons to be naturalised would be encouraged to become acquainted with the laws and constitutions of the realm. This would be a not unreasonable expectation for a limited time and a limited number of persons, but it is scarcely probable that Parliament should expect all future
- G descendants of the Princess Sophia, however remote from any prospect of succeeding to the throne, to be encouraged to apply themselves to the study of English laws and constitutions. The respondent's suggestions that the words "in Your Majesties Life time" merely mean "now", and that "naturalized" means "have an Act passed providing for their naturalization" or the like, do considerable violence to the language used by Parliament. Moreover, the word "now",
- H if it were substituted would be otiose, and the words "and be deemed", etc., fit "naturalized" if it is used in its ordinary sense, but are awkward if "naturalized" is given the meaning which the respondent would ascribe to it. I would, therefore, provisionally accept the construction of the preamble put forward by the Attorney-General, always bearing in mind that the preamble is part of the statute, and that no part of a statute can be regarded as independent of the rest.

- I When there is a preamble, it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is, therefore, clearly permissible to have recourse to it as an aid to construing the enacting provisions. The preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act, or even in related Acts. There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall

* See [1955] 3 All E.R. at p. 662, letters G to I.

short of, the indications that may be gathered from the preamble. Again, the preamble cannot be of much, or any, assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail. The courts are concerned with the practical business of deciding a lis, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in any case of some difficulty, after informing itself of what I have called the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction, that construction will receive effect, even if it is inconsistent with the preamble, but, if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.

Now I am of opinion that we have in the present instance a simple case where the enacting words are capable of the respondent's construction and not reasonably capable of the Attorney-General's construction. The question is whether the words "all Persons lineally descending from the Princess Sophia born or hereafter to be born" can reasonably be construed as subject to a limitation of time, such as the date of Queen Anne's death. Though it may be an exaggeration to say that no words can be conceived more apt to exclude such a limitation, they are clear enough. I find it difficult to think that, if a limitation to the life of Queen Anne had been intended, it would not have been expressed. The words "born or hereafter to be born" appear here for the first time with the evident purpose of clarifying the descriptive words "all Persons lineally descending from Her". Unless "hereafter" means "at any time hereafter", the words "born or hereafter to be born" have no clarifying effect whatever, and would be better omitted. If they are to receive any effect, they are, in the absence of compelling context, inconsistent with any terminus ad quem short of the failure of all descendants. The words are not only clear, they are also direct, whereas it is only by inference that the preamble seems to limit the operation of the Act to those born before Queen Anne's death. There is no clumsiness in the wording to raise a doubt whether they mean what they seem to mean. Nothing but the most compelling context would justify a construction radically altering the plain meaning of the enacting words by reading into them a qualification such as "in Her Majesties Life time". The preamble has no such compulsive force. It may be possible to read the preamble, despite the violence to its language, in the sense put forward on behalf of the respondent, or it may be said that the enacting words go beyond the preamble. It matters not which.

I am, therefore, of opinion that the appeal should be dismissed. I agree with what my noble and learned friend on the Woolsack has said on the possible bearing of the Act of Union on the operation of the Act 4 Anne c. 4, and I express no opinion on it.

LORD MORTON OF HENRYTON: My Lords, only one question arises on this appeal: What is the meaning of a few words in the enacting portion of the short statute 4 Anne c. 4 of 1705? These words are:

"be it enacted . . . That the said Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born be and shall be to all Intents and Purposes whatsoever deemed taken and esteemed natural born Subjects of this Kingdom as if the said Princess and the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born had been born within this Realm of England . . ."

A The argument centres round the words, twice repeated,

“the Issue of Her Body and all Persons lineally descending from Her born or hereafter to be born.”

My Lords, these words, standing by themselves, are surely capable of only one meaning. They include everyone, whenever born, who is a lineal descendant of the Princess Sophia. This was recognised by VAISEY, J., and by all the members of the Court of Appeal. VAISEY, J., referred to these words as ([1955] 1 All E.R. at p. 747) “the apparently clear and unambiguous terms of the enacting provisions of the Act of Anne”, and later referred to them as (*ibid.*, at p. 751) “unqualified and plain in their meaning when standing alone.” The Attorney-General, however, contended that the class described in these words is limited to persons born within the lifetime of Queen Anne, who died only nine years after the Act was passed. He relied principally on the words of the preamble to the Act, which have already been read, but he also placed some reliance on the statute 4 Anne c. 1 of 1705. He further contended that the construction put forward on behalf of the respondent led to an absurd result. Other matters mentioned by the Attorney-General did not, I think, impress your Lordships, and I do not find it necessary to refer to them.

My Lords, to my mind the Attorney-General is faced, at the outset, with one great difficulty. His argument really amounts to an invitation to your Lordships to perform a surgical operation on the enacting part of the statute by inserting, immediately after the words “born or hereafter to be born” the words “in Your Majesties Life time”. Now if the legislature had intended to limit the class of persons to be naturalised, I can think of no reason why these words should not have been inserted. These very words “in Your Majesties Life time” had already been used in the preamble, immediately before the enacting part, and it would have been the most natural thing in the world to repeat them in the enacting part, if the legislature had intended so to limit the class. Instead of so doing, the legislature gave a strong indication of a contrary intention. We find in the preamble a reference to “the said Princess Sophia . . . and the Issue of Her Body and all Persons lineally descending from Her”, and in the enacting part, a few lines later, the same words are repeated, with the addition of the words “born or hereafter to be born”.

Surely, my Lords, these words can only have been added in order to make it abundantly clear that all descendants of the Princess Sophia, whenever born, were to be naturalised. In the face of these words, I find it hard to imagine any context, or any circumstances, which should persuade your Lordships to perform the surgical operation already mentioned, and the matters on which the Attorney-General relied fall far short of persuading me to perform it. I turn first to his submission based on the following words in the preamble:

H “And to the End the said Princess Sophia Electress and Dutchess Dowager of Hanover and the Issue of Her Body and all Persons lineally descending from Her may be encouraged to become acquainted with the Laws and Constitutions of this Realm it is just and highly reasonable that they in Your Majesties Life time (whom God long preserve) should be naturalized and be deemed taken and esteemed natural born Subjects of England.”

I The Attorney-General submitted that these words show the intention of Parliament that only those descendants of the Princess Sophia who were born in the lifetime of Queen Anne were to be naturalised. My Lords, I do not so read the words. I think that the words “that they, in Your Majesties Life time . . . should be naturalized”, etc., do not operate to limit the class but merely state the view that the naturalisation should be effected by an Act passed in Queen Anne’s lifetime. This is, to my mind, a more natural meaning of the words, and I do not think it is necessary to make any addition to, or transposition of, the words used in order to give them that meaning. Moreover, there are, I think,

some strong objections to the construction for which the Attorney-General contends. In the first place, it would be strange indeed if Parliament, having already stated its object to be that the issue of the body of Princess Sophia and all persons lineally descending from her should be encouraged to become acquainted with the laws and constitutions of England, should immediately go on to limit the class of persons to be naturalised, for this very purpose, to persons born in the lifetime of Queen Anne. Secondly, if this passage had been intended to bear the meaning attributed to it by the Attorney-General, surely the words "in Your Majesties Life time" would have been linked with the description of the class and not with the words "should be naturalized". The Attorney-General sought to gain support from the words "and be deemed taken and esteemed natural born Subjects of England", but it seems to me that these words merely state the effect of naturalisation.

I would not venture to say, my Lords, that the construction of the preamble which appeals to me is the only possible construction, but it seems to me equally impossible to say that the construction for which the Attorney-General contends is the only possible construction. The preamble is, to put it at its highest in favour of the Attorney-General, an ambiguous document, and, as such, it cannot in any way control the words of the enacting part. In fact, if the preamble were clear one way and the enacting part were equally clear the other way, there can be no doubt that the latter must prevail.

The argument based on the Act 4 Anne c. 1 of 1705 is to this effect. This Act refers only to persons living at the time when it was enacted. This is shown by the words "by reason of their being beyond the Seas", since no person could be beyond the seas unless he or she were alive. This was the Act which paved the way to the Act now under consideration, and your Lordships should place some limit as to time of birth on the class of persons covered by the latter Act. My Lords, I can find no force in this argument. It is clear, from any view of the preamble to the latter Act, that it extended at least to persons who came into existence between the passing of the Act and the death of Queen Anne, and I would adopt the words of ROMER, L.J., in the Court of Appeal ([1955] 3 All E.R. at p. 662):

"... as, on any view, the legislature departed in the second Act from the very limited scope which was envisaged by the recital in the first, the only question, as it seems to me, is as to the extent of such departure. I, therefore, find no assistance, in construing the second Act, from the language of the first."

As to the argument that the enacting words are absurdly wide in their scope if they are given their natural meaning, it must be borne in mind that the matter must be viewed from the standpoint of those who were legislating in the year 1705, and I would again quote from the judgment of ROMER, L.J. (*ibid.*, at p. 662):

"I see nothing necessarily or inherently absurd in the conception that Parliament was intending to provide in 1705 that all those on whom the British Crown might subsequently devolve by virtue of the Act of Settlement should become British citizens at birth; and Parliament was presumably alive to the fact that if the class of persons affected by the Act should become eventually too large, it could be closed by subsequent legislation. It appears to me that a far greater degree of absurdity than that which has been suggested in this case is required to justify the court in departing from clear enacting language, assuming that absurdity does, in itself, afford ground for any such departure."

If the enacting words are to bear their natural meaning, the respondent must succeed, for it is admitted that he is a lineal descendant of the Electress Sophia and that he is, and at all times has been, a Protestant, so that he is not excluded by the proviso to the Act now under consideration.

A In my view, the Court of Appeal arrived at the correct conclusion and this appeal should be dismissed. I agree with the observations of my noble and learned friend on the Woolsack as to the Act of Union.

B LORD TUCKER: My Lords, I am in complete agreement with the opinion that has been delivered by my noble and learned friend on the Woolsack, and have nothing to add thereto.

C LORD SOMERVELL OF HARROW: My Lords, your Lordships were referred to a number of statements in speeches or judgments dealing with the construction of statutes. There are, I think, two distinct subject-matters dealt with in the passages to which reference was made. In the first place, it was necessary to decide what can, or cannot, be invoked and relied on by either party in support of its case outside the words of the Act itself. It seems now clear that the "intent of the Parliament which passed the Act" is not to be gathered from the Parliamentary history of the statute. The mischief against which the Act is directed and, perhaps, though to an undefined extent, the surrounding circumstances can be considered. Other statutes in *pari materia* and the state of the law at the time are admissible.

D "... subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."

E (LORD STERNDAL, M.R., in *Cape Brandy Syndicate v. Inland Revenue Comrs.* (2) ([1921] 2 K.B. 403 at p. 414), cited and approved by LORD BUCKMASTER in *Ormond Investment Co. v. Betts* (3) ([1928] A.C. 143 at p. 156)). These are properly called rules. They apply in all cases to determine what can, and cannot, be referred to and relied on. The above list is not intended to be either exhaustive or precise, but to mark the distinction between rules as to admissibility and the solution of the problems which arise when one turns to the actual words of the Act.

F A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and the general scope of the Act constitute the background of the contest. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole, or any part, of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where SIR JOHN NICHOLL left it in 1826.

H "The key to the opening of every law is the reason and spirit of the law—it is the *animus imponentis*, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context . . . meaning by this as well the title and preamble as the purview or enacting part of the statute—"

I (SIR JOHN NICHOLL in *Brett v. Brett* (4) (1826), 3 Add. 210 at p. 216). He proceeds in the next sentence to attach in that case special importance to the preamble. We were referred to other statements minimising the importance of the preamble. For example, BULLER, J., in *Crespigny v. Wittenoom* (3) ((1792), 4 Term Rep. 790 at p. 793):

"I agree that the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms. But if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it."

The word "unambiguous" must mean unambiguous in their context. The words "a marriage" are not *ex facie* ambiguous. In one statutory context they mean a marriage celebrated in England, and in another a marriage wherever celebrated. Many local Acts have their geographical limits set out in their preambles and title. I take an example at random. 8 & 9 Vict. c. 22 is an "Act to enable the Commissioners of Greenwich Hospital to widen and improve Fisher Lane in Greenwich". If that Act had contained in the enacting provisions words which in isolation might have applied outside Greenwich, the preamble would control their meaning. If, however, having read the Act as a whole, including the preamble, the enacting words clearly negative the construction which it is sought to support by the preamble, that is an end of it.

It is also said that the court cannot look at a preamble to find an ambiguity. LORD DAVEY's statement in *Powell v. Kempton Park Racecourse Co., Ltd.* (1) ([1899] A.C. 143 at p. 185) is relied on. He said "that you must not create or imagine an ambiguity in order to bring in the aid of the preamble". I find it difficult to believe that LORD DAVEY was intending to create an exception to the rule that an Act, like other documents, must be considered as a whole. Preambles differ in their scope and, consequently, in the weight, if any, which they may have on one side or the other of a dispute. There can be no rule. If, in an Act, the preamble is a general and brief statement of the main purpose, it may well be of little, if any, value. The Act may, as has been said, go beyond or, in some respects, fall short of, the purpose so briefly stated. Most Acts contain exceptions to their main purpose, on the meaning of which such a preamble would presumably throw no light. On the other hand, some general and most local Acts have their limits set out in some detail. I will not hazard an example, but there may well be cases in which a section, read with the preamble, may have a meaning different from that which it would have if there were no preamble. A court will, of course, always bear in mind that a preamble is not an enacting provision, but I think it must have such weight as it can support in all contests as to construction.

Coming to the Act, I therefore accept the Attorney-General's submission that the preamble and enacting words should be read before deciding whether the latter are reasonably capable of the meaning which the Attorney-General seeks to place on them. I do not think that they are. The words "all Persons lineally descending from Her born or hereafter to be born", in my opinion, clearly negative any intention to limit the effect of the Act to those born in Queen Anne's lifetime. Whether the words are regarded as general or specific, they could not have been used if the Act was to be limited to those born in Queen Anne's lifetime.

The preamble is, perhaps, ambiguous, but the phrasing would, I think, have been different if the intention had been that submitted by the Attorney-General. If one goes through the words, having in mind an intention of naturalising in addition to those now living only those future descendants born in Queen Anne's lifetime, the words "all Persons lineally descending from Her" would clearly have been so qualified. Instead of the word "they" one would have had some such words as "those now living and those born hereafter in Your Majesties Life time". There is also, I think, force in the argument for the respondent that "naturalized" refers to the Act of Parliament, and the later words express its effect. This is supported by the fact that the word "naturalized" does not occur in the enacting words. It is sufficient if the preamble is ambiguous. On consideration, I am clear that it does not bear the meaning submitted by the Attorney-General.

I have nothing I wish to add on the other points raised and I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the Crown); *Farrer & Co.* (for the respondent)

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

SCOTT v. SCOTT AND ANOTHER.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 22, 23, 1956.]

Divorce—Damages—Claim against co-respondent—Factors to be taken into account—Respondent's responsibility for liaison—Co-respondent's means.

The husband was originally a farmer farming about 150 acres, but after his marriage he tried various businesses in conjunction with his wife, including a public house in which he was greatly helped by her, since she was a keen business woman and worked in the bar and kept the accounts. They had quarrels before they met the co-respondent, a farmer who with his father and brothers farmed several substantial farms. The husband obtained a decree of divorce against the wife on the ground of her adultery and was awarded £2,500 damages against the co-respondent on the basis of compensation for the loss of his wife, including the business loss and the loss of consortium. The co-respondent appealed against the amount of the damages awarded on the ground, inter alia, that the commissioner had not properly taken into account the parties' earlier quarrels, the extent to which the wife was the moving spirit in the liaison, and the co-respondent's means.

Held (apart from a reduction to £1,750 to correct an error in figures appearing on the face of the judgment): the award of damages must be upheld, since the commissioner had properly regarded the case as one rather for damages for the business loss of losing the wife's business ability than for damages for the loss of the wife as a wife, and neither the fact that the wife had been a moving spirit in the liaison with the co-respondent nor his means, as distinguished from his rank and fortune (*Burne v. Burne & Helvoet*, [1920] P. 17, applied), should be taken into account.

Appeal allowed.

[As to the assessment of damages on a decree of divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 388-390, paras. 854-862; and for cases on the subject, see 27 DIGEST (Repl.) 545-551, 4936-5011.]

Case referred to:

- (1) *Burne v. Burne & Helvoet*, [1920] P. 17; 89 L.J.P. 18; 122 L.T. 224; 27 Digest (Repl.) 575, 5322.

Appeal.

The co-respondent appealed against an order of His Honour JUDGE SHOVE sitting as a special commissioner at the Divorce Court, Lincoln, made on June 27, 1956, in which, on pronouncing a decree of divorce in favour of the husband on the ground of the wife's adultery with the co-respondent, he ordered the co-respondent to pay £2,500 damages. The grounds of appeal were: (i) that the damages awarded by the commissioner were excessive having regard to all the circumstances of the case; (ii) that in assessing them the commissioner had failed to have any or sufficient regard to the conduct of the respondent; (iii) that the commissioner misdirected himself as to the principles on which compensation should be assessed; (iv) that the sum of £2,500 awarded was punitive; and (v) that the commissioner failed to consider the co-respondent's means or lack thereof.

J. E. S. Simon, Q.C., and *R. D. Lybery* for the co-respondent.

R. C. Vaughan, Q.C., and *E. M. L. Mallison* for the husband.

DENNING, L.J.: This is an appeal as to the amount of damages which a co-respondent should pay. The husband and wife were married in 1945. Mr. Scott, the husband, was then forty years old, a divorced man; the wife was twenty-three years old. They had one child, who was born in June, 1950. The co-respondent came on the scene in 1953, and he committed adultery with the

wife in 1954. The husband has obtained a decree of divorce from his wife on that ground. The judge has awarded against the co-respondent the sum of £2,500 as damages. A

Of course, it is well settled in law that damages against a co-respondent are not to punish him for his wrongdoing, but are compensation to the husband for the loss of his wife and, in the case of a wife who was a good business woman, for the loss of her business capacity used in his interests. In this case the wife was apparently a very good business woman and very efficient—indeed, much more of a scholar (as the husband put it) than he was. His main activity was that of a farmer, farming about 150 acres in Lincolnshire; but after he married his wife he tried various businesses in conjunction with her—a coal business and a horse-box business, and eventually he took a public house, the Red Lion, at Sturton-by-Stow. Undoubtedly the wife was a big help to him in that business; she worked in the bar and she kept the accounts. Indeed, it was in the course of that business, working there, that she met the co-respondent, Mr. Anyan. C
The co-respondent is himself a farmer. He farms with his brothers and his father. They have three or four substantial farms of three or four hundred acres each in Lincolnshire. He himself was a married man with two children. He and the wife were eventually found in a compromising situation in a hotel at Cleethorpes, and afterwards they were found in a room in one of the farms. D
Adultery was clearly established.

It is clear on the evidence that the husband and wife quarrelled in certain respects even before they took the public house, although the quarrels might have been less afterwards. Also it was said that the wife was in half a mood to leave her husband on one or two occasions before then, and that she had packed her bag. Whether that be so or not, it is a matter which clearly the judge took into consideration. He took into account the fact that this was not a case where the co-respondent was flaunting his wealth and seducing a woman in that way. It seems to me that in all respects save one the judge directed himself properly. He directed himself to the question what the loss of this wife was to the husband. E

[HIS LORDSHIP referred to an error in the figures appearing in the judge's judgment arising from a wrong figure put forward by counsel and held that the petitioner's loss of income should be £960 instead of £1,500 a year. He continued:] F

It was said that the judge did not take into account sufficiently the co-respondent's means. It was said that a judgment for such a large sum of money would exhaust all the means of the co-respondent, and that in a case of this kind a court ought not to make an order which would have that effect. I do not agree. G
It is very doubtful whether logically it is quite justifiable to take an account of a co-respondent's means. As a matter of practical good sense, the general situation may be taken into account, but not specific figures.

I see no error in the judge's judgment except in regard to that one misdirection as to the amount of the income. What, then, ought this court to do? Looking at it as best I can, it seems to me that to correct the error the sum of £2,500 should be reduced to the sum of £1,750. I think that the appeal should be allowed and judgment entered accordingly. I would allow the appeal to that extent. H

HODSON, L.J.: I entirely agree with all that my Lord has said. I think that the learned judge's approach to this matter was quite impeccable, and that there was no misdirection at all. Unfortunately an error did creep in, with which I shall deal in a moment. First of all, it is said that the judge's approach to the case was wrong because he did not give full weight to the unhappiness which he found to have existed between the husband and the wife before the co-respondent came on the scene. On a careful reading of his judgment, I do not think there is any substance at all in that criticism. I

Secondly, it is said that there was a misdirection because he used this language:

"If I may use a common and unjudicial expression, it is the wife who

A makes the running; if the co-respondent allows himself to be enmeshed, well, he has to take the consequences."

With regard to that I think the position is this, that, if the court or the jury find in a given case that the co-respondent has used his wealth or rank or position to seduce the respondent, that may be taken into account as an element increasing the damages; but I do not think that the converse of that proposition is true, i.e., that where the judge or tribunal finds that it is actually the wife who was the moving spirit in the liaison, the damages ought to be correspondingly reduced. If, as the judge found here, the co-respondent does not resist the temptation, he is justly to be described as causing the damage. I think there is no misdirection there.

C It is further said by counsel for the co-respondent that the cases show that, as a matter of practical common sense, the court will take into consideration the ability of the co-respondent to pay damages. I do not think that is strictly true. The history of these actions (which goes back to the action of criminal conversation) shows that the rank and fortune of the plaintiff or defendant, or petitioner and co-respondent, are material circumstances to be considered; but the authorities also show, I think, that, although the general position is to be considered, the court will not receive evidence of the particular means or profits of the co-respondent. It seems to me that the court would be driven into an absurd position if it spent time examining the prospective ability of the co-respondent to pay damages by an elaborate examination as to his means. It so happens that the co-respondent in this case is a prosperous Lincolnshire farmer, and, so far as evidence was admitted (which I do not think ought to have been) as to his means, it does not show that he was unable to pay the sum which the learned judge awarded.

E In speaking of examination as to means of the co-respondent, I have in mind the language of SIR HENRY DUKE, President of the Probate, Divorce and Admiralty Division, in *Burne v. Burne & Helvoet* (1) ([1920] P. 17). He said that it was clear that he must not receive evidence of particular means or profits of the co-respondent. It is true that, at the end of his judgment, he said (and counsel for the co-respondent drew our attention to this passage) (ibid., at p. 19):

" . . . common sense tells me that I must bear in mind the general position and obligations of the parties and make an award which it will be possible for the co-respondent to meet and which will not defeat its own object . . . "

G I think that those passages from SIR HENRY DUKE's judgment have to be read in conjunction with one another against the background of the history of this kind of action. The only point on which this appeal turns is the point as to the accuracy of the information which the learned judge had as to the means of the petitioner which he derived from running a public house, where he had very great assistance from his wife, she being a more skilful business woman than he was a business man; and I think that he quite rightly laid emphasis on the question how much, from the business point of view, this man had lost from the loss of his wife. He does not seem to have thought it was a case for heavy damages for loss of consortium; he regarded it as a case for damages because of the business loss that this man had suffered. He said:

I " It then comes down to a question of calculating a final sum of money, which on a purely business footing will compensate the husband for the business loss of his wife, also a sum as compensation for the loss of his wife as his wife."

He dealt with the uncertainty of the future and realised that he had to make the best estimate he could of a sum which would compensate the husband for this business loss. [HIS LORDSHIP referred to the judge's error in the figures of loss of the petitioner and continued:] The mistake having been drawn to our attention, I think that the right course is to reduce the sum of damages so as

to put that mistake right so far as we can; and I agree with the figure proposed by my Lord. A

MORRIS, L.J.: I agree. It does not seem to me that the learned judge was in any way wrong in his approach to the problem which faced him; and, save in regard to one matter, it does not seem to me that the learned judge made any mistake.

Counsel took four points on behalf of the co-respondent. He said, in the first place, that there was a misdirection because the learned judge had suggested that the wife had "made the running", and that that matter should be visited on the co-respondent. It seems to me that when the judgment is read as a whole there is no wrong approach by the learned commissioner. He was merely saying that, even if the wife could be thought to have been encouraging to the co-respondent, there was nothing to exonerate him from the consequences of the course of conduct on which he willingly embarked. B

Secondly, counsel for the co-respondent said that the learned judge did not give sufficient weight to the consideration that the marriage had at times been unhappy, or that there was some evidence of unhappiness. I do not find force in that submission. It seems to me that the learned judge had all the circumstances very fully in mind and was endeavouring to arrive at a right sum to compensate the husband. The learned judge said: C

"The damages have to be assessed having regard to all the many contingencies which may happen in human affairs, and all one can do is to make the best estimate one can." D

Thirdly, counsel for the co-respondent said that the learned judge had not paid proper regard to the evidence of the co-respondent's means. It seems to me that the task of the learned judge was to assess what was the proper compensation that the co-respondent should pay without being guided by any detailed evidence as to the ability of the co-respondent to pay some particular sum. I desire to express my concurrence with the way in which this topic has been dealt with by my Lord, **HODSON, L.J.**, in his judgment. [His LORDSHIP referred to the judge's error in the figure of the petitioner's loss and said he agreed with the proposed figure to be substituted.] E

Appeal allowed. Damages reduced from £2,500 to £1,750.

Solicitors: *Field, Roscoe & Co.*, agents for *Burton & Dyson*, Gainsborough (for the co-respondent); *Henry Gover & Son*, agents for *Anthony T. Clark*, Lincoln (for the husband). F

[Reported by **F. A. AMIES, Esq.**, Barrister-at-Law.]

R. v. NICHOLSON.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Hilbery and Slade, JJ.), December 10, 11, 1956.]

Court-Martial—Fraudulent misapplication—Misapplying mess funds—Bar takings in warrant officers' mess—Whether "service property"—Army Act, s. 17, s. 190, as amended by the Army and Air Force (Annual) Act, 1951 (14 & 15 Geo. 6 c. 24), s. 7 (1) (a) (b), (4).

The phrase "service property" in s. 17 of the Army Act, having regard to the definition of "service" in s. 190 of that Act, covers the property of a warrant officers' and sergeants' mess; and therefore the appellant, who while acting as caterer was found guilty of fraudulently misapplying some of the bar takings of such a mess, was rightly convicted under s. 17 of the Act of fraudulently misapplying service property.

Appeal dismissed.

[**Editorial Note.** The Army Act, 1955, came into force on Jan. 1, 1957; see Army Act, 1955 (Commencement) Order, 1955 (S.I. 1955 No. 1805). The definitions in s. 225 (1) of the Army Act, 1955, include definitions of both "service" and "service property".

For the Army Act, s. 17, s. 18, see 22 HALSBURY'S STATUTES (2nd Edn.) 270, 271; for the amending provisions of the Army and Air Force (Annual) Act, 1951, s. 7, see 30 HALSBURY'S STATUTES (2nd Edn.) 460; and for the provisions corresponding to s. 17 and s. 18, see the Army Act, 1955, s. 44, s. 45, 35 HALSBURY'S STATUTES (2nd Edn.) 478, 479.

For the Army Act, s. 190 (17), as substituted by the Army and Air Force (Annual) Act, 1951, s. 7 (4), see 30 HALSBURY'S STATUTES (2nd Edn.) 460, 461; and for the corresponding definition of "service" in the Army Act, 1955, s. 225 (1), see 35 HALSBURY'S STATUTES (2nd Edn.) 591.]

Appeal against conviction.

The appellant, Bombardier (Acting Sergeant) Herbert Nicholson, appealed by leave of the court against his conviction by district court-martial sitting at Hilden, Germany, on five charges of fraudulently misapplying service property while it was in his care contrary to the Army Act, s. 17. He was acting as caterer to the warrant officers' and sergeants' mess at the Headquarters Company, 2nd Infantry Division, and it was alleged that he misapplied various sums from the bar takings of the mess. The ground of appeal was that the convictions were wrong in law because the mess moneys were not "service property" within s. 17 of the Army Act, having regard to the definition of "service" in s. 190 of that Act.

Peter Lewis for the appellant.

E. Garth Moore for the Crown.

SLADE, J.: This is an appeal by Bombardier (Acting Sergeant) H. Nicholson, who was tried by district court-martial at Hilden, Germany, on a charge sheet containing twelve charges. Five of the charges were framed under s. 17 of the Army Act, namely, Nos. 3, 4, 6, 7 and 9; six under s. 18 (4) and the last one under s. 41. He was acquitted of the charge under s. 41 and of all the charges under s. 18 (4) but was convicted of the five charges under s. 17. These charges are in the same, or substantially the same, words, and I need read only one of them, the third charge, which charged the appellant with:

"When concerned in the care of service property fraudulently misapplying the same in that he at Hilden on or about Apr. 25, 1956, when as caterer of the warrant officers' and sergeants' mess, Headquarters Company, 2nd

Infantry Division, he was concerned in the care of service property that is to say the bar takings of the said mess fraudulently misapplied the sum of £12 4s. 1d. part thereof."

The only substantial ground of this appeal is a pure point of law. It is contended that the judge-advocate was wrong in law in advising the court-martial that the expression "service property" in s. 17 could include the property of a service mess. When a person who is subject to military law commits the offence of fraudulent misapplication or fraudulent conversion, it is possible, if the circumstances warrant it, that he may be charged under one of three sections of the Army Act. He may be charged with having committed the civil offence of fraudulent conversion under s. 41. He may be charged under s. 18 (4), as indeed the appellant was in this case on some of the other charges or he may be charged under s. 17.

Under s. 18 (4)* any person subject to military law commits an offence if he

"Steals, embezzles or fraudulently misapplies or receives, knowing it to have been stolen or embezzled, any property belonging to a person subject to military law, or belonging to any service mess or band or to any service institution, or to the Navy, Army and Air Force Institutes, or any public property."

The only requirements of that sub-section are that he shall be a person subject to military law and that his offence should relate to one of the matters set out in s. 18 (4). It is not necessary that he should occupy any fiduciary position in relation to the property alleged to have been stolen, embezzled or as the case may be.

Section 17 deals with persons subject to military law who commit, inter alia, the offence of fraudulent misapplication while occupying a position of trust. Section 17* provides:

"Every person subject to military law who commits any of the following offences; that is to say, Being charged with or concerned in the care or distribution of any public or service property, steals, fraudulently misapplies, or embezzles the same, or is concerned in or connives at the stealing . . . shall, on conviction by court-martial, be liable to suffer imprisonment . . ."

Under that section the offender may receive a higher punishment than he can receive under s. 18 (4).

The word "service" when used as an adjective is defined by s. 190 of the Army Act† in these terms:

"'Service' when qualifying institution, necessaries, books, band, mess or property, means belonging to, or connected with, Her Majesty's military forces (other than Dominion forces) or any body of Her Majesty's military forces (other than Dominion forces)."

It seems, therefore, that the only question this court has to decide is whether the property of a warrant officers' and sergeants' mess comes within the words "property . . . connected with Her Majesty's military forces . . . or any body of Her Majesty's military forces . . ." In the opinion of this court the term "service property" in s. 17 of the Army Act is amply wide enough to cover the

* The section is printed as amended by the Army and Air Force (Annual) Act, 1951, s. 7 (1) (a) (b).

† The definition of "service" was substituted for that of "regimental", formerly defined in s. 190 (17) of the Army Act, by the Army and Air Force (Annual) Act, 1951, s. 7 (4), and the definitions in s. 190 were re-arranged in alphabetical order by the Army and Air Force (Annual) Act, 1952, s. 15 (1) (b), the initial words of the definition of "service", viz., the words "the expression", being repealed by the last-mentioned Act.

A property of a warrant officers' and sergeants' mess, and therefore this appeal fails on that ground and is dismissed.

Appeal dismissed.

Solicitors: Registrar of the Courts-Martial Appeal Court (for the appellant); Director, Army Legal Services (for the Crown).

B [Reported by T. J. KELLY, Esq., Barrister-at-Law.]

C

Re CAMKIN'S QUESTIONS. CAMKIN AND ANOTHER v. SEAGER.

[CHANCERY DIVISION (Wynn-Parry, J.), November 20, 21, 22, 23, 26, 27, 28, 29, 30, 1956.]

D

Husband and Wife—Legal proceedings—Summary proceedings as to property—Jurisdiction—Money claim—Questions involving inquiry as to the existence of fund on which the court's decision could operate—Questions the answer to which will merely show an indebtedness—Whether court has jurisdiction—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.

E

On an application under the Married Women's Property Act, 1882, s. 17, for the determination of questions between a husband and his wife as to the title to or possession of property, the court has no jurisdiction either (a) to conduct an inquiry with a view to finding out whether or not property exists or (b) to entertain questions which, if resolved in favour of the party raising them, will only result in showing that a debt is owed to that party by the other party to the summons. The court's jurisdiction is confined to deciding questions relating to property which, on the evidence before it, is shown to exist.

F

Observations on the inconvenience of the procedure under the Married Women's Property Act, 1882, s. 17, where a series of questions is involved, requiring a large amount of evidence to be considered and analysed.

G

[As to summary proceedings between husband and wife as to property, see 16 HALSBURY'S LAWS (2nd Edn.) 740, para. 1211; and for cases on the subject, see 27 DIGEST (Repl.) 263-265, 2119-2133.

For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804.]

H

Cases referred to:

(1) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.

(2) *Tunstall v. Tunstall*, [1953] 2 All E.R. 310; 3rd Digest Supp.

Adjourned Summons.

I

The applicants, Leonard Albert Camkin and Thomas Stanley Bartlett, as executors of Florence Alethea Seager, deceased, applied to the court by originating summons under the Married Women's Property Act, 1882, s. 23, for the determination of questions arising as to property under s. 17 of the Act, between the deceased wife and her husband, the respondent. Among other things the summons asked for the following relief:

"7. For the determination of the question whether the respondent is entitled to be paid out of the estate of the said Florence Alethea Seager the sum of £5,000 in respect of moneys which he alleges the said Florence

Alethea Seager took from the said two boxes referred to in para. 6 hereof or any other sum in respect thereof and if so what sum. 8. For the determination of all questions between the applicants and the respondent as to whether the respondent is indebted to the estate of the said Florence Alethea Seager in respect of any and if so what sum in repayment of moneys loaned by her to the respondent for his business known as The Enterprise Garage, Sherborne, aforesaid. 9. For the determination of the question whether the respondent is entitled to be paid out of the estate of the said Florence Alethea Seager: (a) the sum of £260 5s. 9d. or any and if so what part of the said sum in respect of accounts which he alleges he paid on her behalf; (b) the sum of £4,200 in respect of moneys which he alleges the said Florence Alethea Seager received in her capacity as book-keeper of his business of garage proprietor carried on at Coldharbour Sherborne aforesaid but wrongfully paid into her account at the Sherborne Branches of Barclays Bank, Ltd., and of Westminster Bank, Ltd., or otherwise wrongly applied by her or any other sum in respect thereof and if so what sum."

On Nov. 22, 1956, after hearing argument, HIS LORDSHIP said that he was not prepared to make any order on questions 7, 8 and 9. This report is limited to HIS LORDSHIP's statement of his reasons for that decision, and to observations on procedure under s. 17 of the Act of 1882.

R. E. Megarry, Q.C., and L. H. L. Cohen for the applicants, executors of the deceased wife.

F. D. L. McIntyre, Q.C., and J. Maurice Price for the respondent, the husband.

Cur. adv. vult.

Nov. 30. **WYNN-PARRY, J.:** This is an originating summons taken out under the Married Women's Property Act, 1882, s. 17. Under the section, in any question between husband and wife as to the title to, or possession of, property, either party, the husband or the wife, or, under s. 23, the personal representatives of the married woman, may apply to the court by summons or otherwise in a summary way for the decision of the question. This case illustrates beyond a peradventure the inconvenience, almost amounting to frustration, which is caused when this procedure is invoked in a case such as this, involving as it does a series of questions, some extremely complicated, in which a mass of evidence, including four banking accounts, has had to be considered and analysed. As the application was necessarily by summons, the evidence had to be adduced in the first instance in affidavit form. Twenty-three affidavits were filed in five batches: the first two were filed by the applicants, the executors of Mrs. Florence Alethea Seager (the deceased wife of the husband); in answer the respondent filed seven affidavits; the applicants replied with eleven further affidavits; the respondent filed a further affidavit, and the spate ended with two further affidavits by the applicants. The exhibits were thirty-four in number.

In its original form the summons raised nine questions, all necessarily framed in general terms, and these afforded the only indication of the several issues to be debated; they did not, nor could they, circumscribe with precision the scope of such debate. The difficulty thus presented to counsel in presentation and dealing with the case, and to the court in endeavouring to pronounce on it, becomes so obvious as to need no underlining. The difficulties to which I have adverted would be very considerably mitigated, if not entirely removed, if power were given to the master similar to the power given to the registrar under the Companies Act, 1948*, which allows him, in the case of a misfeasance summons involving substantial or complicated questions, to direct points of claim and defence, and to make a full order for discovery. When such a procedure is adopted, the matter follows the course of a witness action and, apart

* See the Companies (Winding-Up) Rules, 1949 (S.I. 1949 No. 330), rr. 68 (2), (7); 4 HALSBURY'S STATUTORY INSTRUMENTS 147, 132.

- A from any preliminary affidavits, the evidence is given orally and thus (a) the issues are defined, and (b) evidence emerges in a form which makes it far easier to follow and assess. Speaking for myself, after the experience of trying this summons for eight days under the existing and highly inconvenient procedure, I cannot help feeling that it would be in the interests of justice if such a power in the master were introduced.
- B During the course of the trial, and after hearing argument, I ruled that I was not prepared to make any order on questions 7, 8 and 9 as they stood, because in each case the claim, whether by the applicants or the respondent, was a mere money claim and involved, not merely a decision who was entitled to possession of property such as a fund shown to be in existence, but, as a preliminary, a search in the nature of an inquiry whether property existed on which the decision
- C could operate. If a fund be shown to exist, no doubt the court will pronounce on the rights of the parties, as in *Rimmer v. Rimmer* (1) ([1952] 2 All E.R. 863); but where there is no property or identifiable fund on which the order under s. 17 could operate, proceedings under that section are inappropriate (see *Tunstall v. Tunstall* (2) [1953] 2 All E.R. 310). In my judgment on an application under s. 17, the court has no jurisdiction to conduct an inquiry with a view to finding
- D out whether or not property exists. Its jurisdiction is confined to deciding questions relating to property which, on the evidence before it, is shown to exist. Further, in my view, the court has no jurisdiction to entertain questions which, if resolved in favour of the party raising them, will only result in showing that a debt is owed to that party by the other party to the summons.
- E I did, however, allow an amendment at the insistence of counsel for the respondent which was not opposed and which now constitutes question 9, which, as amended, reads as follows:

“For the determination of all questions between the applicants and the respondent as to the title to, or possession of, the net moneys standing to the credit of the said Florence Alethea Seager at the Sherborne Branch of Barclays Bank, Ltd., and the Westminster Bank, Ltd.”

[His LORDSHIP then dealt with the other questions raised by the summons.]

Solicitors: *Smiles & Co.* (for the applicants); *John F. Chadwick* (for the respondent).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

THE TELEMACHUS.
TANTALUS (OWNERS, MASTER AND CREW) v.
TELEMACHUS (OWNERS).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), December 7, 1956.]

Shipping—Salvage—Award—Amount—Award for personal services—Award liable to taxation in hands of salvors—Whether taxation taken into account in assessing amount of award.

In deciding the amount of a salvage award for personal services allowance should be made for the fact that the salvors (i.e., in the present instance, the master and European members of the crew) would become liable to taxation on the sums that they received; the element of taxation should be considered not as a matter for exact calculation but generally in order to ensure that the amount awarded should, notwithstanding taxation, remain an encouragement to the performing of salvage services (*British Transport Commission v. Gourley*, [1955] 3 All E.R. 796, applied).

[As to the general principles for assessing salvage awards, see 30 HALSBURY'S LAWS (2nd Edn.) 900 et seq.; and as regards, in particular, the consideration of losses or expenses of the salvor, see *ibid.*, 904, para. 1221; and for cases on the subject, see 41 DIGEST 878, 7571-7573.]

As to collateral liabilities and benefits in assessing the measure of damages, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408, note (k); and for cases on the subject, see 17 DIGEST (Repl.) 80, 81, 27-38.]

Case referred to:

(1) *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; 3rd Digest Supp.

Action.

The master and crew of the Tantalus (but not the owners) claimed a reward for salvage services rendered to the Telemachus, her cargo and her freight.

On May 8, 1956, the Telemachus, a motor vessel of 8,265 tons gross, left the port of Semarang on the north coast of Java with cargo on board and when about ten miles out she suffered a casualty in her engine room which resulted in her engines being wholly incapacitated beyond the possibility of repair at sea. On May 10 she was taken in tow by the Tantalus, a steam ship of 7,297 tons gross. Throughout the towage the weather remained settled. The Tantalus towed the Telemachus into the port of Sourabaya. Both ships belonged to the same owners, namely, the Ocean Steam Ship Co., Ltd., the defendants, who admitted that salvage services were rendered. It was agreed between the parties that the value of the Telemachus was £611,750 and of her cargo was £65,690, making a total of £677,440. The value of the Tantalus was agreed at £465,000.

The case is reported on the point whether the element of taxation should be taken into account in assessing the amount of the award.

J. B. Hewson for the plaintiffs.

R. F. Stone for the defendants.

WILLMER, J., stated the facts and continued: The evidence shows quite clearly that the operation was conducted with great efficiency on the part of the salvors, and with great courage on the part of the master of the salving vessel. That is a matter on which I have had the benefit of the advice of the Elder Brother*, who tells me that he was particularly impressed with the courageous act of the master in accepting the responsibility of taking this disabled tow

* Commodore T. L. OWEN, O.B.E., R.D., R.N.R.

A straight in through the difficult entrance of Sourabaya harbour. The success of the operation shows that all persons concerned were well and truly playing their respective parts. The value of the salvaged property in the present case is so large as to be almost irrelevant. The ship is agreed to have been worth £611,750 and the cargo £65,690, making a total fund of £677,440. There is, therefore, an abundant fund out of which I can ensure that the master and crew of the Tantalus are fairly rewarded for their labours. I must, of course, remember that I am dealing only with personal services. I am not concerned with the value of the salvors' property, except in so far as that is material in considering the degree of responsibility which the master of the Tantalus took on himself, in voluntarily rendering the service and, more particularly, in proceeding with the Telemachus in tow right into the inner roads of Sourabaya. In so far as it is relevant to that matter, I should place on record that the value of the Tantalus has been agreed at £465,000. That is some measure of the degree of responsibility which the master of the Tantalus was taking on himself.

It is never easy to reduce to figures what is the appropriate amount to be awarded in a case of this sort. In one sense it was a perfectly straightforward case, involving no particular technical difficulty and no particular danger to those taking part. It was a service rendered in favourable conditions. Both sides agree that the effective service was to tow the Telemachus for a distance of some hundred and ninety-three miles, the last twenty miles or so of which was through the difficult entrance channel to the port of Sourabaya. I have to arrive at such an award as will fairly compensate the master and crew of the salvaging vessel, without injustice to the salvaged interests, and such an award as will, in the interests of public policy, encourage other mariners in like circumstances to perform like services. That, I think, is the underlying principle on which all awards of salvage must be based.

There is, however, I think, one other matter to be taken into consideration. Certainly the master of the Tantalus, and in all probability, all the officers of the Tantalus and all the European members of her crew, will become liable to taxation as part of their earnings on such share of my award as they receive. I raised the question in argument whether that is an element which ought to be taken into consideration, and I raised that point more particularly having regard to the recent decision of the House of Lords in *British Transport Commission v. Gourley* (1) ([1955] 3 All E.R. 796). It appears to me that in principle the same considerations as apply to an award of damages in favour of an injured plaintiff should properly also apply to an award of salvage in the case of a plaintiff who has performed personal services. More particularly is that so when one pays regard to the principles of public policy underlying the law relating to salvage awards. In modern conditions it seems to me that it would be quite unreal, when one is dealing with personal services, to ignore the possible effect of taxation on the amount of the salvage award. If one were to ignore it, it seems to me that one would be cutting at one of the root principles on which salvage is awarded, namely, that of encouragement to mariners to perform services of a salvage nature. If allowance is not made for the fact of taxation, it simply means that the reality of the award made in cases of this sort is so much the less. In those circumstances I have thought it right to take that matter into consideration. I have not sought to do so by way of any exact calculation. I think it must necessarily be dealt with in a rough and ready way, simply as an element to be considered. It appears to me that one is in very much the same position with regard to that as one is in relation to expenses necessarily incurred in the performance of a salvage service. For many years that has been regarded as an element which the court should take into consideration in awarding salvage, and for this reason, that if one ignores the expense which has to be incurred in rendering the service one may be left in the position that the salvage award is no reward at all and no encouragement to mariners to perform salvage services.

It appears to me that in the case of personal services one ought to pay just the same regard to the incidence of taxation as in the case of other services one pays to the incidence of expenses necessarily incurred. In the award which I propose to make, therefore, it is right to say that in the case of the master and in the case of such proportion of the crew as are of European extraction, I have thought the liability to taxation is an element to be taken into consideration. Moreover, I will go further and say that the awards which I am about to pronounce are larger than they would have been if I had come to the conclusion that the tax element was to be wholly disregarded.

Bearing all these various considerations in mind, bearing in mind the excellent work done by the salvors, albeit in favourable conditions, and bearing in mind the size of the fund at my disposal, I think that the present is a case which merits an award to the master of £800, and to the crew, in respect of whom I am only asked to make one consolidated award, of £1,800, making a total of £2,600.

Order accordingly.

Solicitors: *Alsop, Stevens & Co.*, London and Liverpool (for the plaintiffs); *Batesons & Co.*, Liverpool (for the defendants).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

TRUCKELL v. STOCK.

[COURT OF APPEAL (Denning and Hodson, L.J.J., and Ormerod, J.), December 5, 1956.]

Sale of Land—Conveyance—Description of parcels—Reference to plan—Conveyance of dwelling-house—Footings and eaves projecting beyond area conveyed as depicted by plan—Whether footings conveyed.

Boundary—Conveyance of dwelling-house—Footings and eaves extending beyond area depicted by plan—Parcels referring to plan—Whether footings conveyed.

In 1952 the plaintiff bought one of two adjoining dwelling-houses, then in common ownership, and in 1953 the defendant bought the other. The common owner conveyed to the plaintiff, "all that land dwelling-house . . . and premises . . . delineated and coloured pink and red on the plan attached hereto the dwelling-house . . . being known as No. 45 East Street . . .". The footings and the eaves of the plaintiff's house extended beyond the area depicted by the pink and red coloured portion of the plan. The defendant built a wall which, without the plaintiff's consent, rested partly on (making direct contact with) the footings of the plaintiff's house. The plaintiff claimed that the wall constituted a trespass to his land.

Held: the defendant was guilty of trespass to the plaintiff's land because the conveyance to him of the "dwelling-house" comprised all parts of the dwelling-house including the footings and the eaves, although the conveyance did not include the column of air above the footings.

Appeal allowed.

[As to conveyances by reference to a plan, see 11 HALSBURY'S LAWS (3rd Edn.) 427, para. 688, and 3 HALSBURY'S LAWS (3rd Edn.) 356, para. 675; and for cases on the subject, see 17 DIGEST (Repl.) 382, 383, 1869-1875.]

Cases referred to:

(1) *Manning v. Fitzgerald*, (1859), 29 L.J.Ex. 24; 1 F. & F. 634, n.; 17 Digest (Repl.) 289, 956.

- A (2) *Corbett v. Hill*, (1870), L.R. 9 Eq. 671; 39 L.J.Ch. 547; 22 L.T. 263; 7 Digest 263, 3.
- (3) *Eastwood v. Ashton*, [1915] A.C. 900; 84 L.J.Ch. 671; 113 L.T. 652; 17 Digest (Repl.) 383, 1875.

Appeal.

- B Appeal of the plaintiff, Edward Alfred Truckell, from a judgment of His Honour JUDGE SOUTHALL, given on Aug. 16, 1956, at Colchester County Court. The plaintiff alleged that a wall built by the defendant, John Reginald Stock, and resting on the footings of the wall of the plaintiff's house, constituted a trespass. He claimed damages not exceeding £400 and an injunction ordering the defendant to remove so much of the concrete and wall and other material as was on the plaintiff's land or against his dwelling-house. The county court judge found that
- C the footings belonged to the defendant and dismissed the action.

C. H. Duveen, Q.C., and *C. W. S. Lubbock* for the plaintiff.

R. E. Megarry, Q.C., and *J. T. Turner* for the defendant.

- D DENNING, L.J.: This is a quarrel between neighbours in Colchester. The plaintiff, Mr. Truckell, bought a house there, No. 45, East Street, in 1952. Just over a year later, the defendant, Mr. Stock, bought the adjoining house, No. 44, East Street. Previously the houses were in common ownership. After the plaintiff had bought his house, which was separated by the wall of his house from the next door yard, he increased the size of the window. The window previously had been, I think, two feet high. He extended it and made it deeper by another two feet six inches below the existing window. The defendant
- E objected to this extension of the window and he put up a wall (forming part of a shed) which blocked out the added portion of the window. In these circumstances, the plaintiff, finding his window half blocked up, brought an action for trespass against his neighbour, the defendant.

- F The basis of the plaintiff's claim is this: He says that the defendant put the new wall close up to his wall. It was only half an inch away from it. It was so close that it rested on the footings of the wall of the plaintiff's house. He says: "That is a trespass: he has built on my land, because my land does not end with the actual wall, it extends out so as to include the footings."

In order to see what land or property belongs to the plaintiff, we must look at the conveyance to him. These are the material words:

- G "all that land dwelling-house office garages outbuildings and premises situate in East Street Colchester aforesaid and lying to the west of the right of way or roadway hereinafter mentioned and delineated and coloured pink and red on the plan attached hereto the dwelling-house and office being known as No. 45 East Street aforesaid."

- H Those words clearly refer to a "dwelling-house". I should have thought that that meant all the parts of the dwelling-house, including the eaves and the footings and any projection of the house. But when the judge examined the plan, he was quite clear that the pink and red portion did not extend as far as the outer side of the footings, but only showed the boundary of the wall itself at ground level. Inasmuch as the plan did not, by its red markings, extend as far as the footings, he held that the footings did not belong to the plaintiff and therefore he could not allege that there was a trespass.

- I On consideration of the matter, and in particular of *Manning v. Fitzgerald* (1) ((1859), 29 L.J.Ex. 24) and *Corbett v. Hill* (2) ((1870), L.R. 9 Eq. 671), I am quite satisfied that the conveyance of this house to the plaintiff included not only the walls, but the eaves and the footings of the house. It did not include the column of air between the footings and the eaves, but it included the footings and the eaves.

So there we have the position. The house, eaves and footings belonged to the plaintiff, but the column of air forming part of the defendant's yard remained

belonging to the defendant. I am quite satisfied, on the evidence (and the judge has so found) that the defendant, when he came to build his wall, actually put it on the brickwork of the footings which were the plaintiff's footings. He did it without any consent by the plaintiff, and that is a clear trespass. In so far as it actually touched the footings it was a trespass. It would seem to me also that if it exerted a thrust on the outer footings by means of the intervening earth, that, too, would be a trespass. A

What should be done? The judge has said that he was reluctant to come to the conclusion to which he did but that if he was wrong (as we think he was) then he would have considered it a proper case for the granting of a mandatory injunction to compel the defendant to take down the wall which is trespassing on the plaintiff's footings. It seems to me that that is the order we should make. One has only to read the evidence in this case to see that the presence of this wall which the defendant put up is very damaging to the plaintiff's wall, because the damp can get in, and there is no ventilation to clear it away. The judge said: B

"If it is a trespass, I would order that this wall be taken down and I would award £50 damages because of the damage done to the plaintiff."

I am of opinion that this appeal should be allowed and that there should be an order for a mandatory injunction on the defendant to pull down the wall, trespassing as it does on the plaintiff's land, and for damages of £50. I would allow the appeal accordingly. D

HODSON, L.J.: I agree. I think that the learned county court judge's finding of fact was that the wall which the defendant built "impinged" on the footings of the plaintiff's house. The word "impinged" which he used must, I think, be taken to mean that he found as a fact (and there was evidence to support such a finding) that there was direct contact between this wall and the footings. Accordingly, if the footings were the plaintiff's footings, there was a direct trespass. E

I prefer to express no opinion as to what would be the effect if there were an indirect thrust; the matter has not been fully argued before us. Counsel for the defendant cogently pointed out that there must always be indirect thrust between one house and another when they are built on adjoining ground; but that question need not be debated here. The plaintiff no doubt would have succeeded before the learned county court judge on the basis which I have stated but for the fact that the judge found himself (as he said, reluctantly) unable to find that the footings of the plaintiff's house were his property at all. He took great care over the matter: he inspected the house: but he was controlled in his decision on this matter by the conveyance; and the relevant parts of the conveyance are these. The conveyance is dated Feb. 1, 1952, made between the vendor of the one part and the purchaser of the other, and it is of 45, East Street, Colchester, which is the house in question. In the parcel it is stated that what is conveyed is: F

"First all that land dwelling-house office garages outbuildings and premises situate in East Street, Colchester aforesaid and lying to the west of the right of way or roadway hereinafter mentioned and delineated and coloured pink and red on the plan attached hereto the dwelling-house and office being known as No. 45 East Street aforesaid." G

It has been contended before us (and successfully contended before the learned county court judge) that the conveyance and the description of the property contained in the conveyance were dependent on the plan for their accuracy; and the plan which is attached to the conveyance (which is, of course, a ground plan) shows the footings in question, and indeed the eaves of the house, as being outside the area conveyed. The learned county court judge found himself in those circumstances, as he thought, bound to follow the plan and to hold that the footings of the house, and indeed the eaves, had not been conveyed H I

A to the plaintiff at all. The argument is that if there is no qualifying clause such as "This plan is for identification only", and the words of description contained in the conveyance are inadequate, the plan controls, in accordance with the speech of LORD WRENBURY in *Eastwood v. Ashton* (3) ([1915] A.C. 900 at p. 920) where he said:

B "My Lords, I find that the description by plan is couched in the words 'all which said premises are more particularly described'. The words 'more particularly' exclude, I conceive, that they have already been exhaustively described. These words seem to me to mean that the previous description may be insufficient for exact delimitation, and that the plan is to cover all deficiencies, if any."

C That, says counsel for the defendant, is this case. But I do not accept that there is any falsa demonstratio, either in the conveyance itself or in the plan: the two seem to me to be quite consistent with one another if one remembers that the plan is a ground plan and only shows the boundary of the plaintiff's property on the ground; whereas the conveyance of the house and the parcels show the actual physical thing conveyed. That a property—a house—may stick out over the

D land of the adjoining neighbour is a common feature which has caused trouble, as shown by the reported cases. Such a case was *Corbett v. Hill* (2) ((1870), L.R. 9 Eq. 671). I need not refer to the facts of that case, but the particular feature which was the subject of the decision was that there were overhanging portions of one house protruding over the land of another, and notwithstanding that it was held that "the vertical column of air over so much of the room as overhung the defendant's site belonged, not to the plaintiff, but to the defendants". So that although the ground plan (as I understand it) would control the ownership of the air above, it does not in the least prevent the plaintiff owning the parts of his house which protrude over the line marked on the ground plan.

E With all respect to the learned county court judge, I think that he was wrong in law in coming to the conclusion, to which he did come, that the ownership of the footings was not in the plaintiff. Once the conclusion is reached which I reach—namely, that on the true construction of this conveyance the ownership of the footings was in the plaintiff—the rest follows: the trespass is proved; and I agree with my Lord that the order which the county court judge would have made should be made by this court.

F G **ORMEROD, J.:** I agree, and have nothing that I wish to add.

Appeal allowed; injunction granted, that the defendant do within six weeks pull down and remove from the plaintiff's land so much of the concrete and wall and other materials as are on the plaintiff's land or against the plaintiff's house. £50 damages awarded.

Solicitors: *Corbin, Greener & Cook*, agents for *Thompson, Smith & Puxon*, Colchester (for the plaintiff); *Church, Rendell*, agents for *Marshall & Sutton*, Colchester (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

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METROPOLITAN POLICE DISTRICT RECEIVER *v.* CROYDON
CORPORATION AND ANOTHER.
MONMOUTHSHIRE COUNTY COUNCIL *v.* SMITH.

[COURT OF APPEAL (Lord Goddard, C.J., Morris, L.J., and Vaisey, J.), December 3, 4, 1956.]

Police—Constable—Injury through negligence of third party—Wages during illness paid out of police fund—Whether authority in charge of fund entitled to recover amount of wages from third party.

Contract—Quasi-contract—Wages paid, under statutory obligation, to police officer during illness caused by third party's negligence—Sums not recoverable by officer from third party—Whether authority in charge of police fund entitled to recover amount of wages from third party.

In each case a police constable had been injured, while on duty, owing to the negligence of the defendants and in consequence had been incapacitated for duty for a substantial time. In each case he was entitled by statute to his full pay while away from duty and was paid it by the plaintiff, the authority responsible for the administration of the police fund for the area. In each case the constable recovered damages from the defendants for negligence but the damages did not include any sum in respect of loss of wages, as he had lost none. Each plaintiff brought an action to recover from the appropriate defendants or defendant the amount of the wages paid by the plaintiff to the constable while away from duty.

Held: the amount of the wages was not recoverable because (a) the extent of the defendants' or defendant's legal liability to the constable was to compensate him for his injury and his loss, and the fact that there was no loss of wages for which to compensate the constable did not constitute an unjust enrichment or benefiting of the defendants at the expense of the plaintiff, and (b) what the plaintiff had lost was the constable's services for the period while he was away from duty and for that loss the plaintiff could not recover, since the action per quod servitium amisit did not lie as the constable was not the servant of the plaintiff but of the Crown (*Inland Revenue Comrs. v. Hambrook*, [1956] 3 All E.R. 338, followed on this point).

DICTUM OF LORD WRIGHT, M.R., in *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros.* ([1936] 3 All E.R. at p. 706) applied; *Moule v. Garrett* ((1870), L.R. 5 Exch. 132) considered.

Decision of SLADE, J. ([1956] 2 All E.R. 785) reversed.

Decision of LYNKEY, J. ([1956] 2 All E.R. 800) affirmed.

[As to the nature of the action for money had and received, and the doctrine of unjust enrichment, see 8 HALSBURY'S LAWS (3rd Edn.) 235, para. 409.]

Cases referred to:

- (1) *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; 3rd Digest Supp.
- (2) *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)*, [1955] 1 All E.R. 846; [1955] A.C. 457; 119 J.P. 312; 3rd Digest Supp.
- (3) *Inland Revenue Comrs. v. Hambrook*, [1956] 3 All E.R. 338.
- (4) *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros.*, [1936] 3 All E.R. 696; [1937] 1 K.B. 534; 106 L.J.K.B. 437; 156 L.T. 4; Digest Supp.
- (5) *Moule v. Garrett*, (1870), L.R. 5 Exch. 132; 39 L.J.Ex. 69; 22 L.T. 343; *affd.*, (1872), L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 31 Digest (Repl.) 458, 5846.
- (6) *Gebhardt v. Saunders*, [1892] 2 Q.B. 452; 67 L.T. 684; 56 J.P. 741; 31 Digest (Repl.) 336, 4704.

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A Appeals.

These were two appeals, based on similar facts, and in which the same question of law arose.

(i) *Metropolitan Police District Receiver v. Croydon Corporation and Another.*

The defendants, Croydon Corporation and Jesse William Holloway, appealed from a decision of SLADE, J., dated June 11, 1956, and reported [1956] 2 All E.R.

B 785. In this action the plaintiff, the Receiver for the Metropolitan Police District, claimed £104 paid by him to John Edward Bowman, a police constable in the Metropolitan Police, who was run down, while on duty on Jan. 25, 1952, by a motor lorry owned by the defendant corporation and driven by the second defendant as their servant or agent. As a result of the accident Mr. Bowman was incapacitated from performing his duties as a police constable from Jan. 25, 1952, to June 9, 1952, and from Sept. 29, 1952, to Oct. 28, 1952, during which time the plaintiff paid him his full wages and allowances. The plaintiff claimed that the defendants were liable to Mr. Bowman in damages as the result of the accident, and had benefited to the extent of £104, part of the wages and allowances paid to Mr. Bowman by the plaintiff, so that the defendants' obligation to Mr. Bowman had been reduced by that amount, and that the plaintiff was entitled to recover that sum from them. The defendants contended that the claim disclosed no cause of action and that the damages claimed were irrecoverable at law. SLADE, J., held that, since the constable would have been entitled to recover the amount of £104 from the defendants as damages for their negligence if the plaintiff had not paid (under what the law regarded as compulsion) the constable's wages during his incapacity, and since the defendants had the benefit of the plaintiff's payments by the discharge pro tanto of their liability, the plaintiff was entitled to recover from them the sum of £104.

(ii) *Monmouthshire County Council v. Smith.*

The plaintiffs, Monmouthshire County Council, appealed from a decision of LYNKEY, J., dated June 15, 1956, and reported [1956] 2 All E.R. 800. The plaintiffs claimed from the defendant six sums, amounting in all to £751 18s., as money which, by reason of the defendant's negligence causing personal injury to a police constable, William Frank Nash, the defendant was ultimately liable to pay by way of damages, and which, by reason of their statutory obligations, the plaintiffs had paid to or on behalf of Mr. Nash.

G On Nov. 7, 1952, Mr. Nash, a police constable serving in the Monmouthshire Constabulary, was seriously injured owing to the negligence of the defendant. On Dec. 21, 1952, he was certified as unfit for duty by the police surgeon and was away on sick leave until Feb. 21, 1953, when he returned to work but was able to undertake only light duties. On July 3, 1954, he became totally unfit again, and as from Dec. 31, 1954, he was compulsorily retired. Mr. Nash received his full salary and allowances (including a house allowance in respect of the rent of his house) from Dec. 21, 1952, until Dec. 31, 1954, and after that date received a pension, to all of which he was entitled by virtue of statute. By virtue of the Local Government Act, 1888, s. 30 (3), and the Police Act, 1890, s. 33 and Sch. 3, the plaintiffs were legally bound to make and did make these payments. On Feb. 16, 1956, Mr. Nash recovered damages from the defendant for negligence. The damages did not include any sum in respect of loss of wages, as he had lost none, and in assessing the damages his right to a pension was taken into account. The plaintiffs sued the defendant for £751 18s., made up as follows: (i) the full pay and allowances (other than house allowance) paid to Mr. Nash from Dec. 21, 1952, to Feb. 20, 1953, and from July 3, 1954, to Dec. 31, 1954; (ii) half of the full pay received by Mr. Nash between Feb. 21, 1953, and July 3, 1954, when he was on light duties; (iii) house allowance for the periods when Mr. Nash was on sick leave; (iv) half of the house allowance

for the period when Mr. Nash was on light duties; (v) the pension paid to Mr. Nash from Jan. 1, 1955, to Feb. 16, 1956, the date on which Mr. Nash obtained judgment against the defendant; and (vi) fees paid to the police surgeon in connection with Mr. Nash's disability. *LYNSKEY, J.*, held that the plaintiffs were not entitled to recover the £751 18s. from the defendant because he had never been liable to pay these sums to Mr. Nash by way of damages for negligence.

Gilbert Paull, Q.C., Montague Berryman, Q.C., and Humfrey Edmunds for Croydon Corporation and J. W. Holloway, the defendants in the first action.

Gerald Gardiner, Q.C., and P. M. O'Connor for the respondent, the Receiver for the Metropolitan Police District, the plaintiff in the first action.

Gerald Gardiner, Q.C., and R. C. Hutton for Monmouthshire County Council, the plaintiffs in the second action.

R. G. Micklethwait, Q.C., and C. N. Pitchford for Eric George Smith, the defendant in the second action.

LORD GODDARD, C.J.: These are two appeals which raise exactly the same point. The first case is an action by the Receiver for the Metropolitan Police District against Croydon Corporation and a servant of the corporation, in which the Receiver is claiming the amount of a police constable's wages during a time when the constable was off duty on account of an accident which he met with in the course of his duty, being injured by a lorry, the property of the corporation, driven by their servant. In the second case the Monmouthshire County Council are suing for money which was paid to a police constable in the Monmouthshire Constabulary in similar circumstances, the defendant in the second case being Eric George Smith. In the first case *SLADE, J.*, held that the Receiver was entitled to maintain his action. In the second case *LYNSKEY, J.*, came to the contrary decision, and in the opinion of this court, *LYNSKEY, J.*, was right. We do not agree with the decision of *SLADE, J.*

It is necessary to refer briefly to the position in regard to pay, allowances and so forth of police constables, and for the present purposes there is really no difference between the two cases. In London the Metropolitan Police are under the direct control of the Home Secretary, but their wages are paid by the Receiver for the Metropolitan Police District, who, by the Metropolitan Police Act, 1829, is the person put in charge of the fund, which is derived from various sources, such as the rates and an Exchequer grant, out of which it is his duty to pay the wages of the police [s. 10 and s. 12 of the Act.] In this action the Receiver claims that, as he is the guardian of this fund, it is his duty to recover if he can any sum which is properly payable to the fund. It was contended on behalf of the Receiver that, as the police constable in question was off duty for several months, the Receiver was entitled to require the defendants to pay the wages which the Receiver had to pay to the constable during that period of incapacity.

The Monmouthshire County Council come into the matter in this way. A county police force is under the control of the standing joint committee [of the county council and of the justices at quarter sessions*], and the standing joint committee see to the payment of the wages of the members of the force, requiring the county council to provide the necessary sums out of the county fund†. In this case Monmouthshire County Council had to provide the funds which the Monmouthshire Standing Joint Committee required. The county council base

* See the Local Government Act, 1888, s. 9 (14 HALSBURY'S STATUTES (2nd Edn.) 177); pay and allowances of the county police are governed by regulations under s. 4 (1) of the Police Act, 1919, and are payable out of the police fund as defined in the Police Act, 1890, s. 33 and Sch. 3, and the Police Act, 1919, s. 12 (18 HALSBURY'S STATUTES (2nd Edn.) 106, 124, 125). As regards the rates of pay, etc., see Police Regulations, 1952 (S.I. 1952 No. 1704), reg. 23 and Sch. 1, as amended (17 HALSBURY'S STATUTORY INSTRUMENTS 181, 191 and SERVICE).

† Under s. 30 (3) of the Local Government Act, 1888.

A their claim on exactly the same ground as that on which the Receiver for the Metropolitan Police District bases his claim.

By the statutes under which the police forces, both in the metropolis and in the counties, are governed and the statutory regulations made under those statutes, the police authority are obliged to pay a constable his full wages and allowances, although he may be off duty by reason of an injury received in the course of his service. The time may come when the police constable has to retire because the injury so received has unfitted him to remain in the police force. In that case he will receive a pension, but so long as he is in the police force he is paid, whether he is fit for duty or not.

C In each of the cases under appeal, the police constable was injured while he was on duty, and the injury kept him off his duties for several months. He was paid full wages during that time and received all the other emoluments to which he was entitled. He brought an action for damages in respect of the injury, but made no claim for loss of wages as part of the damage which he had sustained, because he had not sustained a loss of wages. Therefore, the damages which the police constables recovered against the respective defendants were not so large as they would have been if the constables had been entitled to claim for loss of wages. It is submitted by leading counsel for the plaintiffs (and this is the foundation of his argument) that the defendants have received a benefit by reason of the fact that, as the Receiver, in the one case, and the county council, in the other, have paid the wages during the period of incapacity, the defendants have not had to pay as large damages as they would have had to pay in the case of an injury to an ordinary person who was not paid wages while incapacitated, because in that case the defendant whose negligence had caused the injury to the workman would have to pay, as part of the special damages, the wages which the workman had lost.

E SLADE, J., treated the case which was before him as one which depended on the doctrine of unjust enrichment, and held that, inasmuch as the defendants escaped paying the injured constable's wages because of the payments made by the Receiver, they must pay to the Receiver the amount of wages which they would have had to pay to the constable if he had not received his emoluments from the Receiver in the way which I have mentioned. That view seems to me to be a misconception, because I cannot see that the defendants were in any way enriched in that manner. The matter was dealt with shortly by EARL JOWITT in his speech in *British Transport Commission v. Gourley* (1) ([1955] 3 All E.R. 796 at p. 802):

"... it is, I think, if I may say so with the utmost respect, fallacious to consider the problem as though a benefit were being conferred on a wrongdoer by allowing him to abate the damages for which he would otherwise be liable. The problem is rather for what damages is he liable; and, if we apply the dominant rule, we should answer, 'He is liable for such damages as, by reason of his wrongdoing, the plaintiff has sustained'."

In that case the question was whether, in assessing the compensation payable to a man for loss of earnings, regard was to be had to his gross earnings or to the amount which would have come into his hands after deduction of income tax. The latter was held to be the right measure.

I In each of the cases now before us, the police constable sustained certain damage for which he has been compensated. That damage did not include loss of wages, because he had already been paid his wages. What is the result of that? The Receiver, in the one case, and the county council, in the other case, have not been called on to pay anything which they would not otherwise have had to pay. Their obligation is to pay the police officers during the time they are off duty through disablement, no matter what the reason is which has caused an officer to be off duty. Therefore, the plaintiffs are no worse off than

they would have been if the accidents had never taken place. It is their duty A
to pay the policeman so long as he is a member of the police force.

Once that point is realised, it follows that the only loss which the plaintiffs
sustained is that they had to pay the police constables, although they received
no service from them. That loss is exactly the loss which was recoverable, and
in certain limited cases is still recoverable, in an action which is generally called
an action per quod servitium amisit. Their damage consists in the fact that B
they were deprived of the services of the police constables. In point of fact it
was never suggested, in either of the cases, that another officer had to be paid
to carry out the injured constable's duty. The old action of per quod servitium
amisit was an action given to a master because he was deprived of the services
of his servant. In *A.-G. for New South Wales v. Perpetual Trustee Co. (Ltd.)* (2)
([1955] 1 All E.R. 846) the Judicial Committee held that that action would not C
lie in the case of a police constable, because the officer was not a servant of the
police authority. He is a servant of the Crown, and may have to act independ-
ently of the police authority. In *Inland Revenue Comrs. v. Hambrook* (3)
([1956] 3 All E.R. 338) this court applied that judgment in the case of an injury
to a civil servant and expressed the view that the action per quod servitium
amisit must nowadays be confined to the case of what are generally known as D
menial servants. Therefore, police authorities are not entitled to claim now
for loss of services of police officers against the person who injures the police
officers.

In order, therefore, to maintain this action, it must be shown that the legal
liability rests on some other principle. The principle which is prayed in aid
here is the principle that money which constitutes unjust enrichment of a E
person may be recovered in an action for money had and received, or money paid
to the use of the person. Both the learned judges considered with great care
and very elaborately the decision of this court in *Brook's Wharf & Bull Wharf,
Ltd. v. Goodman Bros.* (4) ([1936] 3 All E.R. 696), a case in which the plaintiffs,
who were warehousemen, had taken into their bonded warehouse furs which
were imported and were liable to duty. A man keeps a bonded warehouse on F
the terms that he will be responsible to the Commissioners of Customs and
Excise for dutiable goods which are deposited in the bonded warehouse before
the duties have been paid. He is responsible to the Commissioners of Customs
and Excise if those goods go out of his bonded warehouse before the duties have
been paid. In that case the defendants had imported skins and put them in
the plaintiffs' bonded warehouse, not having paid duty, but they would have to G
pay duty when the goods went out. The goods were stolen from the bonded
warehouse, and the Commissioners of Customs and Excise claimed the amount
of the duty from the warehousemen, and recovered it from them. They had no
answer; they had held the bonded goods, the bonded goods had left their
warehouse and could be made available by the thieves on the home market,
and the bonded warehousemen had to pay. They thereupon claimed, and were H
held entitled to recover, from the importers, the amount which they had paid,
because it was primarily the importers' duty to have paid the import duties
as soon as the goods were imported into this country, and they avoided having
to pay that sum on importation only by placing the goods in the bonded ware-
house. LORD WRIGHT, M.R. ([1936] 3 All E.R. at p. 706), likened the case to
one of principal and surety. I

To my mind, that case and the large number of cases which were cited there
and have been cited in the present cases have no bearing on the matter which
we have to decide. The obligation of the defendants in this case is to compensate
the injured men for the damage which they have sustained. Where a man
is injured by the negligence of another, the fact that the injured man's employer
had agreed to pay him his wages whether he was well or ill would, it seems to
me, certainly afford a benefit in one sense to the wrongdoer, because, in an action

A for damages for negligence, the wrongdoer would not have to pay the damages which he would have had to pay if that agreement had not been made. That merely means that he does not have to compensate the plaintiff for an injury which he has not suffered. The obligation is, in the words of EARL JOWITT (in *British Transport Commission v. Gourley* (1), [1955] 3 All E.R. at p. 802), merely to pay "such damages as, by reason of his wrongdoing, the plaintiff

B has sustained". Having paid that, his obligation seems to me to be at an end.

No doubt, if the action per quod servitium amisit had not now been held inapplicable in the case of policemen and police authorities, the police authority would have been able to recover, and probably would have recovered damages from the wrongdoer on the ground that he had deprived the authority of the services of the servant, but that is the only claim, it seems to me, on an analysis

C of the matter, that the police authority can possibly put forward. Their claim is merely for the loss of services. The plaintiffs' financial position has not been altered by a sixpence in this case. Their duty is to pay the wages whether the policeman is on duty or not, so long as he remains a member of the police force.

D For these reasons, I think that the judgment of LYNSEY, J., was perfectly right when he held that there was no obligation on the part of the defendant to pay to Monmouthshire County Council the wages which the county council had paid to the police constable, and which they had to pay, despite the fact that the constable was injured. So long as he remained a member of the police force, the authority had to pay his wages. For these reasons I do not think that the very elaborate review of the cases which we have had, and which were

E before the judges, need be gone into.

My opinion is that the action of the Receiver fails, and that the appeal by Monmouthshire County Council also fails. I would, therefore, allow the appeal in the first case and dismiss it in the second. The only difference of which I know between the two cases is that in the Monmouthshire County Council case there is the question of the pension which was paid to the police constable.

F Leading counsel for the plaintiffs does not seek to found any argument now on that fact. As we were against him in the first case, he agrees that he cannot distinguish the Monmouthshire County Council case in any way. Indeed, as LYNSEY, J., thought, the pension could in no circumstances have been recoverable from the defendant. For these reasons, I do not think there is any distinction between the two cases.

G **MORRIS, L.J.:** I have formed the same conclusions. I have found myself in entire agreement with the judgment delivered by LYNSEY, J., and I am in entire agreement with the judgment which my Lord has just delivered.

The first action arose out of an accident which occurred to a police constable named Bowman. When he was injured, he sued the wrongdoers. He did not

H include any claim for loss of wages. The reason why he did not include any such claim was that he had not lost any wages. At the moment when an accident happens, the wrongdoer does not know, in the nature of things, the extent of his liability. The days are gone when the owner of a carriage, seeing that the horses are becoming fractious and are likely to bolt, can exhort his groom to run into something cheap. Today the wrongdoer does not know at the moment

I of the accident whether he is going to incur a large or a small liability. If he knocks down a professional man earning a large income by his own personal endeavours, the liability for loss of earnings as an item of special damage may be very high. If he knocks down somebody earning a very low wage, this liability may be low. If he knocks down somebody of independent means, the liability—I speak, of course, of liability as regards loss of earnings as an item of special damage—may be nothing. If he knocks down somebody who was going to be paid wages whether he was at work or not, then it seems to me that there is no liability for that item of the damages.

The matter was stated by LORD GODDARD, in the case in the House of Lords to which reference has been made, *British Transport Commission v. Gourley* (1) ([1955] 3 All E.R. 796), when he said (*ibid.*, at p. 804):

"In an action for personal injuries, the damages are always divided into two main parts. First, there is what is referred to as special damage which has to be specially pleaded and proved. This consists of out of pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and which is not specially pleaded. This includes compensation for pain and suffering and the like and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future. The basic principle, so far as loss of earnings and out of pocket expenses are concerned, is that the injured person should be placed in the same financial position so far as can be done by an award of money as he would have been had the accident not happened . . ."

That, if I may say so, is in accord with the statement of EARL JOWITT in his speech in the same case (*ibid.*, at p. 802): "He is liable for such damages as, by reason of his wrongdoing, the plaintiff has sustained". In the action brought by the Receiver for the Metropolitan Police District, the position was that the police constable, who was a servant of the Crown, was one who, although incapacitated from performing his duties as a constable as a result of an injury received in an accident, was still entitled to his full pay and allowances so long as he remained a member of the police force, and until he resigned or was compulsorily retired. Therefore, it seems to me that in the action brought by the police constable, the defendants were adjudged to pay all that they were liable to pay. If the facts had been different and if the police constable had actually suffered a loss of wages, then the defendants would have had to pay more.

How, then, is the claim put in the action? The way in which it is pleaded in para. 4 of the amended statement of claim is as follows:

"The said Bowman sustained serious personal injuries and was incapacitated from performing his duties as a police constable from the date of accident Jan. 25 to June 9, 1952, and from Sept. 29 to Oct. 28, 1952. The plaintiff was compelled to and did pay to the said Bowman the sum of £153 13s. 6d. pay and allowances in respect of the said periods of incapacity. By reason of the matters set out in paras. 2 and 3 hereof the defendants were liable to the said Bowman in damages [that is, because of the negligence] and have benefited to the extent of the sum of £104, part of the said sum of £153 13s. 6d. paid by the plaintiffs, and their obligation to the said Bowman has been reduced pro tanto. In the premises the plaintiff is entitled to recover the said sum of £104 from the defendants."

That really is the way in which the case is stated, and that is the basis of the argument which leading counsel for the plaintiffs addressed to us. It is said that the defendants have benefited. It seems to me that the answer to that is that they just have not benefited. It is said that their obligation to Mr. Bowman was reduced pro tanto; again, it seems to me, the answer to that is that their obligation has not been reduced at all. Their obligation was to pay what Mr. Bowman lost, and they were adjudged to pay what they were liable to pay. It seems to me, therefore, that the real position in this case is that what has been lost, probably not by the plaintiff but by someone else, is the benefit of the services which Mr. Bowman would have rendered during the time when he was incapacitated.

I think that it can be said with some force that the wrongdoer has been fortunate in that he has injured someone who must be paid whether he is injured

A or not, whereas those entitled to the services of the injured man are, during the period of incapacity, denied those services. It might be said that a case could be put forward for consideration whether there might be some change in the law in regard to this matter so as to permit of the recovery of wages payable and paid in reference to a period of incapacity caused by a wrongdoer; but it does not seem to me that the defendants have in this case benefited or received an advantage.

B The claim, in each case, is put partly in reliance on the principles referred to in *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros.* (4) ([1936] 3 All E.R. 696). In his judgment in that case LORD WRIGHT, M.R., said (*ibid.*, at p. 706):

C "The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff."

D I agree, if I may say so, with leading counsel for the plaintiffs that it is never wise to take a passage out of a judgment, and to treat it as though it were a statutory enactment. LORD WRIGHT, M.R., is there merely stating the essence of the rule. It does not seem to me, however, that the plaintiffs bring themselves within that rule. This is because there was no liability on the defendants for the wages, for the reason that the police constables did not lose them.

E Reference was made to *Moule v. Garrett* (5) ((1870), L.R. 5 Exch. 132)*. In that case the plaintiff was the lessee of certain premises, and the defendants were sub-assignees of the lease. The sub-assignees, who were in possession of the premises, failed to comply with a covenant to repair. The lessee was made liable, and met the demand of the lessor for damages for breach of the covenant to repair. The lessee then sued the sub-assignees. There was no privity of contract between the lessee and the sub-assignees, but they were both liable to the lessor. The lessee was held entitled to recover, and amongst the reasons was that given by CHANNELL, B., who said (*ibid.*, at p. 138) that the lessee was really in the position of a surety vis-à-vis the assignee. So in *Brook's Wharf & Bull Wharf, Ltd. v. Goodman Bros.* (4), both the importers and the warehousemen were liable for the payment of the Customs dues, the importers, as between the two parties, being primarily liable.

G Leading counsel for the plaintiffs, in inviting us not to take the words of LORD WRIGHT, M.R., as being an all-inclusive statement of the legal principle, invites us to say that the law is adaptable, and that within its framework can be found a principle which entitles him to recover in this case. He has adopted as part of his argument a statement from WINFIELD ON THE LAW OF QUASI-CONTRACTS (1952), at p. 63. The passage reads:

I "In spite of our endeavour to extract from the decided cases some broad general principle underlying the law as to compulsion in quasi-contract, the utmost we can do is to enlarge our conclusion that, where A, under what the law regards as compulsion, has paid money to B or to C in such circumstances that the law considers that its retention by B (where the payment was to B), or B's failure to recoup A (where the payment was to C) would constitute an unjust benefit to B at the expense of A, A can recover the amount of payment from B."

Again, it does not seem to me that leading counsel for the plaintiffs can bring himself within any such principle, for the whole basis of it is that there must be

* Affirmed (1872), L.R. 7 Exch. 101.

some unjust benefit. I cannot see that there was any unjust benefit here received by the defendants when they have been held liable for all that they were in law liable to pay. Counsel referred to a number of cases in which he submitted that a basis of liability was that there had been the receipt of a benefit. He submitted that in the present case the defendants had received a benefit or advantage which it was unconscionable for them to retain, and he said that a benefit may or may not consist of a sum of money. I do not propose to refer to the cases which were cited to us by counsel, for it does not seem to me that they support the plaintiffs in this case. Some of them were cases in which there were claims for funeral expenses brought against executors; another was a case in which it was held that there could be implied an obligation on the part of a lunatic to repay money necessarily spent on her. I very much doubt whether those cases, when analysed, really depend on an application of any doctrine of receiving a benefit, but, whether they do or not, it seems to me that the submission of counsel for the plaintiffs fails for the reason that it is not shown that the defendants received a benefit.

Counsel referred to *Gebhardt v. Saunders* (6) ([1892] 2 Q.B. 452). In that case the plaintiff was tenant from year to year of the defendants of a house in London in which a nuisance arose because water and sewage collected in the cellars. A notice under the Public Health (London) Act, 1891, s. 4 (1), was served at the premises, directed to the owner or occupier, requiring the nuisance to be abated. No notice was served under s. 4 (3) of the Act which provides for the service on the owner of a notice to abate in cases where the nuisance arose from a defect of a structural character. The plaintiff did the work, and while the work was being done it was found that the nuisance did, in fact arise from a structural defect in the drains. It was held that the plaintiff was entitled under s. 11 (1) of the Act to recover from the defendants the costs and expenses incurred in abating the nuisance as money paid by him for the use and at the request of the defendants. CHARLES, J., in his judgment, said (*ibid.*, at p. 458):

"In my opinion the ordinary principle of law is applicable to this case apart from the statute, the principle applicable to cases where one man has been legally compelled to expend money on what another man ought to have done, and, without having recourse to s. 11, the plaintiff is entitled to recover from the defendants as having been legally compelled to incur expense in abating a nuisance which the defendants themselves ought to have abated."

Leading counsel for the plaintiffs cited that as one illustration of the cases to which he referred as the nuisance cases. Again, it does not seem to me that they support the plaintiffs, and for the same reason, that it is not shown that the defendants in this case received a benefit. If an employer makes a contract for a fixed period with a servant, and agrees to pay him a fixed sum, possibly in advance, whether the servant is ill or well, fit or unfit, and if the servant is injured by a wrongdoer and is away for a week, the servant has not then suffered any loss of pay, and the wrongdoer cannot be liable for what the servant has not lost. For these reasons it seems to me that counsel for the plaintiffs does not bring himself within the principle on which he relies.

VAISEY, J.: Whether the law on the point arising in these two appeals is altogether satisfactory, I am not sure and express no opinion, but, on the law as it stands, I feel no doubt at all that the appeal from the judgment of SLADE, J., succeeds, and that the appeal from the judgment of LYNKEY, J., fails. I

A respectfully agree with the last-mentioned judgment and with all that has fallen from my Lords, and I have nothing to add of my own.

Appeal of Croydon Corporation and J. W. Holloway allowed. Appeal of Monmouthshire County Council dismissed. Leave to appeal to the House of Lords granted.

B Solicitors: *Herbert Smith & Co.* (for Croydon Corpn. and J. W. Holloway); *Ponsford & Devenish, Tivendale & Munday* (for the Receiver for the Metropolitan Police District); *Torr & Co.*, agents for *Vernon Lawrence*, Newport, Mon. (for Monmouthshire County Council); *Rhys Roberts & Co.*, agents for *Myer Cohen & Co.*, Cardiff (for E. G. Smith).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

C

Re No. 10, THE TERRACE, HAMPTON WICK, MIDDLESEX.
BROUGHTON v. THORNE.

D [CHANCERY DIVISION (Vaisey, J.), December 12, 1956.]

Land Registration—Costs—Transfer of registered land on sale by order of court—Scale fee—Not all work completed to which scale fee applied—Whether scale fee chargeable—Solicitors' Remuneration (Registered Land) Order, 1925 (S.R. & O. 1926 No. 2), art. 1 (D) (i), (H), and Schedule (as substituted by the Solicitors' Remuneration (Registered Land) Order, 1953 (S.I. 1953 No. 118)).

E The plaintiff and the defendant were entitled absolutely as joint tenants to a freehold dwelling-house which they occupied. They were registered as proprietors with an absolute title. The plaintiff having obtained an order of the court for the sale of the property, the conduct of the sale was given to S., the solicitor for mortgagees, who prepared particulars and conditions of sale. The property was first sold to the defendant, but, after the preparation of a transfer and the obtaining of copies of the entries on the register and the plan, she failed to complete. The sale to the defendant was rescinded, and the property was sold to the plaintiff. S. returned the defendant's deposit to her and collected a deposit from the plaintiff. All the work done by S. up to this point was (quite properly) charged for in detail and allowed on his bill of costs which was later delivered. The plaintiff did not sign a contract, did not require an abstract of title, and there was no deducing or investigation of title. The transfer to the plaintiff was ultimately executed by the defendant by order of the court. S. included in his bill of costs £25 representing the appropriate scale fee by virtue of the Solicitors' Remuneration (Registered Land) Order, 1925, art. 1 (D) (i) and Schedule. The taxing master disallowed the item. On a summons to review taxation,

H **Held:** the scale fee of £25 ought to have been allowed notwithstanding that some of the work which the fee was stated in para. (H) of art. 1 of the Order of 1925 to cover, e.g., the preparation or perusal of a contract or conditions of sale, had not been done for the purpose of the sale to the defendant, since art. 1 (D) (i) of the Order of 1925 contained a clear direction that the remuneration should be the scale fee prescribed.

I *Re Lacey & Son* ((1883), 25 Ch.D. 301) distinguished.

[As to costs on conveyances of registered land, see 31 HALSBURY'S LAWS (2nd Edn.) 153, para. 193.]

For the Solicitors' Remuneration (Registered Land) Order, 1925, as amended, and for the Solicitors' Remuneration (Registered Land) Order, 1953, see 20 HALSBURY'S STATUTORY INSTRUMENTS 205, 210.]

Case referred to:

- (1) *Re Lacey & Son*, (1883), 25 Ch.D. 301; 53 L.J.Ch. 287; 49 L.T. 755; 42 Digest 195, 2130.

Summons to review taxation.

The following statement of facts is taken from the master's answers to objection, and the statement of the respondent's objection to the taxation.

The plaintiff and the defendant were joint proprietors of freehold property (registered with an absolute title) on which they resided. The plaintiff commenced proceedings for the purpose of compelling a sale of the property, and an order was made as prayed. The respondent, a solicitor acting for the mortgagees, consented and was appointed by the court to conduct the sale. The parties attended before a master and after both had bid for it the defendant became the purchaser of the property at a price of £1,970.

The respondent, under the direction of the court, had previously prepared particulars and conditions of sale and, after the defendant had become the purchaser of the property, the respondent prepared a transfer. Having obtained from the Land Registry copies of the entries on the register and of the plan, he sent them to the defendant as an abstract of title together with the draft transfer. The defendant failed to complete the purchase and the sale to her was rescinded. The property was then sold to the plaintiff for £1,960 and the respondent returned to the defendant her deposit and collected a deposit from the plaintiff. The respondent charged in detail for work done down to this point and these charges were allowed.

The plaintiff, being an occupier and joint proprietor of the property, did not sign a contract, nor did he require an abstract of title, and there was no deducing or investigation of title. The only evidence produced of any work done by the respondent after the sale of the property to the plaintiff other than work charged for in detail in his two bills of costs comprised two letters to the defendant requesting her approval to the draft transfer. The defendant did not reply to those letters, and was ordered by the court to execute the transfer, which she did in the presence of the master.

In addition to the detailed items, the respondent included in one of his bills of costs a sum of £25 representing the scale fee under the Solicitors' Remuneration (Registered Land) Order, 1925, art. 1 (D) (i), and the Schedule thereto substituted by the Solicitors' Remuneration (Registered Land) Order, 1953. The master disallowed this item on the ground that the scale fee was not applicable in the circumstances, but invited the respondent to substitute detailed charges for any work which he might have done over and above the work already charged for in his bills. The respondent declined to follow that course, but brought in an objection to the taxation on the ground that he was entitled to the scale fee of £25.

As his reasons for objection, the respondent stated that the subject of the sale to the plaintiff was the whole legal estate in the property vested in the plaintiff and the defendant as joint tenants not merely the defendant's equitable interest and the price had been fixed on this basis. The title deduced was to the whole legal estate and was liable to requisitions accordingly. The instrument required to carry out the transaction was a transfer on sale of the absolute title in the property vested jointly in the plaintiff and the defendant. It was submitted, therefore, that the solicitor having the conduct of the sale must be entitled to remuneration on the scale provided by the Order of 1925 (as amended), and that no other paragraph than art. 1 (D) (i) of that order would appear to govern the remuneration in the circumstances of this case.

The master disallowed the objection.

Quentin Edwards for the applicant.

Bruce Holroyd Pearce for the respondent.

VAISEY, J.: This is a summons to review taxation. The item which is in dispute is the scale fee, £25, on a transaction of transfer on the sale of registered land.

Solicitors' remuneration in conveyancing in connection with* registered land is regulated by the Solicitors' Remuneration (Registered Land) Order, 1925†, and not by the Solicitors' Remuneration Orders, 1883 to 1953. The Order of 1925 is quite straightforward when it says in art. 1 (D):

"For every completed transfer on sale . . . (i) Where the land is registered with absolute . . . title, the remuneration shall be that prescribed in the Schedule hereto."

The figure which has been ascertained by referring to that Schedule is £25, and the taxing master has disallowed that, on the ground, as I understand it, that, having regard to *Re Lacey & Son* (1) ((1883), 25 Ch.D. 301), the scale fee can only be charged if the majority, so to put it, of the various items of work which were covered by the charge have in fact been done. I do not think that that is so, because *Re Lacey & Son* (1) was a decision under the Schedule to the Solicitors' Remuneration Order, 1883, in which the operative words were that the vendor's solicitor should receive a fee

"for deducing title to freehold or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)."

The Order of 1925, under art. 1 (D) (i), contains, however, a plain direction that the figures in the Schedule are to operate. In art. 1 (H) it is provided:

"The remuneration prescribed by the Schedule hereto covers (in addition to all searches . . .) the preparation or perusal (as the case may be) of the contract, or conditions of sale . . ."

The taxing master points out that some of the various items of work under art. 1 (H), have not been done by the solicitor, and treating *Re Lacey & Son* (1) as an analogy, he says that, if they have not been done, then the work does not come within the scale fee and the solicitor's claim ought to be for itemised amounts. I do not think that is so. I think that the transfer of registered land stands on a very different footing to the conveyance of land under the old régime where there had to be abstracts and various steps taken which are not necessary in the case of land registered with an absolute title. It seems to me on the particular facts of this case that this scale fee of £25 ought to have been allowed, and I will so declare. I will vary the certificate accordingly.

Solicitors: *A. E. Shrimpton*, Woolwich (for the applicant); *Sherrard & Sons*, Kingston-on-Thames (for the respondent).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

* See per HARMAN, J., in *Re West Ferry Road, Poplar, London*, [1955] 2 All E.R. 197 at p. 201.

† As amended by the Solicitors' Remuneration (Registered Land) Order, 1953.

AUTOMATIC WOODTURNING CO., LTD. v. STRINGER.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Somervell of Harrow), November 27, 28, December 20, 1956.]

Factory—Dangerous machinery—Circular saw—Fenced in compliance with Woodworking Machinery Regulations, 1922, reg. 10 (c)—Operator injured in course of ancillary operation—Liability to fence under Factories Act, 1937, s. 14 (1), modified by regulations—Woodworking Machinery Regulations, 1922 (S.R. & O. 1922 No. 1196), reg. 10 (c)—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1). B

Court of Appeal—New trial—Order for new trial—Appeal against order allowed by House of Lords—R.S.C., Ord. 58, r. 5, since replaced by S.I. 1955 No. 1885. C

The respondent, a girl eighteen years old, was employed by the appellants in their factory to operate a power-driven circular saw which was being used for cutting lengths of timber to make chair legs. As she operated the saw, there was left on the table after each cut of the saw a piece of wood called an off-cut. The off-cuts accumulated on the side of the blade of the saw away from where the respondent stood to make the cuts. She was provided with a push-stick to remove the off-cuts, and, while using the push-stick, her hand came into contact with the saw and she suffered injuries. The removing of the off-cuts was an essential part of the operation. In an action against the appellants for breach of statutory duty or negligence, she alleged (i) that the appellants failed to fence the saw in accordance with the Woodworking Machinery Regulations, 1922, reg. 10 (c)*, and (ii) that they failed to provide or maintain a safe system of work. During the course of the trial, the claim under the regulations was abandoned, it being admitted in effect that the machine as a whole complied with the regulations, and the trial judge, after the conclusion of the evidence for the plaintiff intimated that the claim founded on breach of duty at common law failed; but he gave leave for the statement of claim to be amended to include an allegation that the saw was not fenced in accordance with the Factories Act, 1937, s. 14†. In his judgment, delivered subsequently, the trial judge gave no decision on the issue of breach of duty at common law, but held that there had been a breach of s. 14 of the Act. The appellants appealed to the Court of Appeal who held that there had been no breach of s. 14 of the Act, but ordered a new trial on the issue of breach of duty at common law. On appeal by the appellants to the House of Lords against the order for a new trial, and cross-appeal by the respondent against the finding that there had been no breach of statutory duty under s. 14 of the Act, D

Held: (i) there was no reason which would justify an order for a new trial on the issue of breach of duty at common law since the trial judge had dealt with the issue during the course of the trial and all the relevant evidence had been before the trial judge. E

(ii) there was no breach of s. 14 of the Factories Act, 1937, since the saw as a whole admittedly complied with the special obligation imposed by F

* The Woodworking Machinery Regulations, 1922, reg. 10 (c), provides: "The top of the saw shall be covered by a strong and easily adjustable guard, with a flange at the side of the saw farthest from the fence. The guard shall be kept so adjusted that the said flange shall extend below the roots of the teeth of the saw. The guard shall extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw." G

† The Factories Act, 1937, s. 14 (1), so far as is material, provides: "Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ." H

A reg. 10 (c) of the Woodworking Machinery Regulations, 1922, which excluded s. 14 from having any operation in relation to the activity of removing off-cuts as that was an essential part of the industrial operation of sawing lengths of timber (see p. 94, letter I, post).

Benn v. Kamm & Co., Ltd. ([1952] 1 All E.R. 833), and *Dickson v. Flack* ([1953] 2 All E.R. 840) explained and distinguished (see p. 94, letter G, post).

B Decision of the COURT OF APPEAL (sub nom. *Stringer v. Automatic Woodturning Co., Ltd.*) ([1956] 1 All E.R. 327) affirmed in part and reversed in part.

[As to the ordering of a new trial by the Court of Appeal, see 26 HALSBURY'S LAWS (2nd Edn.) 124, para. 245.

C For the Factories Act, 1937, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.

For the Woodworking Machinery Regulations, 1922, reg. 10, see 8 HALSBURY'S STATUTORY INSTRUMENTS 117.]

Cases referred to:

(1) *Shedden v. Patrick & A.-G.*, (1869), L.R. 1 Sc. & Div. 470; 22 Digest (Repl.) 116, 993.

D (2) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.

(3) *Summers (John) & Sons, Ltd. v. Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740; 3rd Digest Supp.

(4) *Benn v. Kamm & Co., Ltd.*, [1952] 1 All E.R. 833; [1952] 2 Q.B. 127; 3rd Digest Supp.

E (5) *Dickson v. Flack*, [1953] 2 All E.R. 840; [1953] 2 Q.B. 464; 3rd Digest Supp.

Appeal and Cross-appeal.

Appeal by employers, the Automatic Woodturning Co., Ltd., from an order of the Court of Appeal, dated Jan. 12, 1956, and reported sub nom. *Stringer v. Automatic Woodturning Co., Ltd.*, [1956] 1 All E.R. 327, reversing an order of OLIVER, J., at Liverpool Assizes dated June 20, 1955, whereby he held that the appellants were in breach of their statutory duty to comply with the Factories Act, 1937, s. 14 (1), and were liable to the respondent, Jean Stringer, in damages for the injuries which she had suffered when operating a circular saw in the appellants' factory. The Court of Appeal held that there had been no breach of duty under s. 14 (1) of the Act, but ordered a new trial on the question of breach of duty at common law. The appellants' appealed to the House of Lords against that part of the order of the Court of Appeal which ordered a new trial, and the respondent cross-appealed against the part of the order that allowed the appellants' appeal on s. 14 (1) of the Act. The respondent, a spinster and an infant, sued by Thomas Stringer, her father and next friend. The facts appear in the opinion of VISCOUNT SIMONDS, p. 92, letters B to I, post.

H *H. I. Nelson, Q.C.*, and *J. M. Davies* for the appellants.

J. M. Kennan for the respondent.

The House took time for consideration.

Dec. 20. The following opinions were read.

I VISCOUNT SIMONDS: My Lords, on Jan. 7, 1954, the respondent, a girl then eighteen years of age, met with an accident while working as a sawyer in the appellants' works at Widnes in Lancashire. It resulted in the partial amputation of two fingers of her right hand. On July 22, 1954, she commenced this action against the appellants, in which she alleged that her injury was due to breaches of statutory duty or negligence on the part of the appellants. Particulars of this allegation were given of which, in view of the course taken in the proceedings, I think it necessary to mention only (i) the plea that the appellants

failed to fence the circular saw at which she was working as required by reg. 10 (c) of the Woodworking Machinery Regulations, 1922, and (ii) the plea that they failed to provide or maintain a safe system of work under which (a) the said circular saw would have been securely fenced and/or maintained, and (b) she would not have been required and/or permitted to remove surplus wood without stopping the circular saw and/or with inadequate instruments. Numerous other particulars were given but they were abandoned in the course of the trial, as was the above-mentioned plea in regard to the Woodworking Machinery Regulations, 1922. A B

It appears that the respondent met with her accident in this way. The power-driven circular saw at which she was working had been properly set by a skilled man for cutting lengths of timber to make chair legs. As she operated the saw, there was left after each cut on the table of the saw a piece of wood called an off-cut. These off-cuts accumulated on the side of the blade away from where the respondent stood to make the cuts. To remove them she was provided with a push-stick which she was instructed to use for that purpose. She was told to walk round to the far side of the blade before using it. She was told never to use her hands. She would, she said, have got into severe trouble if she had not used the push-stick. How the accident happened was not explained. In D examination in chief she said:

"I had the stick in my right hand, I just went to flick the off-cuts off the side of the bench and I felt a little prick on my hand, and when I looked I saw the tips of my fingers lying on the bench."

In cross-examination the following questions and answers were asked and given: E

"Q.—How long was your push-stick approximately? A.—About twelve inches. Q.—Did you have the push-stick in your right hand? A.—Yes. Q.—How did you get your hand cut? A.—I do not know. Q.—Have you no idea at all? A.—No. Q.—If you are using the push-stick, your hand should not go anywhere near the saw, should it? A.—No." F

The respondent was accepted by the trial judge, OLIVER, J., as an honest witness, and so, as I say, the accident was unexplained.

It is necessary now to mention certain matters which took place in the course of the trial. After the respondent's evidence, her counsel expressly abandoned all the allegations made on her behalf in these words: G

"In view of the answer which my client has given, I feel that my case rests entirely upon the last part of the case, that the system of allowing her to flick them like that was wrong."

He was referring to the system of removing the off-cuts from the table of the circular saw with a push-stick. To the learned judge's question "You do not trouble any more about the Factories Act?" he answered "No". I wish to emphasise that this took place after the conclusion of the respondent's case, and that there was no question of the exclusion of any evidence tendered on her behalf. In these circumstances, the appellants called no other evidence than that of their foreman, who had had thirty-five years' experience in the saw-mills business. He explained that the saw could be switched on and off with an electric button, that, when switched off, it ran for about half a minute and, while running down, it was still dangerous, that it was not the practice to stop the saw while removing the off-cuts, he had never seen it done in this or any other firm, and that, assuming a push-stick was used, it did not involve any danger. H I

The evidence being concluded, it appears that, at some stage during the argument by counsel, the learned judge intimated his opinion that the appellants had not been guilty of negligence at common law. He did not give a formal judgment at this stage, for in the meantime he had suggested that the respondent

A could allege that the circular saw was not fenced in accordance with the requirements of s. 14 of the Factories Act, 1937. The statement of claim was formally amended so as to include this plea. The hearing having been adjourned, the learned judge on June 20, 1955, gave judgment which was directed almost entirely to the question of the applicability of s. 14 of the Factories Act, 1937. He found that the appellants had committed a breach of this section, but that B the respondent had been guilty of contributory negligence to the extent of one-half and gave judgment for the respondent for £625 and costs.

I have stated the course of the proceedings at some little length because I wish again to emphasise that the action took a normal course: no evidence was improperly admitted or excluded; the learned judge did not, it is true, give a reasoned judgment for rejecting the claim for negligence at common law, but it C would be to do him much less than justice to suppose that he did not give it his full consideration. Obviously sympathetic, however, as he was to the respondent's case, he was of the opinion, which he shortly intimated, that, on this head, it failed. There was clearly no sort of impropriety in such a course.

The appellants appealed to the Court of Appeal, and before that court the respondent relied, as she was entitled to do, not only on the plea under s. 14 of D the Factories Act but also on the plea of negligence at common law. The Court of Appeal, in my opinion, rightly allowed the appellants' appeal on s. 14, but on the common law plea made an order "that a new trial be had between the parties upon the issue of negligence under common law only". From this part of their order the appellants have appealed to this House, from the former the respondent has cross-appealed.

E My Lords, I will deal first with the appeal. This House is, I think, reluctant to interfere with the Court of Appeal in the exercise of its discretionary jurisdiction to order a new trial, but I have searched in vain for any reason which, in accordance with judicial precedent, would justify such an order in this case. Learned counsel for the respondent very frankly admitted that, if he had been asked to frame any reasons to support an application for a new trial, he would F not have known how to do so. Nor does it seem that the court was asked to make such an order. All the evidence was before the court, and it was open to it to have taken a different view from that of OLIVER, J., and find for the respondent. That course the court did not (and, as I think, rightly) take. Why not? Let me quote JENKINS, L.J. ([1956] 1 All E.R. at p. 334):

G "On these questions [that is the questions relating to negligence at common law], the evidence as it stands provides no guidance; and it is not for us to speculate what the result may be when all these matters and the whole of the material relevant to the issue of negligence are before the court."

I quote also HODSON, L.J.:

H "It may be that on a re-trial evidence will be given on one side or the other as to the practicability of various methods which can be employed to protect the workman from danger."

I But, my Lords, this very question of negligence had been fully tried at the trial by the learned judge. All the evidence which learned counsel had thought fit to call on that issue had been given. And let me here interpolate that the ability with which learned counsel for the respondent conducted her case in this House leaves me in no doubt that he showed good judgment as to the evidence that he decided to call. What then remains? If there had been an application to the Court of Appeal for leave to call fresh evidence (which there was not), it could only have been refused unless the practice consistently followed since *Shedden v. Patrick & A.-G.* (1) ((1869), L.R. 1 Sc. & Div. 470) was disregarded. Yet, so far as I can follow the reasoning of the court, it was in order that the issue might be re-tried with fresh evidence that a new trial was ordered. I

am driven to this conclusion, for it is not a tenable view that the court thought that the same issue should be tried again on the same evidence by the same or another judge.

The appeal should, therefore, in my opinion be allowed with costs, and I turn to the cross-appeal. The respondent invites your Lordships to find in her favour on the issue of negligence at common law or on s. 14 of the Act. On the former issue, which is one of fact, your Lordships are faced with the opinion of a judge very experienced in this branch of the law that the evidence did not support a plea of negligence, and with the inability of the Court of Appeal on that evidence to come to a contrary conclusion. I have reached the same conclusion and cannot usefully add anything on this matter. On s. 14 of the Factories Act, 1937, since the Court of Appeal have differed from OLIVER, J., I will say a few words. The question is whether, on the assumption, which I must make, that the circular saw here in question satisfied reg. 10 (c) (the relevant regulation) of the Woodworking Machinery Regulations, 1922, the respondent can, nevertheless, succeed in her plea that there had been a breach by the appellants of their more general statutory obligation under s. 14 of the Factories Act, 1937.

It was held in *Miller v. William Boothman & Sons, Ltd.* (2) ([1944] 1 All E.R. 333), which was recently approved by this House in *John Summers & Sons, Ltd. v. Frost* (3) ([1955] 1 All E.R. 870), that the obligation of a special regulation such as reg. 10 (c), if it had been duly complied with, is to be regarded as substituted for the more general obligation as to fencing contained in s. 14 of the Factories Act, 1937. It was contended for the appellants and held by the Court of Appeal that the present case was governed by this authority. It had been, however, held by OLIVER, J., that he was enabled by two cases, *Benn v. Kamm & Co., Ltd.* (4) ([1952] 1 All E.R. 833) and *Dickson v. Flack* (5) ([1953] 2 All E.R. 840), to distinguish the earlier case of *Miller v. William Boothman & Sons, Ltd.* (2), and hold that the general obligation of s. 14 of the Act had not, in regard to the operation on which the respondent was engaged, been superseded by the specific obligation in reg. 10 (c). He said:

"I find no difficulty in saying that a saw may be correctly fenced for the purpose of operation as a saw, but not correctly fenced for some other purpose."

This view was expressed by counsel for the respondent by saying that the sweeping away of the off-cuts was an ancillary activity to which compliance with the regulation had no relevance. I agree, however, with the unanimous opinion of the Court of Appeal that *Benn v. Kamm & Co., Ltd.* (4) and *Dickson v. Flack* (5) decide no more than that compliance with a special regulation in regard to the fencing of some specific dangerous part of a machine does not absolve the employer from taking proper steps under s. 14 of the Act to fence some other part of the machine for which no provision is made in the special regulation. This is, I think, made particularly clear in the judgment of my noble and learned friend, LORD SOMERVELL OF HARROW, in *Benn v. Kamm & Co., Ltd.* (4). It is a different thing altogether to say in regard to a single dangerous part of a machine which, as a whole, admittedly complies with the relevant regulation, that it does not comply with it for the purpose of what is called an ancillary activity. The evidence left me in no doubt that an essential part of the industrial operation of sawing lengths of timber with a circular saw was the sweeping of off-cuts from the table of the saw. It is impossible that that should not have been foreseen when reg. 10 (c) was made in regard to circular saws, and the admission, from which we cannot in this case depart, that the regulation was complied with, precludes us from holding that, in regard to this activity, there was any room for the operation of s. 14.

The cross-appeal must, therefore, in my opinion be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, the power of the Court of Appeal to order a new trial is set out in R.S.C., Ord. 58, r. 5*, which is as follows:

“If upon hearing of an appeal, it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court of Appeal, if it shall think fit, to order that the verdict and judgment shall be set aside, and that a new trial shall be had.”

The matter is thus left to the discretion of the Court of Appeal, but the discretion must, of course, be exercised judicially, and I find myself in the same position as my noble and learned friend on the Woolsack; I can find no reason which could justify that court in ordering a new trial in the present case. I desire to add, however, that each member of the Court of Appeal appears to have been under a misapprehension as to the course of events at the hearing before OLIVER, J., and I think that the order for a new trial must have been based, to some extent at least, on this misapprehension.

I turn, first, to the judgment of SINGLETON, L.J. He said ([1956] 1 All E.R. at p. 331): “There is . . . no finding in regard to breach of duty at common law”, and later he observed (*ibid.*, at p. 332):

“I feel that if he had not been satisfied that the [respondent] was entitled to succeed under s. 14 of the Act, [the learned judge] would probably have considered the question of breach of common law duty in the case of a girl of this type brought face to face with unnecessary danger time and time again during the day. I do not think that in such circumstances the employers were fulfilling the duty which they owed to their workers.”

In fact, however, the learned judge did consider the question of breach of common law duty and gave his opinion on it on Friday, June 17, 1955, although that opinion was not repeated in the judgment which he delivered on Monday, June 20.

Counsel for the appellants stated, in para. 12 of their printed Case presented in your Lordships’ House:

“At the conclusion of the evidence the learned judge intimated to counsel for the respondent that on the evidence presented to him he was unable to make any finding of negligence at common law against the appellants.”

To the same effect is para. 12 of the respondent’s Case:

“After hearing argument by counsel for both parties (during which the learned judge intimated that he was of the opinion that the appellants had not been guilty of negligence under the common law) the learned judge adjourned the hearing.”

Counsel on both sides repeated these statements at the hearing before this House. JENKINS, L.J., said, as to this issue ([1956] 1 All E.R. at p. 333): “The learned judge never, so far as one can tell from the judgment, in terms adjudicated on it”. HODSON, L.J., said (*ibid.*, at p. 334):

“Although in the course of speeches of counsel he made an observation which discouraged the [respondent’s] counsel from pursuing the argument based on the common law claim, the learned judge in his judgment never dealt expressly with this claim, having made up his mind that he could find in favour of the [respondent] on another ground.”

The course of the trial has been fully stated by my noble and learned friend on the Woolsack. I think it is clear that OLIVER, J., formed and expressed a

* The former R.S.C., Ord. 58, r. 5, was replaced subsequently by R.S.C., Ord. 58, r. 10; see the Rules of the Supreme Court (Appeals), 1955 (S.I. 1955 No. 1885). Those rules came into operation on Apr. 10, 1956, and the decision of the Court of Appeal was given on Jan. 12, 1956.

clear opinion against the respondent on the question of breach of common law duty, and would have dismissed the action had it not occurred to him that the appellants might have been guilty of a breach of duty under s. 14 of the Factories Act, 1937. No such breach of duty was alleged in the respondent's statement of claim, but the learned judge gave leave to the respondent to amend her statement of claim by alleging such a breach, and gave judgment in her favour on this point on Monday, June 20, 1955. A

The Court of Appeal held unanimously that there had been no such breach. On this point, I am of opinion, in agreement with the speech which has just been delivered, that the Court of Appeal was clearly right. The Court of Appeal then went on to deal with the question whether the respondent had proved any negligence at common law on the part of the appellants. Each member of the court appeared to think that more evidence might have been called at the hearing before OLIVER, J. JENKINS, L.J., said (*ibid.*, at p. 334): ". . . the evidence as it stands provides no guidance". HODSON, L.J., said: "It is not possible on the material before us to arrive at a conclusion one way or the other". My Lords, the burden lay on the respondent to prove negligence, and I read these observations as being equivalent to a finding by two members of the Court of Appeal (correctly, in my opinion), that the respondent had failed to discharge this burden by the evidence given at the trial. This being so, the action should have been dismissed, as the respondent had failed on all other points. Instead, the Court of Appeal ordered a new trial, although counsel for the respondent had called before OLIVER, J., all the evidence which he had desired to call, and had not invited the Court of Appeal to admit further evidence or to order a new trial. My Lords, I cannot think that this order would have been made if the Court of Appeal had fully appreciated that OLIVER, J., after hearing all the evidence, had expressed his view that the appellants had not been guilty of negligence at common law. There is no indication in the record that the learned judge had not fully considered the evidence when he expressed this view. B C D E

In my opinion, the appeal should be allowed and the cross-appeal dismissed, with the result that the respondent's action must also be dismissed. F

LORD RADCLIFFE: My Lords, I agree.

LORD TUCKER: My Lords, I concur.

LORD SOMERVELL OF HARROW: My Lords, I agree.

Appeal allowed; cross-appeal dismissed. G

Solicitors: J. W. Davies (for the appellants); Vizard, Oldham, Crowder & Cash, agents for Linaker & Linaker, Runcorn (for the respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

**ALSEY STEAM FISHING CO., LTD. v. HILLMAN (OWNERS)
AND OTHERS. THE KIRKNES.**

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), November 19, 20, 1956.]

Shipping—Limitation of liability—Towage—Collision between trawler in tow and tug—Loss of tug and of lives of members of crew—Negligent navigation of trawler—Agreement to indemnify tug-owners against all loss and damage—Standard towage conditions—Claims by dependants of deceased and by owners of tug for negligent navigation—Claim by owners of tug for contractual indemnity—Whether owners of trawler entitled to limit liability—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503 (1).

On Oct. 30, 1954, the trawler *Kirknes* was being towed by the tug *Hillman*. The towage was performed in pursuance of a contract entered into between the owners of the two vessels which incorporated the United Kingdom Standard Towage Conditions. By cl. 2, on the employment of a tug, the master and crew became the servants of the hirer and by cl. 3 it was provided that whilst towing the tug-owner would not be liable for any damage, personal injury, or loss of life but "the hirer shall pay for all loss or damage and personal injury or loss of life and shall also indemnify the tug-owner against all consequences thereof". In the course of the towage a collision occurred between the trawler and the tug as a result of which the tug sank with the loss of the lives of four of her crew. The owners of the tug brought proceedings against the owners of the trawler claiming damages for negligence, alternatively a declaration that under the terms of the towage conditions the owners of the trawler had accepted liability regardless of negligence to pay for the damage caused to the tug. The trawler owners admitted liability in general terms.

The owners of the trawler brought this action claiming, pursuant to the Merchant Shipping Act, 1894, s. 503, limitation of their liability (i) to the tug-owners in respect of the damage sustained by their tug and (ii) to the life claimants (the dependants of the deceased members of the tug's crew) in respect of their claims for damages for loss of life. The owners of the trawler alleged that the casualty was caused by the improper navigation of their trawler and that it occurred without their actual fault or privity. On the preliminary question whether they were precluded by the towing conditions or otherwise from limiting their liability,

Held: (i) in so far as the claims against the owners of the trawler were based on negligent navigation the owners were entitled under s. 503 of the Merchant Shipping Act, 1894, to limit their liability, unless that right was excluded by the contract; on the true construction of the contract there was no clear exclusion (express or implied) of that right, and accordingly the owners of the trawler were entitled to limit their liability towards the life claimants, as their claims were based on negligent navigation and sounded in damages.

The Satanita ([1897] A.C. 59) and *Ingram & Royle, Ltd. v. Services Maritimes du Tréport* ([1914] 1 K.B. 541) applied.

(ii) in so far as the claim of the tug-owners was based on their contractual right to indemnity and did not sound in damages the owners of the trawler were not entitled to limit their liability, since s. 503 of the Merchant Shipping Act, 1894, did not extend to a contractual claim for indemnity; and, therefore, the tug-owners were entitled to recover for their loss or damage in full.

The Stonedale No. 1 ([1955] 2 All E.R. 689) applied.

Semble: if the terms of the towage contract had excluded the operation of s. 503 in relation to claims for damages, the life claimants might have been entitled to the benefit of that contract, and to have

recovered their damages in full, since it could be inferred from the wording of the clauses that the tug-owners were contracting not only for themselves but also as agents for their master and crew (*Adler v. Dickson*, [1954] 3 All E.R. 397, considered; see p. 107, letters E to I, post).

[As to the liability for which relief by way of limitation is available for shipowners and others, see 30 HALSBURY'S LAWS (2nd Edn.) 940, para. 1303, note (n); and for cases on the subject, see 41 DIGEST 914, 915, 8059-8069.

For the Merchant Shipping Act, 1894, s. 503 (1), see 23 HALSBURY'S STATUTES (2nd Edn.) 656.]

Cases referred to:

- (1) *The Stonedale No. 1. Abel (Richard) & Sons, Ltd. (Owners) v. Manchester Ship Canal Co.*, [1955] 2 All E.R. 689; [1956] A.C. 1; 3rd Digest Supp. 138 L.T. 656; 92 J.P. 54; Digest Supp.
- (2) *Dee Conservancy Board v. McConnell*, [1928] 2 K.B. 159; 97 L.J.K.B. 487; 138 L.T. 656; 92 J.P. 54; Digest Supp.
- (3) *The Millie*, [1940] P. 1; 109 L.J.P. 17; 161 L.T. 280; 2nd Digest Supp.
- (4) *Furness Withy & Co., Ltd. v. Duder*, [1936] 2 All E.R. 119; [1936] 2 K.B. 461; 105 L.J.K.B. 473; 154 L.T. 663; Digest Supp.
- (5) *Virginia Carolina Chemical Co. v. Norfolk & North American Steam Shipping Co.*, [1912] 1 K.B. 229; 81 L.J.K.B. 129; 105 L.T. 810; on appeal, sub nom. *Norfolk & North American Steam Shipping Co., Ltd. v. Virginia Carolina Chemical Co.*, [1913] A.C. 52; 41 Digest 418, 2613.
- (6) *Ingram & Royle, Ltd. v. Services Maritimes du Tréport*, [1914] 1 K.B. 541; 83 L.J.K.B. 382; 109 L.T. 733; 41 Digest 417, 2609.
- (7) *Louis Dreyfus & Co. v. Tempus Shipping Co.*, [1931] A.C. 726; 100 L.J.K.B. 673; 145 L.T. 490; Digest Supp.
- (8) *The Satanita, Clarke v. Dunraven (Earl)*, [1897] A.C. 59; 66 L.J.P. 1; 75 L.T. 337; 41 Digest 915, 8068.
- (9) *The Friesland*, [1904] P. 345; 73 L.J.P. 121; 91 L.T. 324; 41 Digest 862, 7306.
- (10) *Adler v. Dickson*, [1954] 3 All E.R. 397; [1955] 1 Q.B. 158; 3rd Digest Supp.
- (11) *Great Western Ry. Co. v. Royal Norwegian Government*, (1945), 78 Lloyd's Rep. 152.

Preliminary issue.

The plaintiffs, the owners of the steam trawler *Kirknes*, claimed a declaration limiting their liability for claims arising out of a collision on Oct. 30, 1954.

On Oct. 30, 1954, the *Kirknes* was being towed by the steam tug *Hillman*. During the towage a collision occurred between the two vessels and the *Hillman* sank with the loss of four lives. The towage was performed in pursuance of a towage contract which incorporated the United Kingdom Standard Towage Conditions which provided, inter alia, as follows:

"(2) On the employment of a tug, the master and crew thereof become the servants of and identified with the hirer and are under the control of the hirer or his servants or agents, and anyone on board the hirer's vessel who may be employed and/or paid by the tug-owner shall be considered the servant of the hirer.

"(3) The tug-owner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the hirer's vessel, or for loss of or damage to anything on board the hirer's vessel, or for loss of the tug or the hirer's vessel, or for any personal injury or loss of life, arising from any cause including negligence at any time of the tug-owner's servants or agents, unseaworthiness, unfitness or breakdown of tug, its machinery, boilers, towing gear, equipment or hawsers, lack of fuel, stores or speed, or otherwise, and the hirer shall pay for all loss or damage and personal injury

A or loss of life and shall also indemnify the tug-owner against all consequences thereof, and the tug-owner shall not, whilst at the request expressed or implied of the hirer rendering any service other than towing be held responsible for any damage done to the hirer's vessel and the hirer shall indemnify the tug-owner against any claim by a third party (other than a member of the crew of the tug) for personal injury or loss of life. Provided that any such liability for loss or damage as above set out is not caused by want of reasonable care on the part of the tug-owner to make his tugs seaworthy for the navigation of the tugs during the towing or other services —the burden of proof of any failure to exercise such reasonable care being upon the owner of the tow.

B
C “ (4) The hirer shall not bear or be liable for any loss or damage of any description done by or to the tug otherwise than whilst towing, as herein defined, or for loss of life or injury to the crew of the tug. Nevertheless nothing contained herein shall prejudice any claim the tug-owner may have in admiralty or at common law against the hirer.”

D In July, 1955, the owners of the Hillman began an action against the plaintiffs claiming compensation for damage sustained as a result of the casualty and for other relief under the terms of the towage contract. By letter dated Aug. 10, 1955, the plaintiffs, by their solicitors, admitted liability in that action.

E The plaintiffs, as owners of the Kirknes, instituted proceedings by a writ issued on Sept. 14, 1955, against the tug-owners and against all other persons with claims against the plaintiffs in respect of the sinking of the tug. By their statement of claim the plaintiffs alleged, *inter alia*:

F “ 3. The . . . casualty was caused by the improper navigation of the Kirknes. 4. The . . . casualty occurred without the actual fault or privity of the plaintiffs. 5. By writ of summons issued July 5, 1955, the defendants, the owners of the Hillman, began an action . . . against the plaintiffs, claiming compensation for damage sustained as a result of the . . . casualty and for other relief under the terms of the towage contract. 6. By letter from the plaintiffs' solicitors to the solicitors for the defendants, the owners of the Hillman, dated Aug. 10, 1955, the plaintiffs admitted liability in the said action.”

G And the plaintiffs claimed a declaration that they be not liable to damages arising out of the casualty beyond the amounts therein set out. By their defence the tug-owners alleged that at all material times the Hillman was towing the Kirknes under a contract of towage incorporating the United Kingdom Standard Towage Conditions, referred to cl. 3 thereof, and continued:

H
I “ The plaintiffs' liability under the said contract to pay for all loss or damage resulting from the sinking of the Hillman and to indemnify these defendants against all consequences thereof does not fall within the ambit of the Merchant Shipping Act, 1894, s. 503, and these defendants say that the plaintiffs are not entitled to limit their liability or any part thereof. Further or alternatively these defendants will contend that under the terms of the said conditions the plaintiffs contracted to pay for the total amount of the loss or damage sustained by these defendants as a result of the . . . casualty and to indemnify these defendants in full in respect of all consequences thereof.”

The defendant, the widow and administratrix of the estate of the deceased tug-master, who for the purpose of this action represented the personal representatives of all the deceased members of the crew by her amended defence alleged, *inter alia*, that the Hillman was towing the Kirknes under a contract of towage

incorporating the United Kingdom Standard Towage Conditions, to which she referred, and continued: A

“The plaintiffs’ liability under the . . . contract to pay for all loss or damage resulting from the sinking of the Hillman is not limited by the Merchant Shipping Act, 1894, as claimed in the statement of claim or at all and this defendant says that the plaintiffs are not entitled to limit their liability in respect of any loss or damage suffered by her or by those represented by her. Further or in the alternative, this defendant will contend that under the . . . conditions of towage the owners of the tug Hillman on behalf of [the deceased] contracted specifically with the plaintiffs to the effect that the latter would pay for the total amount of the loss or damage sustained by [the deceased] or his estate as a result of the . . . casualty.” B C

By order dated July 16, 1956, it was ordered that the following question be tried as a preliminary issue, which after amendment by consent at the hearing before WILLMER, J., read as follows:

“Assuming that the plaintiffs are able to prove all the facts alleged in the statement of claim, and it being admitted by the plaintiffs that the Hillman was at the material time towing the Kirknes on the terms of the United Kingdom Standard Towage Conditions, are the plaintiffs precluded by those towage conditions or otherwise from limiting their liability as against the defendants?” D

Kenneth Carpmael, Q.C., and G. R. A. Darling for the plaintiffs.

W. W. Porges, Q.C., and M. E. C. Rena for the tug-owners. E

D. H. Hene for the other defendants.

WILLMER, J.: In the present case I am asked to decide a preliminary question of law which arises in the course of an action for limitation of liability. The plaintiffs in the action are the owners of a trawler called the Kirknes, which, on Oct. 30, 1954, was being towed by a steam tug called the Hillman. In the course of that towage a collision occurred between the Kirknes and the Hillman, as a result of which the Hillman sank, unhappily with the loss of four lives. F

The writ is addressed to

“The owners of the steam tug Hillman and all other persons with claims against the plaintiffs.” G

Before me two sets of defendants have been represented: first, the owners of the tug Hillman, whose claim is in respect of the damage sustained by their tug, and, secondly, the dependants of the deceased tug-master and certain other members of the crew, whose claims are for damages for loss of life. By their statement of claim in the present action the plaintiffs allege that the casualty was caused by the improper navigation of their vessel, the Kirknes; and they also allege that it “occurred without the actual fault or privity of the plaintiffs.” H It is common ground that the towage by the Hillman was being performed in pursuance of a towage contract entered into between the plaintiffs and the owners of the Hillman, and that that towage contract incorporated the United Kingdom Standard Towage Conditions. It will be necessary for me to refer in a moment to the terms of those Standard Towage Conditions. I

The preliminary point which I have to decide was stated in the order for directions. In the course of the hearing before me certain amendments to the terms of reference were made with the consent of all parties. The question as amended is in the following terms:

“Assuming that the plaintiffs are able to prove all the facts alleged in the statement of claim, and it being admitted by the plaintiffs that the Hillman was at the material time towing the Kirknes on the terms of the United

A Kingdom Standard Towage Conditions, are the plaintiffs precluded by those towage conditions or otherwise from limiting their liability as against the defendants ? ”

The owners of the Hillman had started their own action against the present plaintiffs, and by their writ and statement of claim in that action they claimed, alternatively, damages for negligence, on the one hand, and on the other a declaration that under the terms of the towage conditions the owners of the Kirknes, the present plaintiffs, had accepted liability regardless of negligence to pay for the damage caused to the tug.

B The towage conditions provide by cl. 2 that :

C “ On the employment of a tug, the master and crew thereof become the servants of and identified with the hirer and are under the control of the hirer or his servants or agents . . . ”

For the moment nothing turns on cl. 2, although I shall have to come back to it in dealing with one aspect of the case. The most important clause is cl. 3, which is a long clause and clearly divisible into parts, in the sense that it deals with various matters. The two first parts of the clause are those which are relevant to the present case. The clause provides :

D “ The tug-owner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the hirer’s vessel, or for loss of or damage to anything on board the hirer’s vessel, or for loss of the tug or the hirer’s vessel, or for any personal injury or loss of life, arising from any cause including negligence at any time of the tug-owner’s servants or agents, unseaworthiness, unfitness or breakdown of tug, its machinery, boilers, towing gear, equipment or hawsers, lack of fuel, stores or speed, or otherwise . . . ”

E I stop there to remark that so far the clause is dealing with all those things for which the tug-owner is not to be responsible. It goes on next with the following important words :

F “ and the hirer shall pay for all loss or damage and personal injury or loss of life and shall also indemnify the tug-owner against all consequences thereof . . . ”

G The rest of the clause does not matter for the purposes of the present case, for it goes on to deal with the mutual rights and liabilities during periods when the tug is performing some service other than towing. The crucial words for the question which I have to decide are those which I have just read out,

“ the hirer shall pay for all loss or damage and personal injury or loss of life.”

H The present plaintiffs in due course admitted liability in the action brought by the owners of the Hillman. That admission is contained in a letter of Aug. 10, 1955, written by the present plaintiffs’ solicitors to the solicitors for the owners of the Hillman, and it is, I think, pertinent to remark that the admission of liability is in perfectly general terms. I say that because it is clear that the claim put forward in the first instance on behalf of the owners of the Hillman was put forward in the two separate ways to which I have referred. Having regard, therefore, to the general nature of the admission of liability, I must proceed on the basis that the present plaintiffs have admitted the validity of both the claims put forward by the owners of the Hillman.

I As I have said, the first claim is for damages in respect of alleged negligent navigation; the second claim is that, quite regardless of any question of negligence, the present plaintiffs, by reason of the towage conditions, are under a contractual liability to pay for all loss or damage to the tug occurring in the course of the towage; in other words, it is contended that, as a matter of

contract, the present plaintiffs are in the position of insurers of the tug during the time that the towage is being carried on. In so far as the tug-owners' claim is a claim for damages in respect of negligent navigation, it is clear that, *prima facie* at any rate, the plaintiffs come within s. 503 of the Merchant Shipping Act, 1894, which is the section conferring the right of limitation. Section 503 (1), so far as relevant to this case, is in the following well-known terms:

"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,) . . . (c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts . . ."

In so far, however, as the tug-owners' claim is a claim under the contract, it appears to me that wholly different considerations apply.

It is not so long since it fell to me to try the limitation action in *The Stonedale No. 1. Richard Abel & Sons, Ltd. (Owners) v. Manchester Ship Canal Co.* (1) ([1955] 2 All E.R. 689), a case which subsequently went to the Court of Appeal and the House of Lords. The decision of the House of Lords in that case is, in my judgment, directly in point here, and appears to me to preclude me from holding that s. 503 of the Act applies to the tug-owners' claim, in so far as that is based on their contractual rights. I must emphasise again that that aspect of their claim is not a claim for damages, but is a claim in respect of a contractual liability to pay for a loss on the happening of a certain event. *The Stonedale No. 1* (1) was concerned, not with a contractual liability to pay in a certain event, but with a statutory liability imposed on shipowners, under the provisions of the Manchester Ship Canal Acts, to pay for the expense of raising the wreck in the event of their vessel sinking so as to cause an obstruction in the canal. I do not think that I need read any lengthy extracts from the report of *The Stonedale No. 1* (1) in the House of Lords. A few short extracts will suffice. The leading speech, with which all the other members of the House agreed, was delivered by VISCOUNT SIMONDS. After reciting, as I have recited, the relevant provisions of s. 503 of the Act, VISCOUNT SIMONDS goes on ([1955] 2 All E.R. at p. 692):

"My Lords, the vital words in this section to which, as it appears to me, insufficient regard was paid in the argument of the appellants, are 'be liable to damages'. The relief given to shipowners is in respect of their liability to damages and nothing else."

VISCOUNT SIMONDS comes back to the same point and again reiterates (*ibid.*): "The only liability which the shipowner can limit is a liability to damages". He then proceeds:

"I return then to s. 32 of the Manchester Ship Canal Act, 1936, and at once ask the pertinent question whether the respondents, in making their claim for the expenses incurred in raising the sunken vessel and, if necessary, proceeding in a court of competent jurisdiction for recovery of that sum as a debt, seek to make the appellants liable to damages. It appears to me plain that they do not. Your Lordships were pressed by the argument that the Manchester Ship Canal Act should not be construed as taking away from shipowners a right conferred by a public Act. In my opinion, no such question arises. The Merchant Shipping Acts relate to limitation of liability to damages; the Manchester Ship Canal Act confers a statutory right on the company to raise a sunken vessel, and to recover the expenses of raising her from the owner as a debt. The one does not derogate from the

A other, and your Lordships are not called on to resolve any conflict between the provisions of a public Act and a local or private Act."

I can see no distinction in principle between the statutory right conferred on the Manchester Ship Canal Company under their private Act and the contractual right which the tug-owners in the present case obtain by reason of the conditions of their towage contract, that is to say, their contractual right to be paid for all loss or damage, including loss of or damage to the tug, should that event take place during the course of the towage. The fact that the tug-owners also had an alternative claim in damages does not seem to me to affect the case, any more than the fact that in *The Stonedale No. 1* (1), the Manchester Ship Canal Company could also have had a claim for damages for negligent navigation affected the decision in that case. That is a point which was very much argued in *The Stonedale No. 1* (1), and is dealt with in a further passage in his speech by VISCOUNT SIMONDS. He says this (*ibid.*, at p. 693):

D "My Lords, it has been decided, and for the purposes of this case I will assume that it has been correctly decided, that, where through negligence on the part of the owners a vessel has sunk in such a position as to cause an obstruction in a navigable channel maintained by a conservancy authority, that authority has, in addition to any statutory rights it may have, a common law right to recover against the owners, as damages, the reasonable cost of removing the obstruction: see *Dee Conservancy Board v. McConnell* (2) ([1928] 2 K.B. 159). This decision was not called to the attention of LANGTON, J., when he heard *The Millie* (3) ([1940] P. 1), and it has been suggested that, had that learned judge been aware of it, he might have come to a different conclusion. I do not see why he should. It may have to be decided some day whether a shipowner faced with such a common law claim can successfully limit his liability in respect of it under the Act of 1900*; but it appears to me that this affords no argument for saying that a shipowner has a similar right in respect of a claim which is not a common law claim for damages for negligence, but is a claim wholly independent of negligence and founded solely on statute."

G Substituting the word "contract" for "statute", what VISCOUNT SIMONDS said in that passage appears to me to be directly applicable to the present case. Holding myself, therefore, bound by the decision in *The Stonedale No. 1* (1), the principle of which seems to me to be directly in point here, it seems to me that that is enough to dispose of the case so far as the tug-owners are concerned. I do not think it is necessary, therefore, to refer to some of the other authorities which were cited to me by way of analogy, for instance, *Furness Withy & Co., Ltd. v. Duder* (4) ([1936] 2 All E.R. 119), a case on rather a different point.

I I must, however, deal with the alternative claim for damages, and I do so for several reasons. First, it may be held that my decision on the contractual claim is wrong. Secondly, the tug-owners have argued before me that, even if their claim were to be regarded as a mere claim for damages, nevertheless the effect of the towage conditions would still be such as to abrogate s. 503 of the Merchant Shipping Act, 1894. Thirdly, I have to consider the position of the life claimants, in respect of whom it is conceded that they have, and could only have, a claim for damages. While it is perfectly true that a shipowner liable in damages for improper navigation is *prima facie* within s. 503 of the Merchant Shipping Act, 1894, and, therefore, *prima facie* entitled to limit his liability, it is equally true that it is perfectly competent for him to contract out of his rights in that respect. I have been referred to cases where a question has arisen whether or not a shipowner, in his capacity as carrier, had by the terms of his contract contracted out of the benefit of s. 502 of the Act, the section, that

* I.e., the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, which, by s. 1, extended the application of the Merchant Shipping Act, 1894, s. 503.

is, which deals with liability for fire. In *Virginia Carolina Chemical Co. v. Norfolk & North American Steam Shipping Co.* (5) ([1912] 1 K.B. 229), it was held by the Court of Appeal, on the construction of the particular contract of carriage in that case, that s. 502 had been excluded. On the other hand, two years later, in *Ingram & Royle, Ltd. v. Services Maritimes du Tréport* (6) ([1914] 1 K.B. 541), on a clause in rather different terms, the Court of Appeal came to the opposite conclusion, and decided that the operation of s. 502 was not excluded. I would add, in relation to those two cases, that the particular decisions in both of them have been specifically approved by the House of Lords in *Louis Dreyfus & Co. v. Tempus Shipping Co.* (7) ([1931] A.C. 726).

In the course of giving judgment in *Ingram & Royle, Ltd. v. Services Maritimes du Tréport* (6), VAUGHAN WILLIAMS, L.J., deals with what had been said by BUCKLEY, L.J., in the *Virginia Carolina* case (5), and goes on as follows ([1914] 1 K.B. at p. 551):

"After stating that the true construction of s. 502 was that it relieved the shipowner in the case of fire not only from his liability as an insurer, but also from his liability under an implied warranty of seaworthiness, the learned lord justice said that it was common ground that it was competent for the shipowner to contract himself out of the benefits conferred by the statute if he used apt words for that purpose in the bill of lading. In my opinion the contract must be clear to that effect. It is not sufficient to show a contract which is reasonably capable of two interpretations. In order to exclude the statute, the court must come to the conclusion that the interpretation which the cargo owners contend for is the true interpretation of the contract, and not merely a possible interpretation of it."

Then, a little later in his judgment, the learned lord justice says this, much to the same effect (*ibid.*, at p. 553):

"Shortly my judgment is this, that *prima facie* there is included in the bill of lading the statutory protection of the shipowners under s. 502. If the protection is not expressly or impliedly excluded, it follows that one starts with the proposition that the conditions in this bill of lading are accompanied by the provision contained in s. 502 for the protection of the shipowners. I have therefore to see if I can find anything in the words of this bill of lading which excludes the operation of that protection."

It seems to me that when I am dealing, as I am in the present case, with s. 503 of the Act, and when I am dealing, not with a contract between carrier and cargo owner, but with a contract between tug and tow, I have, nevertheless, got to approach the problem in exactly the same way; that is to say, s. 503 of the Act applies unless quite clearly it is expressly or impliedly excluded by the terms of the contract. I was reminded by counsel for the plaintiffs that one must approach a consideration of a question of that sort on the basis that the parties should be assumed to be contracting in accordance with the known state of the law. *Prima facie*, therefore, s. 503 applies, in so far as the claim is one for damages, unless I can find some clear provision in the contract which expressly or impliedly excludes its operation.

The case most helpful both to the tug-owners and, more particularly, to the other claimants, who depend entirely on the claim for damages, is that of *The Satanita, Clarke v. Earl of Dunraven* (8) ([1897] A.C. 59), a case which went to the House of Lords. In that case a collision had occurred between two yachts which were engaged in a race in the course of a regatta. In entering their respective yachts for the race, the yacht owners had been required to sign a document undertaking to abide by the rules, one of which provided that in the event of a yacht disobeying any of the rules, the owner was to be liable for "all damages arising therefrom". The question arose whether or not that contractual agreement between the yacht owners excluded the operation of the

A limitation section of the Merchant Shipping Act, which at that time was s. 54 of the Act of 1862. The House of Lords decided the case on the basis that there was a contract, entered into by the respective yacht owners, on the true construction of which the words used, namely, "all damages", excluded the operation of the relevant section of the Merchant Shipping Act. The leading speech was delivered by LORD HALSBURY, L.C., and in the course of it he says
B this ([1897] A.C. at p. 62):

"It has been urged upon us that unless the parties used very clear language they must be supposed to be contracting according to the known state of the law with regard to ships coming into collision. I do not deny that considerations of that sort are intelligible and reasonable. On the
C other hand, I think it cannot be denied that the case of yachts is different from that of merchant vessels."

He then goes on to point out the different conditions in which yachts engaged in a regatta are navigating, as compared with merchant ships carrying on ordinary voyages. He continues (*ibid.*):

"Now, apart from any other consideration, looking to the fact that part
D of the contract is that disobedience of the rules shall make the party who is guilty of the disobedience liable to damages—'all damages'—if I am to assume that the parties must have known what the condition of the law was in reference to ordinary merchant ships, I think the balance is in favour of those who contend that it would have been proper and appropriate, if
E they had intended to have that limitation of liability, to put some words in the contract to place it beyond doubt. These words are not legal words—they are popular words: you pay 'all damages' if you disobey the rules. I cannot help thinking, therefore, that the true intention of the parties (which, after all, is the thing we have to look at) is to be found in the language they have used; and, having regard to the considerations I have referred to,
F it appears to me that the word 'all' has no significance at all unless it is intended to be used in its popular and natural meaning, and that the expression that they are to pay 'all damages' does not mean damages as limited by the Merchant Shipping Act."

In that case the contract which the House of Lords found was a contract to pay "all damages", that is to say it was a contract dealing specifically with
G damages. It is, however, to be remarked, that the clause I am dealing with here does not, on the face of it, deal with damages at all. The words of cl. 3, which I have already read, deal with the liability to pay for all loss or damage that may arise in a certain event. It is true that the word "all" is used in the clause I have before me, just as the word "all" was used, and was very much stressed, in *The Satanita* (8). When one seeks to attach the proper
H construction to the use of a word like that, one must examine the context in which it is used. In *The Satanita* (8) the word "all" was used in a context in which it would have been difficult to find any other meaning for it, except "all" as a matter of quantum. Here, however, the word "all" is used in a context in which it may very well be that on its true construction it refers to "all" kinds of loss or damage. The words I have quoted follow on a long passage in which
I have been enumerated a number of types of loss or damage, for which it is provided that the tug-owner shall not be liable; and I think it may well be that the use of the word "all" in this context implies no more than a reference back to the various kinds of loss or damage previously enumerated; that is to say, it is, in effect, picking up in one word what had been described in a great many words in the preceding lines. If that assumption be right, it gives a meaning to the word "all" without the necessity of inferring that it was intended to refer to the question of quantum. The words of this clause in the contract are by no means clear, and I should find it difficult to say, particularly

as the word "damages"—in the plural—is nowhere mentioned, that the clause made it clear that the parties intended to contract out of s. 503 of the Merchant Shipping Act, in so far as the tug-owners might have a claim for damages. It seems to me that the contract in the present case is, on its true construction, distinguishable from the contract in *The Satanita* (8). In so far as the tug-owners' claim is a claim based on damages for negligence, I should therefore have held, had it been material to do so, that they have not contracted out of s. 503, but that that section still applied to limit the liability in damages of the tow to the tug. For reasons which I have already given, however, that, so far as the tug-owners are concerned, is an academic question; for, in my judgment, they are entitled to recover in full on their alternative claim in contract, pursuant to the authority of *The Stonedale No. 1* (1).

What I have said in relation to s. 503 not being excluded so far as concerns claims for damages for negligence would in any case be fatal to the argument put forward on behalf of the life claimants. I say that because it is not suggested that the life claimants have anything other than a claim for damages. That makes it strictly unnecessary for me to reach any concluded decision on the extremely difficult question which has been canvassed before me, namely, whether, if my decision had been otherwise, the life claimants would have been entitled to rely on the contract between the tug-owners and the tow owners, so as to exclude the operation of s. 503. The point has, however, been taken on behalf of the life claimants that the tug-owners, in making their contract with the plaintiffs, were acting not only for themselves, but also as agents for the crew of the tug. If that be right, and if I had been able to hold that the terms of the contract were such as to exclude the operation of s. 503 in relation to claims for damages, then it is said that the life claimants would be entitled to the benefit of the contract. In support of the general proposition that owners of a ship can bind the master and crew by the contracts into which they enter, the decision in *The Friesland* (9) ([1904] P. 345), was cited to me. It seems to me, however, that that is a decision which should not be pressed too far. It has to be borne in mind that the question which arose there arose in connection with a right to salvage, as to which I may properly remark that a master and crew have very special rights; and I am not for the moment satisfied in those circumstances that the decision in *The Friesland* (9) can properly be invoked as applicable to a contract of this sort.

More support for the argument on behalf of the life claimants is to be derived from the principles underlying the decision of the Court of Appeal in *Adler v. Dickson* (10) ([1954] 3 All E.R. 397). That case was the converse of the present case. It did not involve a claim of any sort by a master and crew against a third party. It was the reverse case of a claim by an outside party against a master and crew who, by way of defence, claimed to be protected by the terms of the passenger's ticket, into which the passenger had entered with the employers of the master and crew. On the facts of the particular case it was held that the master and crew were not entitled to rely on the exemptions contained in the owners' contract. It is to be observed, when one studies the facts of that particular case, that the clause relied on only purported to protect the owners, and did not purport to protect the owners' employees. In the course of the case there was considerable citation of authority, and I think that it was recognised by at least a majority of the court that there may be cases in which a shipowner, in contracting with outside parties, is held to contract on behalf of the master and crew so as to bind them, that is to say, cases where a shipowner may stipulate for exemption from liability not only for himself, but for his servants. DENNING, L.J., says ([1954] 3 All E.R. at p. 402):

"My conclusion, therefore, is that, in the carriage of passengers as well as of goods, the law permits a carrier to stipulate for exemption from liability

A not only for himself but also for those whom he engages to carry out the contract: and this can be done by necessary implication as well as by express words. When such a stipulation is made, it is effective to protect those who render services under the contract, although they were not parties to it, subject, however, to this important qualification: The injured party must assent to the exemption of those persons. His assent may be given expressly or by necessary implication, but assent he must before he is bound: for it is clear law that an injured party is not to be deprived of his rights at common law except by a contract freely and deliberately entered into by him; and all the more so when the wrongdoer was not a party to the contract, but only participated in the performance of it."

C I think it is true to say that that expression of view on the part of DENNING, L.J., was not, at any rate, wholly supported by JENKINS, L.J., although all the members of the court agreed in the decision of the case. It does seem to me, however, that support for DENNING, L.J.'s view is to be derived from what MORRIS, L.J., said; for he also appears to have recognised the possibility of an employer contracting on behalf of his servants.

D If it be right that it is possible, in a proper case, for a master and crew to rely for purposes of defence on the terms of a contract between their owners and a third party, it seems to follow logically that they should equally be entitled to do so in a case such as the present where, for instance, they are resisting a claim for limitation of liability. The question is whether the contract can clearly be seen to have been entered into by the employers of the master and crew, not only on their own behalf, but also on behalf of the master and crew. As I have said, in *Adler v. Dickson* (10) the court decided that the particular contract was not one entered into on behalf of the master and crew. In the present case it seems to me that there is material which might well justify the view that the tug-owners, in making this contract, were contracting not only on behalf of themselves, but also as agents for the master and crew. As has been pointed out by counsel for the life claimants, this contract throughout its important clauses makes specific provisions with regard to the rights and immunities of the tug-master and crew of the tug. It seems to me that the provisions of cl. 2, whereby the master and crew are made during the currency of the contract the temporary servants of the hirer, are not unimportant, and support the inference that the contract was intended to be made on behalf of the master and crew, as well as on behalf of the owners. Similarly with regard to the references to personal injury and loss of life in cl. 3, and again in cl. 4. With regard to cl. 4, I would say in passing that, in so far as it is material to the present case, I should desire to adopt the construction of that clause which was put on it by ATKINSON, J., in *Great Western Ry. Co. v. Royal Norwegian Government* (11) ((1945), 78 Lloyd's Rep. 152). Looking at all these clauses together, there is, in my judgment material for drawing the inference that the tug-owners in the present case, in making this contract with the ship, were contracting not only on behalf of themselves, but also as agents for their master and crew. To that extent I should feel disposed to accede to the argument of counsel for the life claimants. However that may be, in my judgment this contract does not, on its true construction, exclude the operation of s. 503 of the Merchant Shipping Act, 1894, so far as claims for damages are concerned, and life claimants can bring only claims for damages.

I In those circumstances the result of my judgment on the preliminary point is that the tug-owners are entitled on their contractual claim to recover their damages in full. So far as concerns that claim, the plaintiffs are not entitled to the benefit of limitation of liability. On the other hand, so far as concerns

the claims of the life claimants, which are claims for damages, I hold that the plaintiffs are entitled to the benefit of s. 503. A

Order accordingly.

Solicitors: *Middleton, Lewis & Co.*, agents for *H. K. & H. S. Bloomer & Co.*, Great Grimsby (for the plaintiffs); *Andrew M. Jackson & Co.*, Hull (for the tug-owners); *Botterell & Roche*, agents for *Brown & Son*, Great Grimsby (for the other defendants). B

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

COMMISSIONERS OF CUSTOMS AND EXCISE v. I.F.S. IRISH FULLY FASHIONED STOCKINGS, LTD. C

[QUEEN'S BENCH DIVISION (Ashworth, J.), December 13, 1956.]

Practice—Service—Service on foreign company—Action by Commissioners of Customs and Excise for condemnation of seized goods—Notice of claim by solicitors in London acting on behalf of foreign company—Writ served on solicitors more than a year later—Customs and Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 44), Sch. 7, para. 4—R.S.C., Ord. 13, r. 2. D

Customs—Service of writ claiming condemnation of seized goods—Notice of claim given by solicitors acting for company with registered office abroad—Service of writ on solicitors more than a year later—Whether writ properly served on company—Customs and Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 44), Sch. 7, para. 4. E

In July, 1955, the plaintiffs, the Commissioners of Customs and Excise, seized certain imported goods. Pursuant to Sch. 7 to the Customs and Excise Act, 1952, notices of seizure were served on the consignees of the goods and on the defendants, a company whose registered office was in Dublin. In a letter to the plaintiffs, dated Aug. 26, 1955, a firm of solicitors in London referred to the notice of seizure and wrote that they were acting for the defendants, that they thereby gave notice under Sch. 7, para. 3, to the Act of 1952 claiming that the goods were not liable to forfeiture, and stated (pursuant to para. 4* of that Schedule) that they were authorised to accept service of process and to act on the defendants' behalf. On July 2, 1956, the plaintiffs issued a specially indorsed writ against the defendants claiming forfeiture and condemnation of the goods. The writ and a copy thereof were sent to the solicitors, no notice of change of solicitors having been given to the plaintiffs. On Aug. 17, 1956, the solicitors returned the writ and copy, saying that they were unable to obtain confirmation of their instructions to accept service. The plaintiffs, wishing to proceed to judgment in default of appearance, sought to file, under R.S.C., Ord. 13, r. 2†, an affidavit of service of the writ by the sending of the original and copy writ to the solicitors. On appeal from a ruling of the master that the affidavit should not be accepted for filing, F

Held: the affidavit was a sufficient affidavit of service for the purpose of R.S.C., Ord. 13, r. 2, because by para. 4 of Sch. 7 to the Customs and Excise Act, 1952, the sending of the original and copy writ to the solicitors was deemed to be proper service, at any rate in the absence of any notification such as, e.g., notice of change of solicitors from the defendants. G

Per CURIAM: there is nothing in R.S.C., Ord. 11, r. 1, which would justify a court in permitting service of this writ [i.e., a writ claiming forfeiture and condemnation of goods] out of the jurisdiction (see p. 111, letter F, post). H

Appeal allowed. I

* The terms of para. 4 are set out in the footnote at p. 111, post.

† The relevant terms of R.S.C., Ord. 13, r. 2, are printed at p. 109, letter I, post.

A [**Editorial Note.** The sufficiency of the service in the present case was the consequence of an enactment of the Customs and Excise Act, 1952, applying only where notice of claim is given by a person outside the jurisdiction. In general, however, service of process for the purposes of proceedings under customs or excise Acts, not being proceedings in the High Court, is governed by s. 282 of the Act of 1952 by which service should be personal or by leaving the process

B at the last known place of abode or business, or (in the case of a body corporate) the registered or principal office, of the person to be served. In the High Court the ordinary rules apply save where superseded, as here, by special enactment or in relation to service on the Crown which is governed by s. 18 of the Crown Proceedings Act, 1947 (6 HALSBURY'S STATUTES (2nd Edn.) 60).

C For the Customs and Excise Act, 1952, Sch. 7, see 32 HALSBURY'S STATUTES (2nd Edn.) 910.]

Appeal.

This was an appeal, ex parte, by the plaintiffs, the Commissioners of Customs and Excise, from a ruling of Master BURNAND given on Dec. 3, 1956.

D The defendants were a company incorporated in the Republic of Ireland. After notice of seizure of certain goods which had been consigned to consignees in England and in which the defendants were interested, had been given to the defendants, I.F.S. Irish Fully Fashioned Stockings, Ltd., the plaintiffs received from a firm of solicitors in London a letter, dated Aug. 26, 1955, and giving notice of claim under Sch. 7, para. 3, to the Customs and Excise Act, 1952. The solicitors' letter stated, among other things, that they were acting on behalf of the defend-

E ants and were authorised to accept service of process on their behalf. On July 2, 1956, the plaintiffs issued a specially indorsed writ claiming forfeiture and condemnation of the goods on the ground that they were imported in contravention of the Import of Goods (Control) Order, 1954 (S.I. 1954 No. 23). The plaintiffs sent the original writ and a copy of it for service to the solicitors and requested them to accept service on behalf of the defendants. The writ and copy were returned, however, by the solicitors on the ground that they were unable to

F obtain confirmation of their instructions to accept service. On the plaintiffs' presenting an affidavit of service of the writ for filing pursuant to R.S.C., Ord. 13, r. 2, with a view to proceeding in default of appearance, the affidavit was referred to Master BURNAND, whose decision, indorsed thereon, was in these terms:

G "As the defendants had withdrawn their instructions from [the solicitors] to accept service, it is necessary to serve the defendants in the Republic of Ireland."

H The plaintiffs appealed on the ground that service had been effected pursuant to para. 4 of Sch. 7 to the Act of 1952 by sending the original and copy writ to the solicitors. The appeal came before ASHWORTH, J., in chambers, but judgment was given in open court.

Rodger Winn for the plaintiffs.

I **ASHWORTH, J.:** This matter comes before me by way of appeal from a ruling given by Master BURNAND, who had before him an affidavit by Mr. James Arthur David Heal purporting (and, as will appear, in my view correctly purporting) to verify service of a writ on the defendants. R.S.C., Ord. 13, r. 2, provides:

"Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance . . . he shall, before taking such proceedings upon default, file an affidavit of service . . ."

Very properly this affidavit of service was filed and was considered by the master. He took the view indorsed on the affidavit:

"As the defendants have withdrawn their instructions from Herbert

Smith & Co., to accept service, it is necessary to serve the defendants in the Republic of Ireland."

That is where their registered office is.

Before setting out my reasons for disagreeing with the learned master, I should state briefly the facts of the case. The writ was issued on July 2, 1956. The plaintiffs are the Commissioners of Customs and Excise and the defendants are a company whose registered office is situated in Dublin. The statement of claim indorsed on the writ claims an order of condemnation in respect of a large quantity of stockings. The stockings arrived in this country in January, 1955, and were seized by officers of the plaintiffs in July, 1955. In pursuance of para. 1 of Sch. 7 to the Customs and Excise Act, 1952, notices of seizure dated July 28, 1955, and Aug. 10, 1955, respectively, were sent to the consignees of the stockings, a company in London, and to the defendants. By a letter dated Aug. 26, 1955, Messrs. Herbert Smith & Co., solicitors, wrote to the plaintiffs, or to their officer in Birmingham, referring to the notice of seizure dated July 28. The letter proceeds:

"We are acting on behalf of the present defendants of whose interest in this seizure you are already aware. On their instructions we hereby give you notice under para. 3 of Sch. 7 of the Act of 1952 that they claim that the said goods are not liable to forfeiture. Kindly note that we are authorised to accept service of process and to act on our clients' behalf."

Notice of the plaintiffs' intention to take proceedings was evidently given at some date in June, 1956, because on July 2, 1956, Mr. Heal, on behalf of the plaintiffs, wrote to Messrs. Herbert Smith & Co.:

"Further to my letter of June 19, the writ herein has now been issued and I enclose the specially indorsed original writ plus a copy for service and a copy of the schedule referred to in para. 3 of the statement of claim. Please will you be good enough to indorse your acceptance of the service on the original writ and return it to me, acknowledging at the same time the receipt of the other documents."

On the following day Messrs. Herbert Smith & Co. replied to the effect that the gentleman dealing with the matter was on holiday. On his return from holiday a letter was sent by Messrs. Herbert Smith & Co., dated Aug. 17, to the solicitor acting for the plaintiffs. In that letter Messrs. Herbert Smith & Co. stated:

"We refer to our letter of July 7 and regret the delay in dealing with this matter. We regret we are unable to obtain confirmation of our instructions to accept service herein, and we therefore have no alternative but to return to you the original and copy writ and the schedule."

The plaintiffs, by their solicitor, replied on Aug. 22, making a further effort to persuade Messrs. Herbert Smith & Co. to accept service, but they were unsuccessful, and the matter, in effect, reached deadlock. Mr. Heal has sworn an affidavit in which he says that he spoke by telephone to a partner in the above firm of solicitors, who told him that the defendant company had ceased trading.

The plaintiffs are anxious to proceed and to obtain an order of condemnation. They take the view (with which I agree) that, in the circumstances of this case, Sch. 7 to the Act of 1952 compels them to take proceedings. The reason for that view is that para. 6 of Sch. 7 provides:

"Where notice of claim in respect of any thing is duly given in accordance with the foregoing provisions of this Schedule, the commissioners shall take proceedings for the condemnation of that thing by the court, and if the court finds that the thing was at the time of seizure liable to forfeiture the court shall condemn it as forfeited."

A In my view, it is plain beyond dispute that in this case a notice of claim in respect of the stockings was given, and, further, that the notice was "duly given in accordance with the foregoing provisions of [the] Schedule", because it specified "the name and address of the claimant", as required by para. 4, and, inasmuch as the claimants (the present defendants) were resident outside the United Kingdom, the notice duly specified "the name and address of a solicitor in the United Kingdom who is authorised to accept service of process and to act on behalf of the claimant . . .". That notice was, in my view, the letter of Aug. 26, 1955, from Messrs. Herbert Smith & Co., and having received it, the plaintiffs were compelled under para. 6 to take proceedings.

C It so happens that some nine months later, when the plaintiffs take proceedings, Messrs. Herbert Smith & Co. are no longer in a position to accept service of the writ. None the less, no notice of change of solicitor has been given by the defendants, nor is it suggested that Messrs. Herbert Smith & Co. have dissolved partnership and ceased to exist as a firm. What the position would be in either of those events, or in other circumstances which are not before me, I think that it is preferable not to discuss. In the present case the firm of solicitors who were specified in the notice of claim are in existence, and it seems to me that the provisions of Sch. 7 are such as to render service on those solicitors, not only good service, but the only proper service in the absence of any other notification from the defendants.

E The words on which counsel for the plaintiffs relies are those at the end of para. 4*: ". . . service of process upon a solicitor so specified shall be deemed to be proper service upon the claimant". For my part, I attach importance to the use of the expression, "deemed to be proper service". As in so many cases, those words are apt to deal with a situation in which it might possibly be argued that the service was not proper, but the words provide that service in the particular form shall be deemed to be proper and so to put beyond the reach of argument the effect of service which has been carried out in compliance with the provisions of para. 4 of Sch. 7.

F I was referred to R.S.C., Ord. 11, r. 1, and I share the view taken by the plaintiffs that there is nothing in that rule which would justify a court in permitting service of this writ out of the jurisdiction in purported pursuance of that order. There may well be substance in the point which was brought to my notice, namely, that the wording of Sch. 7, para. 4, to the Act of 1952 has been chosen with care by a draftsman who was conscious of the fact that, unless he inserted some such provision, it might not be possible to effect proper or adequate service on a claimant outside the jurisdiction, at any rate without amending R.S.C., Ord. 11. I can summarise my view in a sentence, and it is this. The plaintiffs, in the circumstances, were bound to take proceedings; Sch. 7, para. 4, to the Act of 1952 provides what shall be deemed to be proper service; they have carried out the requirements laid down in Sch. 7 which show what is needed before proper service shall be deemed to have occurred. In the circumstances I propose to direct that the affidavit of service of Mr. J. A. D. Heal, sworn on Nov. 30, 1956, is a sufficient affidavit of service for the purposes of R.S.C., Ord. 13, r. 2.

Appeal allowed.

Solicitor: *Solicitor of Customs and Excise* (for the plaintiffs).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* The full text of Sch. 7, para. 4, reads: "Any notice under [para. 3] shall specify the name and address of the claimant, and, in the case of a claimant who is outside the United Kingdom, shall specify the name and address of a solicitor in the United Kingdom who is authorised to accept service of process and to act on behalf of the claimant; and service of process upon a solicitor so specified shall be deemed to be proper service upon the claimant."

R. v. COUNTY LICENSING (STAGE PLAYS) COMMITTEE OF
FLINT COUNTY COUNCIL, *Ex parte* BARRETT.

[COURT OF APPEAL (Singleton, Jenkins and Parker, L.J.J.), December 17, 18, 1956.]

Theatre—Licence for the performance of stage plays—Renewal—Condition attached prohibiting theatre from selling intoxicating liquor or tobacco—Rules for ensuring order and decency—Proximity to theatre of a licensed house—Unconditional licence held for many years without complaint—Neighbouring theatre with conditional licence refused unconditional licence—Matters to be considered by and procedure of licensing authority on application to renew licence—Theatres Act, 1843 (6 & 7 Vict. c. 68), s. 5, s. 9.

The manager of a theatre, who for a number of years had held a licence for the performance of stage plays and the sale of intoxicating liquor and tobacco at the theatre, applied to the licensing committee for the renewal of the licence. At the same time another applicant applied to the committee for a similar unrestricted licence for another theatre in respect of which a restricted licence had been held for some years, viz., a licence subject to general rules for enforcing order and decency in theatres made under s. 9 of the Theatres Act, 1843*, including a rule prohibiting the sale of intoxicating liquor and tobacco in the theatre. The committee granted to the second theatre a restricted licence on the ground that there were adequate licensed premises nearby. The application by the manager of the first theatre was then heard. It was unopposed and there was no argument. The committee, without adjourning the application for argument, decided that, although an unrestricted licence had been granted for many years, and there had never been any cause for complaint against the first theatre, the grounds on which they had restricted the licence granted to the second theatre applied to the first theatre with even greater force, since a large hotel with a number of bars adjoined the first theatre. Accordingly they granted only a similar restricted licence to the first theatre, as they felt that their decisions must be consistent if justice were to be done between applicants. The manager was taken by surprise by this decision. He applied for mandamus to the committee to re-hear his application for an unrestricted licence. On appeal by him against the dismissal of his motion for mandamus,

Held: a mandamus to the committee to re-hear and determine the application according to law would be granted for the following reasons—

(i) the application for an unrestricted licence should have been considered on its merits and the restriction against sale of intoxicating liquor and tobacco should not have been imposed merely for consistency with the imposition of a like restriction on the previous application in relation to the other theatre.

(ii) the committee ought to have considered the long and blameless record of the theatre and the facts that unrestricted licences had been granted for over fifty years and that there had been no change in circumstances.

(iii) (per SINGLETON and PARKER, L.J.J.) there was no evidence that the imposition of the condition would promote order and decency in the theatre (see p. 118, letter I, to p. 119, letter A, and p. 124, letter D, post).

R. v. West Riding of Yorkshire County Council ([1896] 2 Q.B. 386) and *R. v. Sheerness Urban District Council* ((1898), 62 J.P. 563) explained and distinguished. *Sharp v. Wakefield* ([1891] A.C. 173) considered, and observations of LORD HALSBURY, L.C. (ibid., at p. 181) applied by PARKER, L.J.

* The terms of s. 5 and s. 9 of the Theatres Act, 1843, are printed at p. 114, letters C and F, post.

A Per PARKER, L.J.: I can see no possible reason for saying that it is necessary in order to preserve order and decency to provide that the sale of tobacco should be prohibited while, at the same time, the patrons can bring all the tobacco and cigarettes they like and smoke them in the theatre (see p. 124, letter F, post).

B Observations on the procedure to be followed if a licensing authority are considering imposing new restrictions on the occasion of a renewal of a licence (see per SINGLETON, L.J., p. 118, letters E and F, post).

Decision of the DIVISIONAL COURT ([1956] 3 All E.R. 535) reversed.

[**Editorial Note.** Restrictions may be imposed either as conditions of granting a licence under s. 5 of the Theatres Act, 1843, or by way of rules made under s. 9 of the Act. Although s. 5 of the Theatres Act, 1843, does not expressly state that a condition can be imposed on the grant of a new licence, the power to impose it is impliedly conferred, and for this purpose the committee may consider, on an application for a new licence, the locality and the existence of other facilities for obtaining liquor (see e.g., per PARKER, L.J., at p. 123, letter E, post).

D There is a similar power where a licence is being renewed, but in that case other considerations also arise, such as are indicated at (ii) p. 112, ante. The question what is a "suitable rule for ensuring order and decency" is relevant only where the power being exercised is that conferred by s. 9 of the Act of 1843, not that implied by s. 5. In the present case the power exercised by the committee was that conferred by s. 9.

E As to the granting of retail licences to sell intoxicating liquor in theatres, see 19 HALSBURY'S LAWS (2nd Edn.) 123, para. 291; and for cases on the subject, see 30 DIGEST (Repl.) 83, 636-640.

For the Theatres Act, 1843, s. 5, s. 9, see 25 HALSBURY'S STATUTES (2nd Edn.) 21, 24.]

Cases referred to:

- F (1) *R. v. West Riding of Yorkshire County Council*, [1896] 2 Q.B. 386; 65 L.J.M.C. 136; 75 L.T. 252; 60 J.P. 550; 30 Digest (Repl.) 83, 638.
 (2) *R. v. Sheerness Urban District Council*, (1898), 62 J.P. 563; 14 T.L.R. 533; 30 Digest (Repl.) 83, 640.
 (3) *R. v. Sylvester*, (1862), 2 B. & S. 322; 31 L.J.M.C. 93; 5 L.T. 794; 26 J.P. 151; 121 E.R. 1093; 30 Digest (Repl.) 30, 197.
 G (4) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 30 Digest (Repl.) 12, 51.

Appeal.

H This was an appeal by the licensee of a theatre against the dismissal by the Queen's Bench Divisional Court (reported [1956] 3 All E.R. 535) of his motion for an order of mandamus directed to the licensing committee who had imposed on his licence a condition that no intoxicating liquors or tobacco be sold in the theatre. The facts appear in the judgment of SINGLETON, L.J.

H. Edmund Davies, Q.C., and *R. G. Waterhouse* for the applicant licensee.

J. C. Llewellyn for the licensing committee.

I SINGLETON, L.J.: This is an appeal from an order of the Divisional Court made on Oct. 17, this year. We had before us some little time ago an application to expedite the hearing of the appeal for what appeared to us to be good reasons, and we agreed to do so if possible; it was found convenient that the appeal should be heard yesterday and today. There was before the Divisional Court a motion on behalf of Mr. Thomas Wesley Barrett for an order of mandamus directed to the County Licensing (Stage Plays) Committee of the County Council of the County of Flint commanding it to hear and determine according

to law an application dated Feb. 11, 1956, by the said Thomas Wesley Barrett for the renewal of the theatrical licence in respect of the Queen's Theatre, Rhyl, in the said county, under the same terms and conditions as before. A

The application for an annual theatrical licence in respect of the Queen's Theatre was made in writing, and the committee which has to deal with such matters met on Mar. 9, 1956, at Rhyl. Mr. Barrett, who was the applicant, is an accountant and secretary of Rhyl Entertainments, Ltd. and he is the responsible manager of the theatre. B

The granting of theatrical licences is governed by the Theatres Act, 1843. By s. 5 of the Act*,

" . . . The justices of the peace within every county, riding, division, liberty, cinque port, city, and borough in Great Britain beyond the limits of the authority of the lord chamberlain, in which application shall have been made to them for any such licence as is hereinafter mentioned, shall, within twenty-one days next after such application shall have been made to them in writing signed by the party making the same, and countersigned by at least two justices acting in and for the division within which the property proposed to be licensed shall be situate, and delivered to the clerk to the said justices, hold a special session in the division, district, or place for which they usually act, for granting licences to houses for the performance of stage plays, of the holding of which session seven days notice shall be given by their clerk to each of the justices acting within such division, district, or place." C D

By the Local Government Act, 1888, s. 7, the council of a county or county borough became the licensing authority. Provision was made in the Act† for delegating their powers to a committee, and the County Council of Flintshire in due course delegated their powers to the committee which heard the application of Mr. Barrett in March of this year. There is a further provision in s. 9 of the Act of 1843, which is headed: " Rules for enforcing order in the theatres licensed by the justices ", and which reads: E

" . . . The said justices of the peace at a special licensing session, or at some adjournment thereof, shall make suitable rules for insuring order and decency at the several theatres licensed by them within their jurisdiction, and for regulating the times during which they shall severally be allowed to be open, and from time to time, at another special session, of which notice shall be given as aforesaid, may rescind or alter such rules . . . " F G

There is power under s. 9 for the Secretary of State to rescind or alter such rules and to make rules for a like purpose.

It appears that a set of rules which was made under the powers given by s. 9 has been adopted, and that those rules are in use throughout England and Wales. H

The rules are headed " Theatrical Licences Rules " of which No. 3 reads:

" No spirituous liquors, wine, ale, beer, porter, cider, perry, or tobacco shall be sold or disposed of in the theatre." I

The committee, when granting a theatrical licence, may include such of these rules as they think proper, and they may strike out any one of the rules which they do not think ought to be applied. In many cases, I dare say in the great majority of cases, it is the practice to strike out r. 3. I do not know whether it is right to say that in most houses to which a theatrical licence attaches, the sale of intoxicating liquor and the sale of cigarettes is allowed; I should imagine

* The section was amended by the repeal of certain words, not printed above, at the end thereof by the Justices of the Peace Act, 1949, s. 46 (2), Sch. 7, Part 3.

† See now s. 85 (1) of the Local Government Act, 1933.

A that in most it is allowed. The Queen's Theatre, Rhyl, with which we are immediately concerned, was first opened in the year 1901, and apart from a short period in the year 1907 when it was being rebuilt after a fire, it has been continuously licensed as a theatre, or perhaps sometimes as a cinema-house; and during all those years the management has been allowed to sell intoxicating liquor and tobacco.

B A person who obtains a theatrical licence under the Act of 1843 can apply to the excise authority for a licence to sell intoxicating liquor; no application to the justices is necessary*. As a rule it may be said that, if he has the theatrical licence, he will obtain an excise licence to enable him to sell on the premises intoxicating liquor, and a licence to sell tobacco. In the case of the Queen's Theatre, Rhyl, r. 3 was struck out when a theatrical licence was obtained. For
C fifty-four years, with the slight interval I have mentioned, the management had been able to sell intoxicating liquor. There were two bars in the theatre. No complaint has ever been made against the conduct of the house or against the conduct of the bars, nor has any other complaint been made, so far as the information before this court shows.

After he had given written notice of his application for a licence for another
D year, the applicant, the manager, appeared before the committee on Mar. 9, 1956, at the Town Hall at Rhyl, and it so happened that on the same occasion there was one other application of some little importance. That was an application of a like kind by the manager of the Pavilion Theatre, Rhyl, the owners of which appear to be the Rhyl Urban District Council. The Pavilion Theatre had not a licence for the sale of intoxicating liquor; it had not had one for some
E years, though I think I am right in saying it had one for a year some time ago.

I have before me the affidavit of Mr. Richard Stephen Davies, the chairman of the committee which had to consider these matters. He deposes in para. 6:

"The applicant then asked for the grant of a theatrical licence in respect of the Queen's Theatre aforesaid. This application was not opposed and the
F applicant made no submission to the committee in support of his application."

For year after year the application of Mr. Barrett for a licence had gone through as a formality, and the licence had been granted with r. 3 of the conditions struck out. In para. 7 the chairman says:

"The committee then retired to consider the aforesaid applications† and
G upon retiring, we were advised by the clerk of the committee that we had a discretion to allow or refuse the applications to delete the said r. 3 from the conditions attaching to the grant of a theatrical licence in either or both cases; but that our discretion must be exercised properly in a judicial and reasoned way"—

H that was quite right.

Paragraphs 8 and 9 read as follows:

"8. The committee first considered the application relating to the Pavilion Theatre aforesaid and most of the members of the committee were of the opinion that it was unnecessary and undesirable to provide
I drinking facilities at this theatre because there were adequate facilities already provided at nearby licensed premises. It was decided by a substantial majority that this application be granted but that the said r. 3 should not be deleted from the conditions attached to the theatrical licence for this theatre.

* See the Customs and Excise Act, 1952, s. 150 (2).

† The applications were those on behalf of the Pavilion Theatre and the one before the court.

"9. The committee thereupon considered the applicant's application and the view was expressed that the grounds upon which the committee had refused to delete the said r. 3 from the conditions attaching to the theatrical licence for the Pavilion Theatre aforesaid (which is situated a short distance from the Queen's Theatre aforesaid) applied with even greater force to the Queen's Theatre in that it was known to members of the committee that a large hotel with a number of bars adjoined the Queen's Theatre and that patrons of this theatre could obtain access thereto by crossing a narrow covered arcade. It was pointed out by me and the clerk of the committee that the Queen's Theatre had hitherto been granted theatrical licences with r. 3 deleted from the conditions attached thereto, but it was felt by members of the committee that this did not fetter their discretion in considering the present application. Members expressed the view that, whatever had been done in the past, it was their duty to consider the present application on its merits as they saw them and that their decisions must be consistent if justice was to be done as between applicants. It was unanimously agreed that the applicant's application to delete the said r. 3 from the conditions attaching to the grant of a theatrical licence should be refused and that a theatrical licence for the year 1956-57 should be granted in respect of this theatre, subject inter alia, to compliance with the said r. 3."

Thus, after fifty-four years during which a licence had been granted with r. 3 deleted, that rule is to apply from March, 1956; the two bars which have existed in the theatre for many years become useless; the proprietors of the theatre cannot sell intoxicating liquor, nor can they sell even a packet of cigarettes, though people are allowed to smoke in the house.

It was considered by the committee better that those who desired to have a drink should go out of the house altogether to some nearby hotel or public house and have their drink there, at which place they would not have the advantage of a bell sounding in the bar to summon them back to their places in the theatre, and although on their return they might cause a certain amount of discomfort to those who had remained in their seats in the theatre. The management of the Queen's Theatre took objection, and they applied to the Divisional Court for an order of mandamus.

LORD GODDARD, C.J., HALLETT and DONOVAN, JJ., were all sympathetic towards the motion or application, but they felt that in law they had no power other than to dismiss the motion. Thus the appeal comes to this court.

I draw attention to the words of the chairman in para. 9 of the affidavit:

"Members expressed the view that, whatever had been done in the past, it was their duty to consider the present application on its merits as they saw them and that their decisions must be consistent if justice was to be done as between applicants."

Counsel for the applicant would have us read that short statement as meaning that having refused to delete r. 3 in the case of the Pavilion Theatre, the committee thought that they must do the same in regard to the Queen's Theatre, for they must be consistent if justice was to be done between applicants. That is not the right way of approach to the matter. Every application of this kind should be considered on its merits; an application should not be refused merely because an earlier one on behalf of someone else had been refused. Members of a committee ought not to be afraid of someone saying: "Well, they were not consistent". Their duty is to do justice on the facts of a particular application before them.

A The Divisional Court held that their hands were tied by two cases which were cited to them. The first is *R. v. West Riding of Yorkshire County Council* (1) ([1896] 2 Q.B. 386), in which it was held that:

B “A county council acting as the licensing authority for the performance of stage plays may, in the exercise of their discretion, attach to the grant of a licence for such performances a condition that the grantee shall undertake not to apply to the excise authorities under 5 & 6 Will. IV, c. 39, s. 7, for an excise licence to sell intoxicating liquors in his theatre.”

C As far as the report of the case shows, no mention was made of s. 9 of the Act of 1843. It may well be that the decision was arrived at under the general power to grant a licence under s. 5 of the Act, and CAVE, J., said (*ibid.*, at p. 388):

D “The propriety of allowing the sale of liquor in a theatre may vary very much according to the locality in which the theatre is situate, or the character of the theatre itself. It is a matter which might very properly be taken into consideration that there was a place where liquor could be obtained within a few yards of this very theatre. I cannot say that the committee have exercised their discretion wrongly.”

WILLS, J., said (*ibid.*, at p. 389):

E “One of the grounds upon which it is well recognised that justices may fairly refuse a licence to a public-house is that there are already too many public-houses in the immediate neighbourhood. There is already a public-house within twenty yards of this theatre. If, then, an unconditional licence were granted to the theatre, the effect would be to multiply facilities for drinking, and it is a neighbourhood in which it is not desirable to do so. If that is not a good ground for the exercise of their discretion by the committee in the way they have done, I cannot conceive what is.”

F I would not have it thought that, if there is an application for a new theatrical licence, the committee which has to consider the matter may not, in considering whether or not they should include r. 3 in the rules under which the house is to be conducted, look on the neighbourhood in general and on the other facilities for drinking which exist in the immediate neighbourhood. There may be conditions which make it desirable that they should do so. Counsel for the applicant submitted to this court that those matters were not relevant and ought not to be considered. In some cases it seems to me that they will be relevant, and a matter for consideration of the committee, as was said by the Divisional Court in the year 1896, and that view appears to me to have been upheld in the other case cited to the Divisional Court, *R. v. Sheerness Urban District Council* (2) ((1898), 62 J.P. 563), where the court held that r. 3 was not *ultra vires*.

H A. L. SMITH, L.J., said (*ibid.*, at p. 564):

I “The town clerk then pointed out r. 3 to the council, and further pointed out that the rule stands until it is rescinded. I am of opinion that the district council were not bound hand and foot by the resolution adopting the rules, but did hear the facts on both sides, that is to say, the evidence concerning the two clubs and a public house being so near the theatre. I do not think it necessary for this decision to discuss *R. v. West Riding of Yorkshire County Council* (1) ([1896] 2 Q.B. 386) and, furthermore, I am of opinion that the case of *R. v. Sylvester* (3) ((1862), 31 L.J.M.C. 93) has no application to this case, as there the justices refused to hear any application unless the rules had been conformed with. For these reasons I am of opinion that the rule for a mandamus must be refused.”

RIGBY, L.J., said (62 J.P. at p. 564):

"I am of the same opinion, inasmuch as I do not consider the rules ultra vires, and think the district council were bound by them. Furthermore, it appears to me that the district council did 'hear and determine' the application, and, therefore, this is not a case for mandamus."

I do not think that the argument of counsel for the applicant, to the effect that the committee are not entitled to consider the locality or the fact there are public houses within a short distance of the theatre, is sound. In this case, however, there are other matters for consideration which appear to me not to have been considered by the committee. It may be that that arises in part from the fact that they did not hear any argument or submissions. The applicant had no reason to think that there was any likelihood of a change being made in the terms of his licence. There was, so far as he knew, no opposition; there was none in fact, there had not been for a number of years. He applied in the ordinary way; he was not represented, but for some reason the committee thought that a change ought to be made. I am not sure what the reason was, unless it was that they thought that their decisions ought to be consistent in the two cases; certainly none is shown in the affidavit of the applicant or in the affidavit of Mr. Davies*, but the committee decided on a change. When they came back they announced their decision; thus their decision was given without any argument, and without any representation by the management of the theatre other than the fact that their manager was there and formally applied.

Counsel for the applicant submitted that the committee did not hear and determine this particular application according to law. It appears to me that if a change such as this is to be made, the committee ought to state their intention, to ask the applicant if he would like to be represented, and to have argument on the matter, and to indicate that, if that was desired, they would adjourn the application until a later date. That would give an opportunity for argument, and, if that course is followed in any such case, it enables the party applying to put his submissions before the committee reach a final decision on the matter. That would be a desirable practice. There is substance in the submission that the change was made without hearing any submissions, and that r. 3 is to be applied against the holder of the licence. This change prevents the sale of intoxicating liquor as well as of tobacco, and means, I should imagine, considerable loss of income, and loss of space in the house, against the construction and management of which not a word has been said at any time. That appears to me to make it desirable that the case should be considered again by the committee: and there are other reasons.

The affidavit by Mr. Barrett, the applicant, has attached to it the form of licence which is granted, and it ends with the proviso:

"Provided that the said Thomas Wesley Barrett do observe and keep rules for ensuring order and decency at and in the said building so licensed as aforesaid, and for regulating the times during which the said building shall be allowed to be open",

a copy of which rules and recommendations are attached to the case; that is followed by a copy of the rules, of which there are thirty-four, one or two of which were struck out. From the proviso it appears that the rules are made under s. 9 of the Act, which is the section giving power to make suitable rules for ensuring order and decency.

I find it difficult to say that you promote the object of ensuring order and decency at and in the said building by including in the rules r. 3, that is by compelling anyone who wishes to have a drink to go out of the theatre, returning at some later time. I can understand that it might be an advantage in some

* The relevant parts of the affidavit of Mr. Davies, the chairman of the committee, are set out at p. 116, letters A to D, ante.

A cases, in some places, but when you have the case of a theatre which has existed since the year 1901 without complaint, and in regard to which it has not been hinted that there was any lack of order and decency, I do not consider that a departure from the custom of fifty odd years in the way proposed would ensure order and decency. It was there already, and no one says to the contrary.

B These matters are delegated to the committee. It is the committee's duty to consider them, and this court ought to be slow to say anything which would take away anything from the authority of the committee. At the same time if, as in this case, all the evidence points one way, and one way only, I do not think it is right, certainly it is not desirable, for a change of this kind to be made. It causes great difficulties to those who are responsible for the management of the theatre, and I cannot see how it can promote order and decency. I emphasise
C that there had been no complaint whatever against the management of this theatre in all the years it existed. If there was the slightest ground for complaint, I could understand it, but if a house has a record of this kind, the management ought to have some credit, and ought not lightly to be deprived of a considerable part of its income which would go, I suppose, to public houses or licensed bars nearby, or, in the other case, to those who sell tobacco and cigarettes, if people
D are able to buy them elsewhere after eight o'clock.

It appears to me that the committee paid attention to the desire to be consistent, in other words they decided to grant the same form of licence to the Queen's Theatre as they had done to the Pavilion Theatre. I do not think that the cases are in quite the same position, nor do I think that the committee ought to have imposed r. 3 on the Queen's Theatre unless in some way it could promote order
E and decency within the house, and I do not see that it could in view of the history of the house.

The further matter for consideration appears to me to be the position in regard to tobacco and cigarettes. All the members of the Divisional Court referred to this. LORD GODDARD, C.J., said ([1956] 3 All E.R. at p. 541):

F "How prohibition of the sale of tobacco has anything to do, at any rate in these days, with decency and order, I confess that I fail to see, and if the committee had been asked at the hearing to delete the words 'and tobacco' they might have done so."

He thought that, as the committee had not been asked to deal with tobacco separately, the Divisional Court ought not to interfere. I feel that that position
G arose because the committee dealt with the application without any argument or submissions, and without explaining to the applicant that they were going to make a change. There was nothing to warn him of the likelihood of any change until the decision was given.

HALLETT, J., said (*ibid.*):

H "I should like to add that I share the feeling my Lord has expressed as to the difficulty of understanding why a prohibition on selling tobacco as distinct from smoking should now be attributed to the preservation of good order and decency. However, that is a matter which, as my Lord has explained, cannot be canvassed on this occasion."

I do not think that is right; the applicant ought to be allowed to take the point
I in view of what happened before the committee. DONOVAN, J., began his judgment in this way (*ibid.*):

"I agree with much regret. Speaking for myself, I cannot see how order and decency are preserved or advanced by telling the patrons of this theatre that they can drink next door instead of in the theatre itself . . . * The result is that the committee were entitled in law to take into account the drinking facilities next door, though, speaking for myself, I feel it was a

* The passage after the asterisk is at p. 542.

very harsh decision to do so in this particular case in view of the fine record this theatre had enjoyed for over fifty years, during which time order and decency had been preserved to everybody's satisfaction; but that is not a matter for this court."

In one sense it is not a matter for the court, but if it be right to say that the decision of the committee was given from the point of view of what they regarded as consistency rather than looking at the facts of this case, the facts and history of the Queen's Theatre, Rhyl, I feel that it is open to the court to say that that is not the right approach to the case. DONOVAN, J., added (*ibid.*, at p. 542):

"It is also, as has been pointed out by the Lord Chief Justice, another result of the committee's decision that no tobacco can be sold inside the theatre. A man may take his own pipe and cigarettes in and smoke them, but must not buy them inside the theatre. That is a wholly unreal and unnecessary distinction and the committee do not say otherwise; they do not mention it at all. But the application was to delete r. 3 as a whole, and, that being so, and since the application was, in my view, properly dealt with by the committee, it is not possible to single out tobacco and grant relief in respect of that alone. For the rest, I agree entirely with what has fallen from the other members of the court."

At the end of the judgment, the Lord Chief Justice, addressing Mr. Brabin (who appeared for the applicant in the Divisional Court), told him that he could have leave to appeal if he wanted it; thus rather inviting an appeal, and the applicant took advantage of the leave to appeal given and appealed to this court.

I do not like granting an order of mandamus against a committee of this type. I hope I realise some of the reasons that prompted their action, which might perhaps be more apposite in another case than in this. It appears to me that the decision at which they arrived is somewhat of a hardship on those who have conducted this theatre with propriety over the years, so that they themselves might well look on it as an injustice. There were two bars in the theatre, which of course had to be kept up to date with all the necessary fitments, else some complaints would have been made. Suddenly, without any warning, they lose the right to use them.

In my view the order for mandamus should go and the committee should determine this matter afresh according to law. I do not mean to say for one moment that they have done anything which they think to be wrong in any sense. Counsel for the committee said that the committee did not desire to be contentious in the least in this court; they desired, as far as possible, to assist the court, and would welcome whatever views the court thought it right to state to them. No one would wish to be dictatorial. I have stated in general terms how I look on the case, having heard what counsel said as to how the committee would like this case to be treated. They at least will have the advantage of knowing that the Lord Chief Justice and the judges who sat in the Divisional Court did not find themselves in agreement with the committee's determination, though they felt unable to alter it in view of the decisions to which I have referred. I believe it to be our duty to say that the committee should consider this case again, and if they do reconsider it on the lines that I have suggested, after the views of my brethren have been expressed, they may well think right to grant the licence on the old terms, in which case I should consider that they were acting in accordance with justice, and I believe that to be what they desire. The case should go back.

JENKINS, L.J.: I am of the same opinion. For a matter of fifty-five years down to Mar. 9, 1956, apart from a short period of rebuilding after a fire, the Queen's Theatre, Rhyl, had been continuously licensed as a theatre under a succession of licences, none of which were subject to any condition or rule against the sale of intoxicants on the premises. On Mar. 9, 1956, the committee

of the Flint County Council concerned with the matter of theatrical licences met to consider the grant of licences for an ensuing period. The applicant, the secretary of the company which owns the Queen's Theatre and the holder of the appropriate licence on their behalf, duly attended this meeting, as a representative of the owners of the theatre had done for very many years, and made formal application for renewal of the licence, never dreaming that anything else would happen but that the licence would be renewed in the old form, with no condition or rule against the sale of intoxicants. It must have been greatly to his surprise when the committee, after retiring, returned and announced their decision in the case of the Queen's Theatre, which was to the effect that a licence would be granted for the ensuing period, but that that licence would, for the first time as compared with all the many licences the Queen's Theatre had been allowed over the years, contain a rule prohibiting the sale of intoxicating liquor on the premises.

As I have said, at the date of that meeting, the Queen's Theatre, apart from a short period of rebuilding after a fire, had been continuously allowed a licence in the form I have mentioned, and there had never been any shadow of complaint by anyone, or any suggestion that the premises were not properly conducted in every way. In these circumstances, this sudden reversal of policy in relation to the Queen's Theatre after a period of more than half a century, though no doubt arrived at with the best of intentions, appears to me to have been neither reasonable nor just. The applicant applied to the Divisional Court for the order of mandamus which has given rise to the present appeal, and the Lord Chief Justice and the other learned judges who were members of the court on that occasion made it plain enough that they shared the view which I have expressed as to the apparent injustice and unreasonableness of the result, but they felt themselves constrained by the authorities to which SINGLETON, L.J., has referred, that is to say *R. v. West Riding of Yorkshire County Council* (1) ([1896] 2 Q.B. 386), and the case in this court, and therefore binding on us as on the Divisional Court, *R. v. Sheerness Urban District Council* (2) ((1898), 62 J.P. 563), to reject the application.

If I may respectfully say so, I entirely agree with the members of the Divisional Court that they were bound by the *West Riding* case (1) to hold that the proximity of other facilities for obtaining intoxicating liquor is a relevant circumstance proper to be taken into account in determining whether a licence should be granted or not, and I agree with them, too, that the *Sheerness* case (2) affords authority in this court to the same effect. To my mind, however, those two decisions, the second of which this court must of course accept as binding, do not conclude the matter against the applicant.

It appears to me from the chairman's affidavit that the committee approached the application in respect of the Queen's Theatre in a wrong way. First of all from para. 8 of the chairman's affidavit, it appears that:

"The committee first considered the application relating to the Pavilion Theatre aforesaid and most of the members of the committee were of the opinion that it was unnecessary and undesirable to provide drinking facilities at this theatre because there were adequate facilities already provided at nearby licensed premises. It was decided by a substantial majority that this application be granted but that the said r. 3 should not be deleted from the conditions attached to the theatrical licence for this theatre."

Rule 3 was the rule about intoxicating liquor.

So far, then, the majority view of the committee was that it was unnecessary and undesirable to provide drinking facilities at the Pavilion Theatre because there were adequate facilities at a nearby licensed premises. This consideration was, on the authorities, a consideration proper to be taken into account. But when the committee passed to consider the position of the Queen's Theatre, it

seems to me with respect to them that they are shown by the chairman's affidavit to have fallen into error. The chairman's affidavit deals thus with their deliberations on this application:

"9. The committee thereupon considered the applicant's application and the view was expressed that the grounds upon which the committee had refused to delete the said r. 3 from the conditions attaching to the theatrical licence for the Pavilion Theatre aforesaid (which is situated a short distance from the Queen's Theatre aforesaid) applied with even greater force to the Queen's Theatre in that it was known to members of the committee that a large hotel with a number of bars adjoined the Queen's Theatre and that patrons of this theatre could obtain access thereto by crossing a narrow covered arcade. It was pointed out by me and the clerk of the committee that the Queen's Theatre had hitherto been granted theatrical licences with r. 3 deleted from the conditions attached thereto, but it was felt by members of the committee that this did not fetter their discretion in considering the present application. Members expressed the view that, whatever had been done in the past, it was their duty to consider the present application on its merits as they saw them and that their decision must be consistent if justice was to be done as between applicants."

To my mind it was right for the committee to regard it as open to them to consider a case where an application was made for a renewal of a licence just as it would be open to them to consider an original application. That is to say it would not be right for them to regard renewal of a licence or the grant of a new licence to a former licence-holder as a matter of course, and not as a matter calling for consideration on its merits, and for the exercise of their discretion. So far therefore para. 9 shows no ground for complaint, but it does seem to me to show that regarding the matter as open to them to decide *de novo* in the exercise of their discretion, the committee applied some sort of general principle to the effect that a licence without deletion of r. 3 ought not to be granted in any case whatsoever where it could be said that there were adequate facilities for obtaining liquor elsewhere. That seems to have been regarded by the committee as a matter of general principle. Then they went on to consider that they had already refused the application for the Pavilion Theatre on the ground of proximity of other sources of supply, and that the Queen's Theatre was an *a fortiori* case, because the alternative supply was even more conveniently situated than the supply in the case of the Pavilion Theatre, and to conclude accordingly that if it was right in the case of the Pavilion Theatre to refuse the deletion of r. 3, it was a *fortiori* right to do so in the case of the Queen's Theatre, and therefore that the Queen's Theatre licence must follow the fate of the Pavilion Theatre licence, because it was essential that the same rule should be applied in all cases, or, in other words, that the committee should be consistent.

I cannot think that that method of approach fulfils the requirement that the matter should be heard and determined according to law. It seems to me it sets up a general principle as to the effect of proximity of other premises where liquor can be obtained when the proper course is to consider each case on its merits. It seems to me that it wrongly pursues consistency at the expense of the merits of individual cases. It seems to me that notwithstanding *Sharp v. Wakefield* (4) ([1891] A.C. 173), which shows that the grant of a licence by way of renewal is a matter for the exercise of discretion just as is the grant of an original licence, it cannot be right in this case wholly to ignore, as to all appearances the committee wholly ignored so far as giving any weight to it was concerned, the circumstance that for more than half a century the Queen's Theatre had enjoyed a wholly blameless and useful existence as a theatre licensed for the sale of intoxicating liquor; or to ignore the fact that so far, as appears from the evidence, there has been no relevant change of circumstance whatsoever which

could affect the committee's decision in March, 1956, as compared with their decision at an earlier period.

Accordingly, while I share SINGLETON, L.J.'s reluctance to disturb the conclusion of the committee, who, I have no doubt, performed their functions to the best of their ability and in a highly conscientious manner, nevertheless it does seem to me that they have erred in this case, and accordingly that it should be sent back to be heard and determined according to law. I would therefore allow this appeal.

PARKER, L.J.: I agree. The committee who are respondents to this motion and to this appeal carry out, as a result of the Local Government Acts of 1888 and 1933, the functions of the justices under s. 5 of the Theatres Act, 1843, in regard to the granting of theatrical licences. Under that section the justices, and now the committees, have power to grant theatrical licences, and there is implied a wide discretion. Under s. 9 the justices, and now the committees, have power to make suitable rules for ensuring order and decency at the several theatres licensed by them. Apparently for a long time, indeed, as appears from *R. v. Sheerness Urban District Council* (2) ((1898), 62 J.P. 563) in regard to the County of Kent since 1890, there have been model rules, of which r. 3, with which we are concerned in this case, was then in being, but, as the section shows, it is for the committees in respect of each particular theatre to consider when the application is made, whether it be a new application or by way of renewal, which, if any, of those rules should be made applicable, and for breach of those rules penalties are laid down.

Counsel for the applicant's first and main contention was that when granting a theatrical licence the committee may attach only such conditions as are suitable for ensuring order and decency at the particular theatre, in other words that s. 9 alone empowered the committee to lay down conditions. I cannot believe for myself that that is so; although there is no express power in s. 5 to grant a licence subject to conditions, I think that it is clearly implied. It seems to me that, at any rate in regard to a new application as opposed to a renewal, the committee would be entitled to take into consideration the other facilities in the neighbourhood for the sale of liquor, and if in their discretion they thought right, to impose a condition that the licensee either should not apply for an excise licence or should not sell liquor. Indeed, that, as it appears to me, was the decision of the Divisional Court in *R. v. West Riding of Yorkshire County Council* (1) ([1896] 2 Q.B. 386) which was approved by this court in *R. v. Sheerness Urban District Council* (2).

It does not, however, follow that it would be right to lay down any such conditions in the case where, as here, a theatre has held an unrestricted licence in regard to the sale of liquor and tobacco for very many years. It is true that, as appears from *Sharp v. Wakefield* (4) ([1891] A.C. 173), a case dealing with justices' licences, the same legal considerations prevail whether the application is an original application or by way of renewal. But it is quite clear that, although there may be no difference in the legal considerations, there must be a difference in regard to the facts to be considered. Indeed, LORD HALSBURY, L.C., said (*ibid.*, at p. 181):

"My Lords, I am very far indeed from saying that, assuming the complete discretion that I have indicated to exist, it would be likely that the persons exercising it would consider an original application in the same way as one which was applied for by the person who has already been licensed for one year. Of course, the justices would remember that a year before a licence had been granted and presumably (unless some change during the year was proved) they start with the fact that the topics to which I have referred have already been considered, and one would not expect that those topics would be likely to be reopened, unless, as I say, some change has been

proved. This would be likely to limit the inquiry to the conduct of the house and the character of the licensee, and, perhaps, the condition of the house, but as matter of fact and not as matter of law at all."

In the present case, however, it is conceded that there was no evidence of, and no suggestion that there had been, any change of circumstance, any change in the facilities in the locality or any change in regard to the character of the neighbourhood generally. Indeed, as my Lords have said, the basis of the decision arrived at by the committee was that it would be only right that there should be consistency between the applicants, and, having decided that there was to be a restriction in the case of the Pavilion Theatre, it was thought right to impose a restriction also in regard to the Queen's Theatre.

In any event, so far as this case is concerned, the condition prohibiting the sale of liquor and tobacco was not made as a condition of the granting of the licence under s. 5; in other words, it was not imposed as a result of the committee's discretion under that section; the prohibition was made and imposed pursuant to s. 9 of the Act, and in regard to that section the discretion of the committee is within narrow limits, in that the rules or conditions laid down shall be only those which are suitable, albeit not necessary, for ensuring order and decency at the several theatres licensed by them.

There was no complaint made at any time as to the way the theatre or the bars in the theatre were managed, and I would agree entirely with DONOVAN, J.'s opening remarks ([1956] 3 All E. R. at p. 541):

"I agree with much regret. Speaking for myself, I cannot see how order and decency are preserved or advanced by telling the patrons of this theatre that they can drink next door instead of in the theatre itself."

In other words, as it seems to me, there was no evidence at all on which the committee could impose the prohibition on the sale of liquor in the form of a rule under s. 9.

One final word in regard to the sale of tobacco. It may well be that, in 1890 or earlier when these model rules were made, it was thought that smoking in a theatre was not becoming, in other words, that it was contrary to decency, and it may be that, not only was smoking prohibited in the theatre but that it was thought right to prevent the sale of tobacco in the theatre as well, but today I can see no possible reason for saying that it is necessary in order to preserve order and decency to provide that the sale of tobacco should be prohibited while, at the same time, the patrons can bring all the tobacco and cigarettes they like and smoke them in the theatre.

For these reasons, as well as those given by my Lords, I would allow this appeal.

Appeal allowed.

Solicitors: *George Thatcher & Son*, agents for *J. Kerfoot-Roberts, Son & Griffiths*, Holywell (for the applicant licensee); *Sharpe, Pritchard & Co.*, agents for *W. H. Jones, Mold* (for the licensing committee).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

LISTER v. ROMFORD ICE & COLD STORAGE CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Somervell of Harrow), November 5, 7, 8, 12, 13, December 20, 1956.]

Master and Servant—Liability of servant—Negligence—Injury to fellow workman—Implied terms of contract of service—Duty of servant to take care—Whether master required to insure servant against his own negligence—Whether servant entitled to benefit of insurance effected by master.

Damage—Remoteness—Servant's negligence—Master's liability to third party—Recovery from servant.

Insurance—Motor insurance—Whether employer required to take out policy covering personal liability of servant while driving vehicle in the course of his employment—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 35 (1), s. 36 (1), s. 121.

While backing his lorry in the yard of a slaughter-house to which he had been sent to collect waste, the appellant, a lorry driver employed by the respondents, negligently ran into and injured his father, who was also employed by the respondents on the same work. The father obtained judgment for damages for negligence against the respondents. The respondents' insurers, acting in the respondents' name by virtue of a term in the contract of insurance but without consulting the respondents, brought an action against the appellant for damages for negligence or breach of contractual duty to drive with due care. In defence the appellant alleged that the following terms (among others) were implied in his contract of service with the respondents, viz., (a) that the respondents would indemnify him against all claims or proceedings brought against him for any act done by him in the course of his employment; (b) alternatively, that he would receive the benefit of any contract of insurance effected by the respondents and covering their liability in respect of the action brought by his father. The respondents pleaded, in proof of damage, the judgment given against them in the action brought by the appellant's father and payment of the amount which he recovered. These allegations were admitted, and the respondents relied on them alone as evidence of damage.

Held: the appellant had been in breach of duty to his employers, the respondents, to take due care (dictum of WILLES, J., in *Harmer v. Cornelius* (1858), 5 C.B.N.S. at p. 246, applied) and (LORD RADCLIFFE and LORD SOMERVELL OF HARROW dissenting) the respondents were entitled to recover in damages from the appellant the amount for which they had been made liable to his father, including the respondents' costs of defending the action brought by the appellant's father against them, since

(i) no term was implied in the contract of employment of a driver of a motor vehicle either that he was entitled to be indemnified by his employers against claims or proceedings for acts done in the course of his employment or that he was entitled to the benefit of any insurance which his employers either had effected or as reasonable and prudent men should have effected, concerning accidents due to his driving without due care, and, therefore, the respondents were not deprived of their remedy against the appellant for his breach of duty of care, and

(ii) the damages were not too remote and had been sufficiently proved (*Green v. New River Co.* (1792), 4 Term Rep. 589, applied; cf., p. 131, letter C, and p. 136, letter B, post).

Per LORD MORTON OF HENRYTON and LORD TUCKER: the Road Traffic Act, 1930, did not impose an obligation on an employer to take out a policy which would cover the personal liability of a servant while driving in the course of his employment (see p. 136, letter F, p. 143, letter F, post).

Dictum of LORD GODDARD, C.J., in *John T. Ellis, Ltd. v. Hinds* ([1947] 1 All E.R. at p. 339) and *Lees v. Motor Insurers Bureau* ([1952] 2 All E.R. 511) applied.

Decision of the COURT OF APPEAL (sub nom. *Romford Ice & Cold Storage Co., Ltd. v. Lister*) ([1955] 3 All E.R. 460) affirmed.

[Editorial Note.] Although the decision did not turn on the question of possible liability of the appellant to the respondents by way of contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, LORD MORTON OF HENRYTON specifically approved the judgment of ORMEROD, J., deciding that the respondents were entitled to a hundred per cent. contribution under s. 6 (2); see p. 138, letters B to D, post. VISCOUNT SIMONDS concurs in the view that the respondents would be entitled to a hundred per cent. contribution from the appellant, but does not base his decision on that ground (see p. 135, letter B, post).

As to liability of a servant to his master for negligence, see 22 HALSBURY'S LAWS (2nd Edn.) 184, para. 307; and for cases on the subject, see 34 DIGEST 117, 884-888.

As to the implied obligation of a workman to exercise skill, see 2 HALSBURY'S LAWS (3rd Edn.) 131, para. 251.

As to contribution between joint tortfeasors, see 32 HALSBURY'S LAWS (2nd Edn.) 190, para. 284; and for cases on the subject, see 42 DIGEST 979, 980, 95-108 (contribution), *ibid.*, 980-982, 109-127 (indemnity).

As to implied terms in contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 123, para. 215; and for cases on the subject, see 12 DIGEST (Repl.) 685-688, 5269-5285.

For the Road Traffic Act, 1930, s. 35, s. 36, s. 121, see 24 HALSBURY'S STATUTES (2nd Edn.) 602, 605, 661.

For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, see 25 HALSBURY'S STATUTES (2nd Edn.) 359.]

Cases referred to:

- (1) *Jones v. Manchester Corpn.*, [1952] 2 All E.R. 125; [1952] 2 Q.B. 852; 116 J.P. 412; 36 Digest (Repl.) 185, 990.
- (2) *Semtex, Ltd. v. Gladstone*, [1954] 2 All E.R. 206; 3rd Digest Supp.
- (3) *George Wimpey & Co., Ltd. v. British Overseas Airways Corpn.*, [1954] 3 All E.R. 661; [1955] A.C. 169; 3rd Digest Supp.
- (4) *Harmer v. Cornelius*, (1858), 5 C.B.N.S. 236; 28 L.J.C.P. 85; 32 L.T.O.S. 62; 22 J.P. 724; 141 E.R. 94; 1 Digest 433, 1239.
- (5) *Green v. New River Co.*, (1792), 4 Term Rep. 589; 100 E.R. 1192; 22 Digest (Repl.) 303, 3135.
- (6) *Robb v. Green*, [1895] 2 Q.B. 1; *affd.* C.A., [1895] 2 Q.B. 315; 64 L.J.Q.B. 593; 73 L.T. 15; 59 J.P. 695; 34 Digest 121, 928.
- (7) *Amber Size & Chemical Co., Ltd. v. Menzel*, [1913] 2 Ch. 239; 82 L.J.Ch. 573; 109 L.T. 520; 34 Digest 122, 933.
- (8) *Mason v. Sainsbury*, (1782), 3 Doug. K.B. 61; 99 E.R. 538; 29 Digest 309, 2557.
- (9) *Pearson v. Skelton*, (1836), 1 M. & W. 504; Tyr. & Gr. 848; 150 E.R. 533; 42 Digest 979, 104.
- (10) *Adamson v. Jarvis*, (1827), 4 Bing. 66; 12 Moore, C.P. 241; 5 L.J.O.S.C.P. 68; 130 E.R. 693; 42 Digest 979, 103.
- (11) *Ryan v. Fildes*, [1938] 3 All E.R. 517; Digest Supp.
- (12) *Merryweather v. Nixan*, (1799), 8 Term Rep. 186; 101 E.R. 1337; 1 Digest 683, 2926.
- (13) *Yeomans v. Legh*, (1837), 2 M. & W. 419; 6 L.J.Ex. 117; 150 E.R. 821.
- (14) *Gregory v. Ford*, [1951] 1 All E.R. 121; 2nd Digest Supp.
- (15) *John T. Ellis, Ltd. v. Hinds*, [1947] 1 All E.R. 337; [1947] K.B. 475; [1947] L.J.R. 488; 176 L.T. 424; 2nd Digest Supp.
- (16) *Lees v. Motor Insurers Bureau*, [1952] 2 All E.R. 511; 3rd Digest Supp.

- (17) *The Moorcock*, (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 12 Digest (Repl.) 686, 5274.
- (18) *Palmer v. Wick & Pulteneytown Steam Shipping Co.*, [1894] A.C. 318; 71 L.T. 163; 42 Digest 980, 105.
- (19) *Smith (W. H.) & Son v. Clinton & Harris*, (1908), 99 L.T. 840; 42 Digest 981, 113.
- (20) *Coggs v. Bernard*, (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E.R. 107; 12 Digest (Repl.) 250, 1935.
- (21) *Biddell Brothers v. E. Clemens Horst Co.*, [1911] 1 K.B. 214; *revsd.* C.A., [1911] 1 K.B. 934; 80 L.J.K.B. 584; 104 L.T. 577; *revsd. on other grounds*, H.L. sub nom. *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 17 Digest (Repl.) 42, 503.
- (22) *Digby v. General Accident Fire & Life Assurance Corpn., Ltd.*, [1942] 2 All E.R. 319; [1943] A.C. 121; 111 L.J.K.B. 628; 167 L.T. 222; 2nd Digest Supp.

Appeal.

Appeal by Martin Alfred Lister, a lorry driver employed by the respondents, Romford Ice & Cold Storage Co., Ltd., from an order of the Court of Appeal (DENNING, BIRKETT and ROMER, L.J.J.), dated Oct. 26, 1955, and reported sub nom. *Romford Ice & Cold Storage Co., Ltd. v. Lister*, [1955] 3 All E.R. 460, affirming an order of ORMEROD, J., dated Feb. 18, 1955, whereby he gave judgment for the respondents for a sum of £1,800 (being £1,600, the amount awarded as damages against the respondents in an action against them as employers of the appellant based on his negligence, and £200, the agreed costs of the respondents of defending that action) and costs.

H. Lester and *D. A. E. Hart* for the appellant.

Martin Jukes, Q.C., and *P. M. O'Connor* for the respondents.

The House took time for consideration.

Dec. 20. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the facts in this case are not seriously in dispute but they give rise to questions of considerable difficulty and importance. The appellant, Martin Alfred Lister, was, in January, 1949, in the employment of the respondent company as a lorry driver. He was then some twenty-seven years of age and had, apart from an interval during the war, been in that employment since he was seventeen. He had previously for a short time been employed by them as a general labourer. On Jan. 28, 1949, accompanied as mate by his father, also named Martin Alfred Lister, whom I will call "Lister senior", he drove his lorry into a slaughter-house yard off the Old Church Road, Romford, to collect some waste. In the yard he backed his lorry, and in doing so knocked down and injured Lister senior, who had previously alighted from it.

In June, 1951, Lister senior issued a writ against the respondents claiming damages for the personal injuries suffered by him, alleging that they were due to the negligent driving of the appellant, and that the respondents, as his employers, were vicariously liable. This action was tried by McNAIR, J., on Jan. 28 and 29, 1953, and that learned judge held that the appellant had negligently driven the lorry in reverse without looking where he was going, but that Lister senior was also at fault in failing to take proper care for his own safety, the relative responsibility being two-thirds for the appellant and one-third for Lister senior. The responsibility of the respondents was purely vicarious. The damage was assessed at £2,400 and judgment was entered for Lister senior for £1,600, two-thirds of that amount, and costs.

On Jan. 23, 1953, five days before the trial of Lister senior's action, the respondents issued the writ in the action, in which this appeal is brought, claiming against the appellant

"damages or in the alternative . . . payment by way of indemnity or

contribution in respect of such damages . . . as may be adjudged or agreed to be paid . . .” A

to Lister senior in the first action and the respondents' costs of that action. On May 12, 1953, the respondents delivered their statement of claim in the present action. They pleaded the facts which I have stated, including the judgment which had by then been given. They alleged that they had paid the damages of £1,600 and were liable to pay the costs, and that they had suffered loss and damage to the extent of such damages and costs by reason of the appellant's negligence. They pleaded further or alternatively that it was an implied term of the contract of service of the appellant that he would carry out his duties with reasonable care and skill and that he had failed to do so, whereby they had suffered loss and damage. They claimed an order that they might be indemnified by the appellant in respect of the sums which they had paid to Lister senior and their costs of defending the first action and, alternatively, “damages for negligence and/or breach of contract”. I understand the first head of claim to be for a contribution of a hundred per cent., i.e., in effect, an indemnity under the Law Reform (Married Women and Tortfeasors) Act, 1935, which I will call “the Act of 1935”, and the second head of claim to be founded alternatively on tort or the breach of a contractual duty of care. B C D

The defence of the appellant, to which I must refer somewhat fully, put in issue the question of his negligence. It alleged that he was present in court throughout the trial of the first action and was ready to give evidence on behalf of the respondents but that they did not allow him to do so, and that the judgment against them was, therefore, due not to his negligent driving but to their failure to call him as a witness. I do not think that your Lordships will take this plea very seriously. It cannot by any means be sustained. Something more formidable follows, raising, I think, a question of general importance. For it was then pleaded that it was an implied term of the contract of service that the respondents would indemnify the appellant against all claims or proceedings brought against him for any act done by him in the course of his employment, and, in the alternative, that it was an implied term that he would receive the benefit of any contract of insurance effected by the respondents and covering their liability in respect of the first action, that the respondents had, in fact, effected such insurance, and that he claimed the benefit thereof. And it was further pleaded that there was no such implied term of service as the respondents alleged, that he would carry out his duties with reasonable care and skill, but that, on the contrary, the respondents, by engaging him to drive a lorry on their behalf, impliedly accepted him with all such faults and failings as he might possess, and without any right or claim against him in respect of negligent acts arising out of and in the course of his employment. It was in this state of the pleadings, though they were amended when the case was heard by the Court of Appeal, that the matter came before ORMEROD, J., for trial. E F G

I will at once state the conclusions to which that learned judge came. After stating that the case had been put by counsel for the respondents (plaintiffs in the action) in two ways, first that, on the ordinary law of contract, the servant was liable to his master for damage suffered by him for the servant's breach of contract, it being an implied term of his contract that he would use reasonable care in the performance of his work, and, secondly, that he was, as a joint tortfeasor, entitled to contribution under s. 6 (1) (c) of the Act of 1935, the learned judge said that he was constrained by the words of DENNING, L.J., in *Jones v. Manchester Corpn.* (1) ([1952] 2 All E.R. 125 at p. 131) to consider the case from the point of view of the Act of 1935. He found as a fact that the appellant had been guilty of negligence, rejected the contention that the claim for contribution could only be raised in the original action, and then proceeded to deal with what he regarded as the substantial defence, viz., that the contract of service was subject to the implied terms to which I have already referred. As H I

A to this, he held, following the decision of FINNEMORE, J., in *Semtex, Ltd. v. Gladstone* (2) ([1954] 2 All E.R. 206) (a case, I will interpolate, which was, in my opinion, rightly decided), that, while it must be an implied term that the employer would not require the servant to do anything illegal and, therefore, would comply with the provisions of the Road Traffic Act, 1930, in respect of insurance, there was no evidence to support any further implication. He B rejected also the plea that the writ was prematurely issued, and, on a consideration of the circumstances, held that the respondents were, under the Act of 1935, entitled to a contribution which would amount to a complete indemnity. He gave judgment for the respondents accordingly.

C There has, I think, been some confusion in the course of the case between two wholly separate torts, (a) the tort for which the appellant and, vicariously, the respondents, might be made liable to Lister senior and in respect of which the respondents could claim contribution under the Act of 1935, and (b) the tort for which the appellant might be made liable to the respondents in respect of his breach of the common law duty of care. But I do not think that this now affects the issue, for, as I shall try to show, the deciding factor, whatever the cause of D action, is whether or not certain terms are to be implied in the contract of service between the appellant and the respondents.

The appellant appealed to the Court of Appeal. At the outset of the hearing in that court, the appellant took the preliminary point that the issue of the writ was premature, inasmuch as the liability of the respondents to Lister senior had not been established: this was said to follow from the decision of this House in *George Wimpey & Co., Ltd. v. British Overseas Airways Corpn.* (3) E ([1954] 3 All E.R. 661). The respondents' answer was that, at any rate, it was not premature so far as it was founded on breach of contract, whatever might be the position in regard to the claim to contribution under the Act of 1935. The Court of Appeal, in order that all the substantive matters in the appeal might be argued and decided, gave leave for a second action to be brought and consolidated with the first, the pleadings and evidence in the first action to stand as if they had taken place in the second action. This was duly done.

F Before I state the result of the appeal, it is necessary to note that the appellant was allowed to make substantial amendments of his defence and, as they formed the basis of much argument in this House, I will remind your Lordships that, by para. 7A, it was pleaded that it was an implied term [of the appellant's contract of employment] that the appellant would not be required to do anything unlawful and, in particular, would not be required to drive unless there was in force in relation to the use of the vehicle such a policy of insurance as would provide him with the indemnity required by s. 36 (1) of the Road Traffic Act, 1930, and, by para. 7B, that it was an implied term of the contract that the respondents' motor insurance should cover the appellant against any third-party liability which he might personally incur arising out of his driving the respondents' vehicles in the course of his employment, and, by para. 7C, that in breach of these implied terms or one of them the respondents required the appellant to drive a vehicle without there being in force in relation to his user thereof a policy which provided him with any indemnity either as required by the Road Traffic Act, 1930, or at all. The appellant was also allowed to amend his defence by adding a plea that the accident whereby Lister senior suffered damage was solely caused or contributed to by the negligence of the respondents. This plea had no substance whatever and I shall say nothing more of it.

I In order to explain the appellant's defences which rested on the implied terms in regard to insurance and the Road Traffic Act, 1930, I refer to s. 35 (1) of that Act, which provides that, subject to the provisions of that Part of the Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such

a policy of insurance or such a security in respect of third-party risks as complies with the requirements of that Part of the Act. Section 36 (1) states these requirements and, so far as material to this appeal, provides that such a policy must be a policy which insures such person or persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road, but contains the proviso that such a policy shall not be required to cover liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment.

It appears that, in fact, the respondents had taken out just such a policy as the Act required excluding such death or injury as the proviso which I have read authorised it to exclude. The policy also provided that the indemnity given thereby should, subject to the provisions thereof, be extended to any person in the employ of the respondents driving the vehicle on their order and for their purposes. They had also taken out a policy insuring them against their liability as employers. This fact is relevant only because the policy contained a term authorising the underwriters to "prosecute in the name of the assured for their own benefit any claim for indemnity or damages or otherwise", and it has not been concealed that this action was brought by the underwriters in the name of the respondents, who, if it lay with them, would never have brought it. I say that this fact is not otherwise relevant, because the action remains the action of the respondents and their rights are not greater or less than they would be if they were uninsured.

On the appeal being heard, the court was divided, DENNING, L.J., being in favour of allowing the appeal and BIRKETT and ROMER, L.J.J., of dismissing it. It was, accordingly, dismissed.

It will be convenient to discuss first the question which divided the Court of Appeal, viz., what, if any, were the terms to be implied in the contract of service between the parties. It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The proposition of law stated by WILLES, J., in *Harmer v. Cornelius* (4) ((1858), 5 C.B.N.S. 236 at p. 246) has never been questioned:

"When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes,—Spondes peritiam artis. Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts . . . An express promise or express representation in the particular case is not necessary."

I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction and involve his master in very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case; on the contrary, "possess" and "exercise" are there conjoined. Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for "skill" is the word used in the cited case, but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty.

I have already said that it does not appear to me to make any difference to the determination of any substantive issue in this case whether the respondents' cause of action lay in tort or breach of contract. But, in deference to DENNING,

A L.J., I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) is such a case. It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this, the negligence of a

B servant in performance of his duty is a clear example.

I conclude, then, the first stage of the argument by saying that the appellant was under a contractual obligation of care in the performance of his duty, that he committed a breach of it, that the respondents thereby suffered damage and they are entitled to recover that damage from him, unless it is shown either that the damage is too remote or that there is some other intervening factor

C which precludes the recovery. I should note in passing that it was urged on behalf of the appellant that the respondents had not proved the quantum of damage suffered by them by proving only that judgment had been given against them and that they had paid, or were liable to pay, the amount of the judgment and costs. This plea could not be sustained. It appears to me to be against reason and authority : see, e.g., *Green v. New River Co.* (5) ((1792), 4 Term

D Rep. 589).

What, then, is to deprive the respondents of their remedy ? I do not think it can be said that the damages are too remote, for the injury to a third party and the ensuing liability of a master are events which the exercise of proper care is intended to avert. It is on the implication of some implied term that the appellant must rely, and to this question I now turn. My Lords, I cannot

E but be aware that any decision on this question which has divided learned judges in the courts below and on which your Lordships are also divided in opinion may have far-reaching consequences, and I have myself had great difficulty in reaching a conclusion.

I will refer first to the implied terms pleaded in the re-amended defence, for at the end of the day the argument for the appellant was founded not on

F them but on the original pleas, or at least on something very like them. The amended pleas can be shortly disposed of. As to para. 7A*, the valid answer was made, in general, that the appellant was not required by the respondents to do anything unlawful, and, in particular, that the Road Traffic Act, 1930, does not require that a policy of assurance shall be taken out which provides the driver of a vehicle with an indemnity against all the consequences of his own

G negligence. And as to para. 7B*, it was answered that a policy taken out by the respondents in fact covered the appellant against third-party claims, but that it was not a third-party claim that faced the appellant in this action. No more need be said of these pleas, except that the variety and multiplicity of the suggested terms were naturally contrasted with the general principle that an implication must be precise and obvious. I return, then, to the original

H pleas. These, I remind your Lordships, were contained in para. 4 and para. 5† of the defence and were alternatives. Paragraph 4 pleaded an implied term that the respondents would indemnify the appellant against all claims and proceedings brought against him for any act done by him in the course of his employment. Were it not that at one time this term appeared to hold first place in the appellant's favour, I should have thought that it might be summarily dismissed. It is all-embracing in its scope ; whatever the degree of

I negligence, even of criminality, in his act ; whether the respondents were covered by insurance or not, whether the act gave rise to a third-party claim, which ought by law to be covered, or not ; in every case the appellant would go free and the respondents bear the burden. I can neither accept an implication in such general terms nor put into the mouth of the pleader qualifications which

* The terms of paras. 7A and 7B are printed at p. 136, post.

† Paragraphs 4 and 5 of the defence are printed at pp. 136, 137, post.

might make the plea less unacceptable. It was in para. 5 that the implied term was pleaded which has appeared to me most worthy of consideration. It was that the appellant would receive the benefit of any contract of insurance effected by the respondents and covering their liability in respect of the action brought by Lister senior. It would, it was said, be inconsistent with this term if the respondents, having effected a policy and having been indemnified under it, then sought to recover damages from the appellant either for breach of his contractual duty of care or under the relevant provisions of the Act of 1935. This is the plea which found favour with DENNING, L.J., and the argument was put so simply and cogently by him that I venture to quote his judgment ([1955] 3 All E.R. at p. 467):

"Take this very case where the insurers issue a writ in the employer's name against the servant without consulting either the employer or the servant beforehand. When the servant receives the writ he will take it to his employer and say 'Why are you suing me? Surely you have got the money from your insurance company. So you cannot sue me.' This natural comment between master and man throws a flood of light on the implied understanding of the parties."

A little later he says (*ibid.*):

"This shows that there is an implied term in these cases whereby, if the employer is insured, he will not seek to recover contribution or indemnity from the servant."

It will be observed that the implied term which thus commended itself to the learned lord justice is limited in its scope. The driver is to be relieved from liability if his master is covered by insurance against the claim. If he is not covered, for instance, because the accident takes place not on a road but on private premises and the law does not require him to insure against such a risk, and he has not done so, then, under this plea, the driver must bear the consequences of his negligence if he is himself sued. This consideration led counsel to yet another variation of the plea. This was that the driver was entitled to be indemnified not only if the employer was in fact insured or was required by law to be insured, but also if he ought, as a reasonable and prudent man, to have been insured against the risk in question. It was in this final form, which approximates nearly to the plea in para. 4, that, after much travail, the implied term was submitted to your Lordships. No qualification of this general proposition was suggested. The driver might owe a duty of care to his employer, but for any dereliction from duty he was to be absolved from all responsibility. Nor was it suggested that, in the present case, there were any features which distinguished the relation of the appellant and the respondents from that of any other driver and his employer. That is why, at the outset of this opinion, I said that this appeal raises a question of general importance. For the real question becomes not what terms can be implied in a contract between two individuals who are assumed to be making a bargain in regard to a particular transaction or course of business. We have to take a wider view, for we are concerned with a general question, which, if not correctly described as a question of status, yet can only be answered by considering the relation in which the drivers of motor vehicles and their employers generally stand to each other. Just as the duty of care, rightly regarded as a contractual obligation, is imposed on the servant, or the duty not to disclose confidential information (see *Robb v. Green* (6) ([1895] 2 Q.B. 315)), or the duty not to betray secret processes (see *Amber Size & Chemical Co., Ltd. v. Menzel* (7) ([1913] 2 Ch. 239)), just as the duty is imposed on the master not to require his servant to do any illegal act, just so the question must be asked and answered whether, in the world in which we live today, it is a necessary condition of the relation of master and man that the master should, to use a broad colloquialism, look after the whole matter of

A insurance. If I were to try to apply the familiar tests where the question is whether a term should be implied in a particular contract in order to give it what is called business efficacy, I should lose myself in the attempt to formulate it with the necessary precision. The necessarily vague evidence given by the parties and the fact that the action is brought without the assent of the employers shows at least *ex post facto* how they regarded the position. This, however, is not
B conclusive; for, as I have said, the solution of the problem rests, not on the implication of a term in a particular contract of service, but on more general considerations.

My Lords, undoubtedly there are formidable obstacles in the path of the appellant, and they were formidably presented by counsel for the respondents. First, it is urged that it must be irrelevant to the right of the master to sue his
C servant for breach of duty that the master is insured against its consequences. As a general proposition it has not, I think, been questioned for nearly two hundred years that, in determining the rights *inter se* of A and B, the fact that one or other of them is insured is to be disregarded: see, e.g., *Mason v. Sainsbury* (8) ((1782), 3 Doug. K.B. 61). This general proposition, no doubt, applies if A is a master and B his man; but its application to a case or class of case must
D yield to an express or implied term to the contrary, and, as the question is whether that term should be implied, I am not constrained by an assertion of the general proposition to deny the possible exception. Yet I cannot wholly ignore a principle so widely applicable as that a man insures at his own expense for his own benefit and does not thereby suffer any derogation of his rights against another man.

E Next—and here I recur to a difficulty already indicated—if it has become part of the common law of England that, as between the employer and driver of a motor vehicle, it is the duty of the former to look after the whole matter of insurance (an expression which I have used compendiously to describe the plea as finally submitted), must not that duty be more precisely defined? It may be answered that in other relationships duties are imposed by law which can only
F be stated in general terms. Partners owe a duty of faithfulness to each other; what that duty involves in any particular case can only be determined in the light of all its circumstances. Other examples in other branches of the law may occur to your Lordships where a general duty is presented and its scope falls to be determined partly by the general custom of the country which is the basis of the law and partly, perhaps, by equitable considerations; but even so,
G the determination must rest on evidence of the custom or on such broad equitable considerations as have from early times guided a court of equity.

In the area in which this appeal is brought, there is no evidence to guide your Lordships. The single fact that, since the Road Traffic Act, 1930, came into force, a measure of insurance against third-party risk is compulsory affords no ground for an assumption that an employer will take out a policy which covers
H more than the Act requires, for instance, a risk of injury to third parties not on the road but in private premises. There is, in fact, no assumption that can legitimately be made what policy will be taken out and what its terms and qualifications may be. I am unable to satisfy myself that, with such a background, there can be implied in the relationship of employer and driver any such terms as I have indicated. And though, as I have said, I feel the force of the
I argument as presented by DENNING, L.J., I must point out that, at least in his view, the indemnity of the driver was conditional on a policy which covered the risk having in fact been taken out. It may be that this was because his mind was directed to a case where such a policy was taken out, and that he would have gone on to say that there was a further implication that the employer would take out a policy whether required by law to do so or not. But here we are in the realm of speculation. Is it certain that, if the imaginary driver had said to his employer: "Of course you will indemnify me against any damage

that I may do however gross my negligence may be", the employer would have said: "Yes, of course!". For myself, I cannot answer confidently that he would have said so or ought to have said so. It may well be that, if such a discussion had taken place, it might have ended in some agreement between them or in the driver not entering the service of that employer. That I do not know. But I do know that I am ever driven further from an assured certainty what is the term which the law imports into the contract of service between the employer and the driver of a motor vehicle. A B

Another argument was, at this stage, adduced which appeared to me to have some weight. For just as it was urged that a term could not be implied unless it could be defined with precision, so its existence was denied if it could not be shown when it came to birth. Here, it was said, was a duty alleged to arise out of the relation of master and servant in this special sphere of employment which was imposed by the common law. When, then, did it first arise? Not, surely, when the first country squire exchanged his carriage and horses for a motor car or the first haulage contractor bought a motor lorry. Was it when the practice of insurance against third-party risk became so common that it was to be expected of the reasonable man, or was it only when the Act of 1930 made compulsory and, therefore, universal what had previously been reasonable and usual? C D

Then, again, the familiar argument was heard asking where the line is to be drawn. The driver of a motor car is not the only man in charge of an engine which, if carelessly used, may endanger and injure third parties. The man in charge of a crane was given as an example. If he, by his negligence, injures a third party who then makes his employer vicariously liable, is he entitled to assume that his employer has covered himself by insurance and will indemnify him, however gross and reprehensible his negligence? And does this depend on the extent to which insurance against third-party risks prevails and is known to prevail in any particular form of employment? Does it depend on the fact that there are fewer cranes than cars and that the master is less likely to drive a crane than a car? E F

It was contended, too, that a term should not be implied by law of which the social consequences would be harmful. The common law demands that the servant should exercise his proper skill and care in the performance of his duty; the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master. Other sanctions there may be, dismissal, perhaps, and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, I think, an aspect of the case which made a special appeal to ROMER, L.J.* It cannot be disregarded. G H

Finally, it was urged that the implication of the suggested term in the contract between employer and driver would have the effect of denying to the insurer the right of subrogation given to him either expressly by the policy of insurance or by the implication of law. This would, no doubt, be the result; but I do not attach much importance to this, for if the implied term is imposed by law, not in respect of a particular contract but as a legal incident of this kind of contract, the insurer may be assumed to know it as well as anyone else. It may surprise him, but he should study the law. I

My Lords, I have come to the conclusion that the considerations which I have discussed do not permit me to imply a term such as is pleaded in any of the alternative forms adopted in the original and amended defence or advanced in

* Compare [1955] 3 All E.R. at p. 480, letter F.

A argument at the Bar, and that the appeal, so far as it is founded on an implied term in the contract of service, must fail. I do not find it necessary to discuss at any length the alternative claim under the Act of 1935. If, under the first head of claim, the respondents can recover damages for breach of contract, they can do no more. I will only say that I see no reason to doubt that, under the Act, and probably apart from the Act (see *Pearson v. Skelton* (9) ((1836), 1 M. & W. 504), B *Adamson v. Jarvis* (10) ((1827), 4 Bing. 66)), the respondents would be entitled to recover contribution from the appellant to the extent of a hundred per cent. *Ryan v. Fildes* (11) ([1938] 3 All E.R. 517) was, I think, rightly decided. But, if the respondents cannot recover damages for breach of contract, they are, in my opinion, precluded from obtaining contribution from the appellant; if they claim under the Act, by its express language (see s. 6 (1) (c)) and, if they claim C apart from the Act, by the principles on which the rule in *Merryweather v. Nixan* (12) ((1799), 8 Term Rep. 186) has been consistently applied. In the result, the appeal, in my opinion, cannot succeed and must be dismissed.

LORD MORTON OF HENRYTON: My Lords, I believe your Lordships are all of opinion that this appeal must fail unless the appellant can make good D one or more of the special pleas set out in para. 4, para. 5 and paras. 7A, 7B and 7C of the re-amended defence, delivered as re-amended on July 4, 1956. For this reason, I shall deal briefly with the other issues in the action, though they are of considerable importance, and shall then turn to the pleas just mentioned.

The appellant injured his father and fellow-worker by reversing a motor lorry when his father was behind it. ORMEROD, J., found as a fact that the appellant E "was negligent in the way in which he reversed that motor lorry", and that "that negligence . . . was responsible for the injuries which his father suffered". That finding of fact clearly could not be successfully challenged in your Lordships' House, and, in my opinion, the appellant was under an implied contractual obligation to take reasonable care in driving the vehicle which he was employed to drive. I agree entirely with the views already expressed on this point by the noble and learned Lord on the Woolsack and by BIRKETT and ROMER, L.JJ., in F the Court of Appeal. Prima facie, therefore, the appellant is liable in contract to pay to the respondents any damages which they have suffered as a result of his failing to take reasonable care on the occasion in question.

The next question which arises is: Was there evidence before ORMEROD, J., establishing that the respondents had suffered damage, by reason of the negligent act of the appellant, to the amount of £1,600 and costs, that being the sum for G which McNAIR, J., gave judgment for the appellant's father in the action which he brought against the respondents? The respondents called evidence of negligence which satisfied ORMEROD, J., but they relied solely on the judgment of McNAIR, J., to establish the damage which they had suffered. Counsel for the appellant submitted that that judgment was not relevant evidence, in the H present action, of the quantum of damage; the appellant was not a party to the action brought by his father, and the decision of McNAIR, J., was in no way binding on him. Counsel for the respondents pointed out that, by para. 5 and para. 6 of their statement of claim in the present action, the respondents pleaded the judgment of McNAIR, J., and the fact of payment of the damages awarded against them, and these paragraphs were admitted by the appellant. He did not I contend that the judgment and payment were conclusive evidence as against the appellant of the quantum of damage suffered by the respondents, but he submitted that they were at least prima facie evidence, and no rebutting evidence was given by the appellant.

My Lords, I feel no doubt that this submission is correct, and it is supported by the observations of the court in *Green v. New River Co.* (5) ((1792), 4 Term Rep. 589 at p. 590) and of PARKE, B., in *Yeomans v. Legh* (13) ((1837), 2 M. & W. 419 at p. 421). In the latter case, the defendant was sued, in an action on the case, for negligent driving by his servant whereby the plaintiff suffered injury. The

servant was called as a witness and the question was whether he was a competent witness without a release. PARKE, B., said (*ibid.*, at p. 421): A

" . . . I think the witness was competent without a release. The effect of the clause in the statute [3 & 4 Will. 4 c. 12, s. 26] is to make the witness competent, where the only interest is that the verdict may be used for or against the witness. In this case there is no interest, *except that the verdict might be used against him in an action by his master, to show the amount of the damages recovered.*" B

It was further submitted by counsel for the appellant that the damages now claimed are too remote to be recoverable. My Lords, in my view there is no substance in this argument. The liability of the respondents to pay damages to the appellant's father arose directly out of the negligent act of the appellant which constituted the breach of his contract with the respondents. C

If I am right so far, it is clear that, in the absence of the special pleas already mentioned, this appeal must fail, since the respondents would be entitled to receive, as damages for breach of contract, the sum awarded to them by ORMEROD, J., and the Court of Appeal. In considering these pleas I find it convenient to turn first to para. 7A, para. 7B and para. 7C of the re-amended defence, which are as follows: D

" 7A. It was an implied term of the [appellant's] employment that he should not be required by the [respondents] to do anything unlawful . . . "

So far, my Lords, I would agree: see *Gregory v. Ford* (14) ([1951] 1 All E.R. 121); but the paragraph continues— E

" . . . and in particular that he should not be required to drive unless there was in force in relation to the use of the vehicle such a policy of insurance as would provide him with the indemnity which s. 36 (1) of the Road Traffic Act, 1930, requires. The said term is to be implied by law."

This part of the paragraph seems to be based on a misconception. The Road Traffic Act, 1930, does not compel the employer to provide an indemnity for the driver personally; see *John T. Ellis, Ltd. v. Hinds* (15) ([1947] 1 All E.R. 337 at p. 339), and *Lees v. Motor Insurers Bureau* (16) ([1952] 2 All E.R. 511). F

Paragraph 7B and para. 7C are as follows:

" 7B. Further it was an implied term of the [appellant's] employment that the [respondents'] motor insurance should cover the [appellant] against any third-party liability which he might personally incur arising out of his driving the [respondents'] vehicles in the course of his employment. G

" 7C. In breach of the aforesaid implied terms or of one of them the [respondents] required the [appellant] to drive the said vehicle without there being in force in relation to his user thereof any policy which provided him with any indemnity either as required by the Road Traffic Act or at all." H

I need not consider whether or not para. 7B is well-founded, for it does not appear that any third party has made any claim against the appellant. The only claim against him is the employers' claim in the present action.

I now come to the alleged implied terms set out in para. 4 and para. 5 of the re-amended defence which are as follows:

" 4. It was an implied term of the [appellant's] contract of employment with the [respondents] that the [respondents] would indemnify him against all claims or proceedings brought against him for any act done by him in the course of his said employment. In the premises the [respondents] are not entitled to bring these proceedings against the [appellant]. I

" 5. In the alternative it was an implied term of the said contract that the [appellant] would receive the benefit of any contract of insurance effected by the [respondents] and covering their liability in respect of the action

A above referred to. The [respondents] have effected such insurance and have been fully indemnified and the [appellant] claims the benefit thereof."

Counsel for the appellant sought to find some justification for implying one or other of these terms in the particular circumstances of the appellant's employment with the respondents, but I can find nothing in these circumstances which should differentiate the appellant from any other young man who, having passed the necessary driving test, is employed to drive a motor lorry. I add that the appellant had been driving motor lorries for the respondents for about ten years before the accident happened.

B If any such term is to be implied in this case, it must surely be implied in all cases where an employee is employed to drive any kind of vehicle which might cause damage to third parties. And the implied term cannot be limited to cases where the vehicle is being driven on a public highway, for the accident in the present case occurred in a yard. Surely it must logically extend to cases such as a crane driver in factory premises, and many other cases come to mind which cannot logically be distinguished from the present case. Such an obligation might have been imposed on the employer by statute, and it is, perhaps, of some significance that the legislature did not take this course when the law was so strikingly altered by the Road Traffic Act, 1930. It cannot be said, in my view, that the implication of either of these terms is necessary in order to give "to the transaction such efficacy as both parties must have intended that . . . it should have." (*The Moorcock* (17) (1889), 14 P.D. 64 at p. 68, per BOWEN, L.J.)

D Turning now to another branch of the argument for the appellant, I cannot see that any events which have occurred in modern times, such as the passing of the Road Traffic Act, 1930, could justify your Lordships in holding it to be the law today that one or other of the implied terms now under discussion forms part of every contract whereby a man is employed to drive a vehicle. No provision of the Act of 1930 suggests to me that the terms to be implied in such a contract immediately after the Act became law should differ in any respect from the terms to be implied immediately before the Act became law. This matter is fully dealt with in the opinion about to be delivered by my noble and learned friend, LORD TUCKER, which I have read, and I need only say that I entirely agree with his views on it.

E Counsel for the appellant finally suggested that some such term ought to be implied because, in its absence, the employee was placed in a most unfortunate position. It is, however, your Lordships' task to decide what the law is, not what it ought to be. In saying this, I am far from suggesting that either of the terms now under discussion ought to be implied.

F As to para. 4, the words "all claims or proceedings" would seem wide enough to cover, for instance, a fine imposed on the appellant under the Road Traffic Act, 1930; and the words "any act" would appear to cover reckless as well as careless acts. So read, this alleged term might well be void as being against public policy. I shall, however, assume in favour of the appellant that the term should be construed more narrowly, so as to read "would indemnify the appellant against any civil liability for accidental injury or damage done by him in the course of his said employment". Even so, it seems to me hardly consistent with the duty of a driver to take reasonable care in driving his employer's vehicle. That duty has been recognised in many cases, but no such implied term was ever suggested. As I have said, such a term is not necessary to give efficacy to the contract, and, indeed, it seems to me doubtful if an employer would agree to it. If so, it cannot be implied.

I My reasons for rejecting the implied term set out in para. 4 of the re-amended defence apply also to the implied term set out in para. 5, with one exception; I do not think that the latter term, or any possible construction of it, could be held to be void as against public policy. It has, however, this somewhat surprising result—insurers who had paid the employer in a case of this kind would,

apparently, be deprived of their right of subrogation by reason of an implied term in a contract to which they were not a party. The result is, my Lords, that I am unable to accept any of the implied terms which have been pleaded, and I apprehend that no other implied term comes before your Lordships' House for consideration. A

I feel, my Lords, that I ought not to end without making further reference to the judgment of ORMEROD, J. That learned judge felt himself bound by authority not to decide the respondents' claim for damages for breach of contract. His decision in favour of the respondents was given in the exercise of his discretion under s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935. In the eyes of the law the respondents were joint tortfeasors with the appellant, since the appellant was their employee and his negligent act was done in the course of his employment. ORMEROD, J., therefore, had to consider whether the respondents ought to recover contribution from the appellant, and, if so, what the amount of the contribution should be. After considering and rejecting submissions by counsel for the appellant that the contribution should be reduced by reason of certain defects in the lorry provided by the respondents, he said: B C

"I am afraid here that the negligence was the negligence of the [appellant], and in those circumstances he is not entitled to anything by way of mitigation, and there must be a contribution here for the full amount." D

The learned judge and I have thus arrived at the same result, although by a different route. I think it is only right to say that, in my opinion, this alternative route was open to the respondents in the present case, the reasoning of the learned judge was correct, and his exercise of his discretion was entirely proper. E

I would add that there may have been yet another route by which the respondents might have achieved success. Counsel for the respondents submitted that his clients could have sustained an action in tort against the appellant, apart altogether from the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, notwithstanding the well-known decision of LORD KENYON, C.J., in *Merryweather v. Nixan* (12) ((1799), 8 Term Rep. 186). He referred to *Adamson v. Jarvis* (10) ((1827), 4 Bing. 66), *Pearson v. Skelton* (9) ((1836), 1 M. & W. 504), and *Palmer v. Wick & Pulteneytown Steam Shipping Co.* (18) ([1894] A.C. 318), and to observations of LORD COLERIDGE, J., in *W. H. Smith & Son v. Clinton & Harris* (19) ((1908), 99 L.T. 840). In the first of these cases [*Adamson v. Jarvis* (10)], BEST, C.J., said (4 Bing. at p. 73), in regard to the rule laid down in *Merryweather v. Nixan* (12): F

"... from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." G

This saying was approved by LORD HERSCHELL, L.C., and other members of this House in the third of the cases [*Palmer v. Wick & Pulteneytown Steam Shipping Co.* (18)] just mentioned. Counsel for the respondents submitted that his clients, though joint tortfeasors with the appellant in the eyes of the law, were only liable vicariously for the wrongful act of their servant, and were not debarred at common law from bringing an action for damages against him. My Lords, this is an interesting point, which may some day fall for decision by this House, but I express no opinion on it, as it has not been considered in the courts below and I am of opinion that the respondents are entitled to succeed on other grounds. H I

I would dismiss the appeal.

LORD RADCLIFFE: My Lords, in my opinion the appeal ought to be allowed and an order made dismissing the respondents' action. Although the argument of the case necessarily travelled over a number of interesting points, there are only two issues which present themselves to me as essential to its decision. I confine myself to them accordingly. The first question is: Did the

A appellant incur any and, if so, what liability to the respondents by virtue of the fact that, while acting as their employee, he drove their lorry negligently and thereby injured a third party? The second is: Are the respondents entitled to enforce any such liability by legal action against the appellant, having regard to the circumstances of his employment and, in particular, the statutory scheme of compulsory insurance against third-party risks which related to his employment?

3 On the first point, I think it plain that the law does impute to an employee a duty to exercise reasonable care in his handling of his employer's property. It is the fact of such employment that places the property within his control; and if, as must be the case, he owes a general duty to all concerned not to be negligent in his exercise of that control, it would be a surprising anomaly that, merely because there was also a contractual relationship between himself and his employer, the standard of his obligation to his employer were to be somehow lower than the standard of his obligation to the outside world. I cannot see any good reason why we should uphold the existence of such an anomaly. If the contract of employment is viewed as a general legal relationship in which the law imputes certain rights and responsibilities to each side, it would assign a very undignified position to the employee to suppose that the employer takes him "with all faults", and that the employee does not, by virtue of his engagement, impliedly undertake to use all reasonable care in the conduct of his employer's affairs. To say this is to say nothing new in the law. I am satisfied that, from early times, the law has consistently recognised the existence of this duty. I need not lengthen my opinion by reciting the authorities, some of which have been referred to by your Lordships. Nor does any different result appear if we attend to the circumstances of this particular employment. Certainly the appellant was a youth of seventeen when he began to drive for the respondents. But he was required to take, and did take, his driving test before he took up the job, and there is nothing in the relationship which excludes an expectation of reasonable skill and care. Actually, I should regard the implications of his present employment as being determined by the circumstances in which he was re-employed after the end of the late war. He "came back as a full-time driver."

It was much canvassed in argument before your Lordships whether, if there was some such duty on the appellant, it was anything more than the general duty he owed the world to avoid the tort of negligence. On one view of the case this would, indeed, be a question of some importance in respect of costs. Since I take a different view as to the proper result of the case anyway, I do not need to dwell on this part of it. It is, perhaps, sufficient if I say that, in my view, this question is a somewhat artificial one. The existence of the duty arising out of the relationship between employer and employed was recognised by the law without the institution of an analytical inquiry whether the duty was in essence contractual or tortious. What mattered was that the duty was there. A duty may exist by contract, express or implied. Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since, in modern times, the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract. It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and, although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other. I have said this much out of respect to that part of the judgment of DENNING, L.J., in the Court of Appeal which deals with this topic. I do not agree with him that

([1955] 3 All E.R. at p. 465) "the action against a servant must be founded on tort", and I do not think that his citation of authorities proves this point. A

When I turn to the second issue with which I wish to deal, it seems unlikely that any decided authority will be of direct assistance. For the critical point is that we have to deal with an employment which it was illegal for the employer to authorise or for the employee to pursue unless insurance cover had been provided against third-party liability. What are the necessary consequences of that legal requirement on the respective rights and liabilities of employer and employee? That there were some consequences has been common ground throughout this case. It is accepted that the law must impute a term to the effect that the employee could not be required to carry out any order that would involve him in doing something that was illegal, even though, but for the illegality, the thing required would have been within the normal scope of his duties. Put into non-theoretical language, that means that, because of the Road Traffic Act, 1930, the appellant could not be employed to drive the respondents' lorry for them on the road unless there existed a policy of insurance complying with the conditions of the Act and so providing cover to indemnify any third party who might suffer actionable damage from the appellant's driving of the lorry. B C

Now the insurance policy required could not come into existence of its own motion. One of the two parties, employer and employee, had to assume responsibility for taking it out or keeping it running and for paying the necessary premiums to buy the cover. To which of them ought we to attribute that responsibility, having regard to the relationship of the parties? In my view, to the employer. I cannot suppose that, short of special stipulation, any other answer would be given in such a case. So far as it is relevant, all the evidence given at the trial, both by the appellant and by Colonel Howis, the respondents' managing director, confirms that this would be the right answer. Is it then consistent with such an arrangement that, if the driver does cause third-party damage by negligence and the person injured sues and recovers damages from the employer on the ground of his vicarious responsibility for the act of his servant, the employer should be able to recover the damages that he has had to pay by suing the driver? In my opinion, that is the simple question on which this appeal turns, but, of course, it is, in practice, impossible to keep it simple owing to the complications which emerge in any well-argued case. I will try briefly to notice some of them. It is not that I do not think that they involve difficulties, but the difficulties do not present themselves to me as being such as should affect the final result. D E F

In the first place, I do not think that it matters whether the employer is really, or only ostensibly, the plaintiff. In this case we know, because no secret has been made of it, that the real plaintiff is one of the two insurance companies concerned. But the appellant's point, if it is a good one at all, is equally good whether it is his employer who is claiming against him or the insurers by subrogation. To each his reply is the same—"I and my employer recognised that a fund of money had to be secured by insurance to take care of any third-party liability that my driving might involve us in and we arranged that he should pay for and provide the insurance policy that would produce the money. It follows from that that he cannot now look to me to find all or part of that money". If that answer is a good reply to the employer, it is good against insurers who are subrogated to him. I do not at all understand the idea that it is somehow hard on the insurers that they should be affected by an implied term that bound the person to whose rights they are claiming to be subrogated. G H I

Secondly, it is, I think, true that it would not have been illegal in the circumstances of this particular accident if there had been no insurance policy against third-party liability. I assume, though we did not have any detailed argument about it, that the yard in which the accident took place was not a "road" within the meaning of the Road Traffic Act, 1930; and also that the Act does not

A make it compulsory to provide insurance against injury caused to another servant of the same employer. But if we take it, as in my view we must, that the existence of compulsory insurance under the Act involved that it was a term of the employment that the driving should be covered by a policy against third-party liability, I do not think that the term postulated should be tied down to all the complications and qualifications which arise on a strict interpretation of the Act. What mattered to the parties was that, while the lorry was being driven on the employer's business, someone might be injured in circumstances that entitled him to recover damages from either employer or employee or both of them. From that point of view it did not signify whether the accident occurred on a road or in a yard that turned off it, or whether the person injured was or was not in the employer's service. Any other view would leave it to the employee to take out his own policy to cover the residual risks, and this does not seem to me a reasonable arrangement to impute to the parties.

In fact, as we know, the employer provided insurance at his own expense by means of two separate policies, and these between them secured cover without excepting accidents off a road or injury to a fellow employee. Moreover, the motor vehicle policy took what is certainly not the uncommon form of including a "Third-Party Extension", the effect of which was that the driver was equipped with his own direct right to call for indemnity from the insurers if he became liable to a third party for damages caused while driving the respondents' lorry. I must call attention to this last point, because it illustrates the almost intolerable anomalies which are involved in the respondents' argument. The situation is this. If an accident takes place through negligence, the person injured can sue either employer or employee or both of them. If he sues the employee alone, the latter calls on the insurance company for the cover which the employer has bought him; the insurance company has to provide the fund of damages required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer either alone or jointly with the employee, the position of the employee is, apparently, much worse and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide, is in the end the one who foots the bill. I should be very much interested to know how the premium required by an insurance company is adjusted to the risk of these alternative situations.

My Lords, on this part of the case I take the same view as that taken by DENNING, L.J. I agree with what he says in his judgment ([1955] 3 All E.R. at p. 467), and I do not think it possible to escape the force of his reasoning. If we assume any understanding at all between the appellant and the respondents as to insurance against third-party liability, to the appellant's inquiry as to who was to provide it, the respondents must have answered: "We will see to that and the expense of providing it will fall on us". But the result of this appeal depends on which of the following alternatives they must be taken to have added. One would be to this effect—"but, of course, you understand that although we are going to secure the moneys required to pay the injured person in the first instance, you will have to make them good ultimately, either to us or to the insurance company". The other would be—"and, of course, it is understood that, since we are providing for the fund that will indemnify the injured person, that closes any question of our calling on you at any time to contribute to that fund". I can only say that, to me, the first alternative seems a contradiction of what is involved in the respondents' undertaking to pay for and provide the

fund. The second seems to be the natural exchange to take place between the company and their lorry driver. A

I am, therefore, in favour of allowing the appeal. I think it a very difficult point, and I well understand the difference of approach that leads us in this House to different conclusions. I ought, however, to say something about two considerations which have been advanced on behalf of the respondents, but which are to me unpersuasive. It is said that to imply such a term as I propose is, in effect, to contradict the general duty of the employee to exercise reasonable care in carrying out his employer's work. I do not think that this is so. The general duty remains, and it will have its legal effect on all acts of the employee which do not touch this question of insurance against third-party liability. It is the special system whereby this form of insurance is a necessary condition of the employment which brings about the special result. Then it is sought to show that the term in question cannot exist in law because it has never been heard of before this case. When did it first enter into the relations of employer and employed? Could it really have existed since the Road Traffic Act, 1930, if it did not exist before it? My Lords, I do not know, because I do not think that I need to know. After all, we need not speak of the master's action against his servant for negligence as if it had been common fare at the law for centuries. Economic reasons alone would have made the action a rarity. If such actions are now to be the usual practice, I think it neither too soon nor too late to examine afresh some of their implications in a society which has been almost revolutionised by the growth of all forms of insurance. No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another, but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place. B C D E

LORD TUCKER: My Lords, I am of opinion that a servant employed to drive a vehicle in the course of his employment by his master owes a duty to his master to take reasonable care in the driving and management of the vehicle, that for breach of this duty an action founded on contract can be brought by the master against the servant, and that damages which have been awarded against the master by reason of the servant's negligence or breach of this duty are not too remote to be recoverable in the master's action against his servant claiming damages for breach of contract. The reasons for reaching these conclusions, which are in accord with the views of the majority of the Court of Appeal, have already been stated. I agree with them and do not wish to add anything thereto. I will, accordingly, confine myself to the question of the terms which the appellant contends should be implied in his contract of service which, if accepted, would have the result of relieving him from the financial consequences of his breach of his contractual duty in so far as such breach might result in injury to the person or goods of a third party when he was driving a motor vehicle on his master's business. F G H

My Lords, the terms which it is alleged are to be implied in this contract are to be found in the appellant's defence after amendment and re-amendment. Throughout the hearing of this appeal, counsel for the appellant has been content to adhere to the terms as pleaded and has not sought leave to make any further amendment, notwithstanding various alternatives tentatively suggested by some of your Lordships during the hearing. In these circumstances I propose, and, indeed, I feel myself bound, to confine my observations to the implied terms which have been pleaded. They are as follows (para. 4, para. 5, para. 7A and para. 7B of the defence): I

"4. It was an implied term of the [appellant's] contract of employment with the [respondents] that the [respondents] would indemnify him against

A all claims or proceedings brought against him for any act done by him in the course of his said employment . . .

“ 5. In the alternative it was an implied term of the said contract that the [appellant] would receive the benefit of any contract of insurance effected by the [respondents] and covering their liability in respect of the action above referred to. The [respondents] have effected such insurance and have

B been fully indemnified and the [appellant] claims the benefit thereof.

“ 7A. It was an implied term of the [appellant's] employment that he should not be required by the [respondents] to do anything unlawful and in particular that he should not be required to drive unless there was in force in relation to the use of the vehicle such a policy of insurance as would provide him with the indemnity which s. 36 (1) of the Road Traffic Act, 1930, requires. The said term is to be implied by law.

C “ 7B. Further it was an implied term of the [appellant's] employment that the [respondents'] motor insurance should cover the [appellant] against any third-party liability which he might personally incur arising out of his driving the [respondents'] vehicles in the course of his employment.”

D Apart from the difficulty on general principles, to which I shall refer later, of accepting any implied terms of this kind, those pleaded seem to me, on their face, to be open to serious objection. Paragraph 4 is far wider than anything which could reasonably be required on any view, and would result in completely nullifying the effect of the duty of care which the servant owes to his master and to give him a licence to be as negligent as he liked. Paragraph 5, to be effective, must purport to deprive the insurance company of their right, on payment of the claim, to be subrogated to the rights and remedies of their insured, which right exists independently of any express term in the contract of insurance. Alternatively, it may mean that the insured, who has paid damages to the injured person out of his own pocket and received payment by way of indemnity from his insurance company, must pay out of his own pocket the same sum to his servant to enable him to meet a claim brought against him by the insurance company by virtue of their right of subrogation. Paragraph 7A is based on the erroneous assumption that the Road Traffic Act, 1930, imposes an obligation on the employer to take out a policy which will cover the personal liability of the servant while driving in the course of his employment: cf. *John T. Ellis, Ltd. v. Hinds* (15) ([1947] 1 All E.R. 337) and *Lees v. Motor Insurers Bureau* (16) ([1952] 2 All E.R. 511), the correctness of which decisions has not been challenged. Paragraph 7B seeks to impose contractually a wider obligation than Parliament thought fit to impose when the Road Traffic Act, 1930, was passed.

E But, my Lords, apart from these objections which make it impossible for me to accept any of the pleaded implied terms, the case raises questions of importance going beyond the precise language used in this case by the pleader.

F Some contractual terms may be implied by general rules of law. These general rules, some of which are now statutory, e.g., Sale of Goods Act, 1893, Bills of Exchange Act, 1882, etc., derive in the main from the common law by which they have become attached in the course of time to certain classes of contractual relationships, e.g., landlord and tenant, innkeeper and guest, contracts of guarantee and contracts of personal service. Contrasted with such cases as these, G there are those in which, from their particular circumstances, it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their minds to the contingency which has arisen. These are the “ officious bystander ” type of case, to use the well-known words of MacKINNON, L.J.* I do not think that the present case really comes in that category; it seems to me to fall rather within the first class referred to above.

* In *Shirlaw v. Southern Foundries* (1926), *Ltd.* ([1939] 2 All E.R. 113 at p. 124).

Without attempting an exhaustive enumeration of the duties imposed in this way on a servant I may mention: (i) the duty to give reasonable notice in the absence of custom or express agreement; (ii) the duty to obey the lawful orders of the master; (iii) the duty to be honest and diligent in the master's service; (iv) the duty to take reasonable care of his master's property entrusted to him and generally in the performance of his duties; (v) to account to his master for any secret commission or remuneration received by him; (vi) not to abuse his master's confidence in matters pertaining to his service: cf. *Robb v. Green* (6) ([1895] 2 Q.B. 1, 315). It would, I think, require very compelling evidence of some general change in circumstances affecting master and servant to justify the court in introducing some quite novel term into their contract, e.g., a term absolving the servant from certain of the consequences of a breach of his recognised duty to take care, or as to the provision of insurance covering the servant's liability to third parties or his master. I find it difficult to understand what, if any, are the limitations of this theory. Is it to be confined to the relationship of master and servant with reference to motor cars, or is it to extend to all those employed in industry or transport who, in the very nature of things, are engaged on work in which negligence on their part may result in widespread and grievous damage amounting to thousands of pounds for which they may be liable to their employers, and in respect of risks which it was customary for the employer to insure against long before the advent of the motor car?

It is said that the passing of the Road Traffic Act, 1930, has created the new situation which gives rise to the necessity for these implied terms. It is common knowledge that, for many years before 1930, the great majority of prudent motor car owners protected themselves by insurance. Section 35 and s. 36 of the Act were passed not for the protection of the bank balances of car owners, or the life savings of their employees, but simply and solely to ensure that persons injured by the negligent driving of motor cars who established their claims in court might not be deprived of compensation by reason of the defendant's inability to satisfy their judgments. Again, it is said that the passing of the Act has admittedly resulted in the introduction of one implied term, viz., that the servant shall not be required to drive a motor vehicle the user of which has not been covered by insurance as required by the Act. This is merely the application of an existing term to the situation created by the Act. It has always been an implied term that the master will indemnify the servant from liability arising out of an unlawful enterprise on which he has been required to embark without knowing that it was unlawful. When the Road Traffic Act, 1930, required the user to be covered by insurance, a journey which would previously have been lawful became unlawful in the absence of the required cover. My Lords, I cannot accept the view that the impact of this Act on the previously existing obligation of the master is in any way comparable to the implied terms which it is now sought to introduce into the contract of service. On the question of these alleged implied terms, I find myself in complete agreement with ORMEROD, J., and BIRKETT and ROMER, L.JJ. I do not think that there is any substance in the subsidiary matters relied on by counsel for the appellant with regard to the claim not having been made by way of third-party procedure, or as to the inadmissibility in evidence in the present action of the judgment for damages in the suit by the injured man against the present respondents. In the result, I would dismiss the appeal.

✓ **LORD SOMERVELL OF HARROW:** My Lords, the appellant was a lorry driver employed by the respondents. On Jan. 28, 1949, the appellant, while driving in the course of his employment, injured his father who was in the same employment. The father, whom I will call "the third party", claimed damages from the respondents based on the alleged negligence of the appellant. The claim succeeded though the third party was held also to have been negligent. Judgment was entered against the respondents for £1,600 and costs. The respondents in the present proceedings claim (i) an indemnity or contribution under

A the Law Reform (Married Women and Tortfeasors) Act, 1935, (ii) the £1,600 and costs as damages for breach (a) of an implied term of the contract of service that the appellant would exercise reasonable care, (b) of a duty at common law to take care. It is not now disputed the appellant was negligent. As an answer to all or any of these claims, the appellant relied on an implied term that the respondents would cover his, the appellant's, liability to third parties and other
B damage by insurance and that the present claim seeking to make him personally liable for the damages due to the third party was inconsistent with that term. There were other issues some of which are not now maintained and some which do not arise on the view which I take.

ORMEROD, J., held in favour of the respondents on the Act of 1935. This was affirmed by the Court of Appeal, DENNING, L.J., dissenting. He held that
C servants were not normally under a contractual duty to their masters to exercise reasonable care in the performance of their duties. That left a liability in tort. But for the Act of 1935, the employer could not, as a joint tortfeasor, claim indemnity or contribution. He can claim under that Act. DENNING, L.J., held, and I am summarising, that, the employer being insured, there was an implied term that he would not seek to recover contribution or indemnity from the
D servant.

On the alleged contractual duty to carry out the duties of his employment with reasonable care, cases were cited to us which were not, I think, cited to the Court of Appeal. The earliest I need refer to is *Green v. New River Co.* (5) ((1792), 4 Term Rep. 589). The plaintiff's house had been damaged by the bursting of one of the defendant's pipes. LORD KENYON, C.J., held that negligence must be
E proved. A witness was called who said that some hours before the burst he had drawn the attention of the defendant's turncock to oozing water, the suggestion being that the turncock was negligent in failing to attend to the matter. The defendant's counsel offered to call the turncock. The plaintiff objected to his giving evidence without a release. LORD KENYON was of opinion that the turncock was an incompetent witness as he came to disprove his own negligence, which, if established by the verdict, would be the ground of an action against
F himself by his employers. The failure to attend to the matter would be, I think, a contractual and not a "tortious" failure.

In *Harmer v. Cornelius* (4) ((1858), 5 C.B.N.S. 236 at p. 246), WILLES, J. said:

"When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes,—*Spondes peritiam artis*. Thus, if an apothecary, a watch-maker, or an attorney be employed for reward, they each impliedly undertake to possess *and exercise* [my italics] reasonable skill in their several arts . . ."

It was suggested that, in this passage, WILLES, J., was laying down that a servant warranted only possession of skill, and was not undertaking to exercise it with reasonable care. I think that this is wrong. The learned judge is saying that the skilled labourer of the first sentence is under the same contractual obligation to his master as those mentioned in the second sentence are to their customers or clients. The obligation to exercise reasonable care is assumed. There is, however, no authority binding on your Lordships' House.

[Most of the statements against too readily implying terms are in judgments in cases where one party is seeking to imply a term into a written and often detailed contract which is effective and covers the obligations of the parties in normal circumstances without the addition of the term sought to be implied. The position is different when the contract, written or oral, is silent as to matters which have to be settled one way or the other if the contract is to be effective. In the past, as today, goods are often sold, the parties dealing expressly only with the identification of the goods physically or by description and the price. The buyer claims that the goods are defective. The court has in such a case to imply terms.

It would be doing so if it had allowed no exceptions to the warning caveat emptor. Section 12 to s. 14 of the Sale of Goods Act, 1893, set out the terms which, over the preceding years, the courts had implied when the parties were themselves silent. Other examples of this process can be found in the terms to be implied in tenancies. A classic example of the process is the judgment of HOLT, C.J., in *Coggs v. Bernard* (20) ((1703), 2 Ld. Raym. 909). It may be that, in the case of sales of goods and tenancies, the ground has been covered. I would not expect the ground to have been covered in the case of weekly wage earners who would seldom be worth suing. In any case, new circumstances may present new problems which have to be dealt with in the same way.

I think it is right to imply a duty on the part of the servant to take reasonable care in the carrying out of his duties. There would be a breach, although there were no damage, and, happily, most acts of negligence do not cause damage. In the case of a chauffeur it would not, of course, be confined to driving, but would apply to the care of the car and other matters. I, therefore, accept the submission on behalf of the respondents that there is normally a contractual duty on a servant to take care. I now turn to the implication submitted on behalf of the appellant as to the personal liability of the driver of a lorry or car for damage caused by negligent driving.

Soon after motor cars came into use it became obvious that the risk of accidents due to negligence causing serious injuries and damage was very much greater than when vehicles were drawn by horses. Many years before 1930 no reasonable man allowed himself to be in a position where, if negligent, he would be liable to pay out of his own resources third-party damages. He insured. Though this case is concerned only with third-party liability, it would, I think, be found that the normal policy also covered damage to himself and his car. When a man is engaged as a chauffeur or a lorry driver, the question whether his resources are at risk, should he cause damage through his negligence, is as important to him as it is to an owner driver. Nothing was said in this case and I dare say nothing is usually said. If, when such a contract was being negotiated, the question had been raised, it is obvious, I think, that the appellant would have stipulated for the usual cover that an owner driver provides for himself. If nothing is said, it is, in my opinion, for the employer to see that the driver's resources are protected by insurance. It is inconsistent with such an obligation that the employer should seek by action to make the driver personally liable, as in the present case.

I instanced during the argument the case of an owner who drives himself at times and at other times employs a chauffeur. "Unreasonable" would be too mild an epithet if the owner had protected his own resources if he was negligent but had failed to ensure the protection of his driver or, of course, made it clear to him that he must insure himself. If the present claim succeeds, that would be the position. I find it easier to imply this term than the obligation of the driver to take care. This term seems to me to be necessary for the efficacy of the contract. No driver would undertake the work if he was told his resources might be liable for damage caused by a negligent act or omission. It is suggested that such a term would not be precise. It would, I think, be as precise as the "i" or the "f" in a c.i.f. contract. The policy tendered in a c.i.f. contract must be on the "terms current in the trade": *Biddell Brothers v. E. Clemens Horst Co.* (21) ([1911] 1 K.B. 214 at p. 220). If a policy is taken out in the ordinary terms, that is sufficient.

I have not referred to the provisions of the Road Traffic Act, 1930, which make third-party insurance obligatory. This greatly strengthens the arguments for the term which I have implied, but I think, myself, the arguments would have been strong enough apart from that Act, which was directed to protecting the public. I think that the term which I have implied is covered by the pleadings.

I must say a word about *Digby v. General Accident Fire & Life Assurance Corp., Ltd.* (22) ([1942] 2 All E.R. 319). It was assumed in the earlier proceedings before DU PARCQ, J., that the owner could bring an action against her driver for

A damages caused to the owner. The driver then claimed against the insurance company in respect of his liability to his owner. It is not, at any rate, clear that the owner was seeking to make the driver personally liable. It may have been that the driver was sued in order that the damages, if any, against him could be ascertained in order to test the liability of the insurers. In any event, the point does not appear to have been taken in the proceedings before DU PARCQ, J.

B LORD ATKIN says (*ibid.*, at p. 327) that the proceedings against the driver were, no doubt, taken "with a view of eventual recovery from the insurance company." It is fair to the respondents to state that these proceedings are brought in their name but without their knowledge or, I think, approval. They are brought by an insurance company, which ultimately paid the third party, under alleged rights of subrogation contractual or in law. It was suggested that the term which I

C have implied is unenforceable unless agreed to by the insurers of the employer. This point was not pleaded and I cannot think it is right. The insurer, when he has paid, succeeds to such rights as the assured possesses. The assured is not, as I see it, fettered in any way as to the terms on which he contracts with his driver. A good deal of argument was based on the fact that there were two insurances, one being an employer's liability policy and the other a motor

D vehicle policy. The former paid the third party, the latter making, I think, a payment said to be *ex gratia* of £200. There was a dispute, but this cannot throw any light on the contract between employer and driver. It follows that, in my opinion, *Semtex, Ltd. v. Gladstone* (2) ([1954] 2 All E.R. 206) was wrongly decided.

The implied term is an answer to the claim for damages and also to the claim for indemnity or contribution under the Act of 1935. Both claims seek to

E make the appellant personally liable in respect of damages to a third party which is plainly of the kind to be anticipated and covered. It is said that this would have far-reaching consequences. So, I think, would the decision of the Court of Appeal. With respect, I think that that decision is not only far-reaching but also anomalous. One may take as an example an accident causing damage which is within the compulsory provisions of the Road Traffic Act, 1930. If a driver

F was sued direct, it seems clear the insurers would have to pay and there would be an end of it. If, however, the employer is sued, the insurers again pay but can by subrogation recover against the driver and levy execution on his savings. This would, I think, be anomalous. It would also mean that any driver who realised what the law was would have to take out a policy to cover this risk. ROMER, L.J., at the end of his judgment said* that it was not in the public

G interest that drivers should be immune from the financial consequences of their negligence. The public interest has for long tolerated owners being so immune and it would, I think, be unreasonable if it was to discriminate against those who earned their living by driving. Both are subject to the sanction of the criminal law as to careless or dangerous driving. The driver has a further sanction in that accidents causing damage are likely to hinder his advancement.

H The terms which I have implied might, I agree, apply to other cases. The question would be whether the damage sought to be recovered from the servant was damage which any reasonable person would cover by insurance. There would be the further question whether the employment was such that the servant, if nothing was said, was entitled to assume that the master would arrange the insurance. This is plain enough in car or lorry cases, as the owner has to have

I a policy under statute. In other cases it might be a question of evidence.

Other points were argued which do not arise on the view which I have formed. I would allow the appeal.

Appeal dismissed.

Solicitors: *Sidney Torrance & Co.* (for the appellant); *J. F. Coules & Co.* (for the respondents).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

* See [1955] 3 All E.R. at p. 480, letter F.

PERCY E. CADLE & CO., LTD. v. JACMARCH
PROPERTIES, LTD.

[COURT OF APPEAL (Denning and Hodson, L.JJ., and Ormerod, J.), December 6, 1956.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to reconstruct premises on termination of current tenancy—“Reconstruct”—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (f).

Under a lease expiring on Oct. 1, 1956, the tenants occupied the basement and the ground floor of premises for the purpose of carrying on business as tobacconists and hairdressers. The first floor of the premises was let to another tenant who could obtain access to his premises only by means of a staircase belonging to the owners of the adjoining building. The landlords gave notice to the tenants under s. 25 of the Landlord and Tenant Act, 1954, terminating the lease on Oct. 1, 1956, and stating that they would oppose the grant of a new tenancy on the ground (provided by s. 30 (1) (f) of the Act) that they intended to “reconstruct the premises comprised in the holding or a substantial part of those premises . . . and could not reasonably do so without obtaining possession of the holding”. The landlords proved that they intended to convert the three floors into a self-contained unit by building internal staircases from the basement to the ground floor and from the ground floor to the first floor; they also intended to lay a proper floor in the basement and to let the whole premises to a multiple store.

Held: the landlords’ opposition failed since the word “reconstruct” in s. 30 (1) (f) of the Act of 1954 meant “rebuild”, and the landlords had not proved an intention to rebuild the whole or a substantial part of the premises comprised in the holding (viz., the ground floor and basement), and an intention to effect a change of identity without a physical reconstruction (viz., such a change as would be caused by combining the three floors of the premises into a larger whole by erecting internal staircases) was not enough; accordingly the tenants would be granted a new tenancy.

Appeal dismissed.

[For the Landlord and Tenant Act, 1954, s. 30 (1) (f), see 34 HALSBURY’S STATUTES (2nd Edn.) 414.]

Appeal.

This was an appeal by the landlords, Jacmarch Properties, Ltd. from an order of His Honour JUDGE ROWE HARDING dated Aug. 28, 1956, at Pontypridd County Court, granting to the tenants, Percy E. Cadle & Co., Ltd., a new tenancy of the ground floor shop and basement at No. 96, Taff Street, Pontypridd, for seven years from Oct. 1, 1956, at a rental of £350 per annum. The county court judge held that the landlords’ intended alteration of the premises did not amount to the reconstruction of a substantial part of the premises within the meaning of s. 30 (1) (f) of the Landlord and Tenant Act, 1954, and that the landlords had, therefore, no valid ground for opposing the grant of a new tenancy.

L. A. Blundell for the appellants, the landlords.

W. N. Francis for the respondents, the tenants.

DENNING, L.J.: The present case raises the question of the proper meaning of the word “reconstruct” in s. 30 (1) (f) of the Landlord and Tenant Act, 1954. The premises concerned are 96, Taff Street, Pontypridd, Glamorgan. They were let for fourteen years from Oct. 1, 1942, and the lease, therefore, is due to end on Oct. 1, 1956. They consist of the ground floor and the basement of 96, Taff Street: on the ground floor the tenants use the front portion as a tobacconist’s shop, and the back portion as a men’s hairdressers; to get down to

A the basement they have to go outside the front door of the shop and down some steps into the basement, where there is a store, but it is so damp and poorly situated that it is very little used. That is the holding of which the tenants are in possession under the lease. The first floor of the premises, which is not occupied by the tenant, is used as a ladies' hairdresser by somebody else; in order to get to the first floor, it is necessary to go outside and up a staircase belonging to

B the owners of the adjoining premises. Just a little more than six months before the lease was due to come to an end, a property company, Jacmarch Properties, Ltd., bought the whole of these premises. The conveyance was dated Mar. 26, 1956; on Mar. 28, 1956, they gave notice to the tenants under s. 25 of the Act terminating the lease on Oct. 1, 1956, and stating that they would oppose the grant of a new tenancy on the ground that they intended to "reconstruct the

C premises comprised in the holding or a substantial part" of them, and that they "could not reasonably do so without obtaining possession of the holding". In other words, they said that they wanted possession and that they would resist a new tenancy, on the ground stated in s. 30 (1) (f) of the Act.

It is plain that they had formed a firm and settled intention to modernise this building. They intended to make the three floors into one self-contained unit.

D They intended to put inner staircases from the ground floor shop down to the basement, and from the ground floor shop up to the first floor. They intended to put lavatories on the first floor, with all the necessary plumbing. They intended to make the basement a much better place by putting in a proper floor and doing away with the damp. They proposed to let the whole to a new multiple store at a substantial rent which would cover the improvements which

E they were doing. They said that they would improve the premises a great deal by their work. The landlords argued that the work which they intended to do amounted to a "reconstruction" of "the premises comprised in the holding". The county court judge held that it did not. Counsel for the landlords argued before this court today that the judge misinterpreted the word "reconstruct" in the Act. I desire to point out that the only premises with which we are

F concerned in the present case are the ground floor and the basement. It is only if the landlord "intends to . . . reconstruct" those premises that he can resist a new tenancy. We are not concerned with the first floor at all because that is not "comprised in the holding".

Counsel for the landlords invites us to say that when premises like these shop premises are thrown into a larger whole, so that they lose their identity in the

G larger whole, that is a "reconstruction". He referred us to the cases with which we are familiar under the Rent Acts regarding change of identity. He conceded that there would have to be some work done, but argued that the amount did not matter very much, so long as there was a change of identity. In my judgment, the word "reconstruct" in this sub-section is not satisfied by a change of identity; there must be substantial work of construction. The word "reconstruct" here is best expressed, I think, by the synonym "rebuild".

H There must be in effect a rebuilding of the premises or (of course) of a "substantial part" of those premises. Whether there is work of that character and to such a degree is primarily a matter for the county court judge. In the present case the county court judge looked on the work to the basement floor as work of repair, and the putting in of the new internal staircases as work of improvement.

I He thought that there was not a "reconstruction". I think that he was right. I would dismiss the appeal.

HODSON, L.J.: I agree. Section 30 (1) of the Landlord and Tenant Act, 1954, contains these words:

"The grounds on which a landlord may oppose an application under s. 24 (1)* of this Act are such of the following grounds as may be stated in the

*Section 24 (1) provides for the tenant's application to the court for a new tenancy.

landlord's notice . . . (f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding."

We are only concerned with the first part of para. (f); and the learned county court judge has found in the present case that, although the intention to do the work required by the provision was satisfied, nevertheless the landlords were not entitled to oppose the application for a new lease because he found that they did not intend to "demolish or reconstruct the premises comprised in the holding or a substantial part of those premises". He dismissed the first part of that proposition somewhat summarily and did not consider that the work amounted to a "reconstruction" of a "substantial part" of the premises.

I think that the learned county court judge arrived at a conclusion which he was entitled to reach on the evidence. The argument which has been directed to this court by counsel for the landlords is based on this proposition: that the word "reconstruct" must not be read in too literal a sense. He admits that the word "reconstruct" involves physical work, but he says that that does not necessarily cover the whole meaning of the word, which may be satisfied by some physical work coupled with a change of identity or character of the building such as is envisaged here. I notice that the word "reconstruct" follows the word "demolish" in the sub-section. "Demolish" clearly involves the physical act of destruction; and I agree with DENNING, L.J., that the word "reconstruct" seems to be equivalent to "rebuild", and to contemplate a state of affairs where there has been a measure of demolition falling short of a total demolition. I think, therefore, that the physical meaning of the word is the meaning which Parliament intended, and that it is not to be distorted by paying attention to the meta-physical aspect of change of identity and change of character.

ORMEROD, J.: I agree. Counsel for the landlords' argument was based largely, as I understood it, on the supposition that reconstruction primarily meant the changing of the character of the premises into premises of an entirely different character, and that, although a certain amount of structural work might be necessary in those circumstances, the amount of the structural work to be done was in no sense a test whether the proposed work was a "reconstruction". That appears to me to be entirely fallacious. I agree with my Lords that the word "reconstruct" must mean a physical reconstruction of the premises. It must mean, I think, in the first place, a substantial interference with the structure of the premises and then a rebuilding, in probably a different form, of such part of the premises as has been demolished by reason of the interference with the structure.

In those circumstances, the learned county court judge appears to have applied his mind to the proper principle, and there was evidence on which he could find as he did. I see no reason why his finding should be disturbed; and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Harris, Chetham & Co.* (for the landlords); *Kinch & Richardson*, agents for *Allen Pratt & Geldard*, Cardiff (for the tenants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

BILES v. CAESAR AND OTHERS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.J.J.), December 10, 1956.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to reconstruct the premises on termination of current tenancy—Intention stated to reconstruct whole of premises—Evidence of intention to reconstruct substantial part of premises only—Landlords joint owners—Death of one co-owner—Evidence by surviving co-owner and executor of deceased co-owner before probate—Whether intention proved—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 25 (1), s. 30 (1) (f).

The landlords were the joint owners of premises in which a shop and workshop on the ground floor were let to the tenant. The landlords gave notice to the tenant under the Landlord and Tenant Act, 1954, s. 25 (1), to terminate the tenancy on Apr. 6, 1956, stating that they would oppose the grant of a new tenancy on the ground "that on the termination of your tenancy we intend to demolish and reconstruct the whole of the premises comprised in your holding". On Jan. 30, 1956, the tenant applied to the court for the grant of a new tenancy. On Feb. 13, 1956, one of the landlords who had a two-thirds share in the property died, having appointed his son and an accountant to be his executors. On Mar. 27, 1956, at the hearing of the tenant's application, the surviving landlord and the son of the deceased landlord (before obtaining probate of his father's will) gave evidence to the effect that they intended to reconstruct a substantial part (but not the whole) of the premises. The judge reserved his decision until after probate had been obtained of the will of the deceased landlord and the executors had been joined as parties, and thereafter gave judgment in favour of the landlords. The tenant contended that the judgment should be reversed because (i) the landlords had not proved the intention stated in their notice under s. 25 of the Act (viz., an intention to reconstruct the whole of the premises), and (ii) the relevant intention of the landlords for the purposes of the Act could not be established in the absence of executors who, before the hearing was concluded, had proved the will of the deceased landlord.

Held: the landlords had sufficiently specified and made out their ground of opposition to the grant of a new tenancy under the Landlord and Tenant Act, 1954, for the following reasons—

(i) s. 30 (1) of the Act required the landlords to state on which paragraph of the sub-section they relied but not to state on which part of such paragraph they relied; the landlords' notice under s. 25 clearly indicated an intention to rely on para. (f) of s. 30 (1)* as the ground of their opposition, and could be maintained by evidence showing that they intended "to demolish or reconstruct . . . a substantial part of" the premises within s. 30 (1) (f), since the greater included the less, and

(ii) there was sufficient evidence of the landlords' intention within s. 30 (1) (f) notwithstanding that probate of the will of the deceased landlord had not been obtained, since (a) in s. 30 (1) (f) the word "landlord" meant the landlord having the legal title (which, in this case, at the relevant time was in the surviving joint owner alone), and (b) even if evidence of the intention of the executors of the deceased landlord was material, it was competent to an executor to give such evidence before the grant of probate.

Meyappa Chetty v. Supramanian Chetty ([1916] 1 A.C. 603) applied.

Appeal dismissed.

* This provision is set out at p. 153, letter B, post.

[For the Landlord and Tenant Act, 1954, s. 25 and s. 30 (1), see 34 HALSBURY'S A STATUTES (2nd Edn.) 410, 414.]

Case referred to:

- (1) *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A.C. 603; L.R. 43 Ind. App. 113; 114 L.T. 1002; sub nom. *Chetty v. Chetty*, 85 L.J.P.C. 179; 23 Digest 84, 721.

Appeal.

Appeal by the tenant, Leslie Edward Biles, from an order of His Honour JUDGE RAWLINS at Aldershot County Court, made on July 24, 1956, refusing to grant to the tenant a new lease of business premises at No. 47, Union Street, Aldershot, to which Part 2 of the Landlord and Tenant Act, 1954, applied. The respondents originally joined to the tenant's application for a new tenancy were the present respondent, Francis George Caesar, and his brother, Percy Joseph Caesar. They were co-owners of the premises No. 47 Union Street, Mr. Percy Joseph Caesar being entitled to a two-thirds share. He died on Feb. 13, 1956, and the present respondents, Cyril John Caesar (his son) and Ernest John Waldron, were executors of his will which they proved on May 25, 1956.

L. A. Blundell for the tenant.

R. E. Megarry, Q.C., and *M. G. Polson* for the landlords.

DENNING, L.J.: Two brothers, Francis George Caesar and Percy Joseph Caesar, owned premises at No. 47, Union Street, Aldershot. In 1947 they let a shop on the ground floor, with a workshop behind, to Mr. Biles, a jeweller. Mr. Biles, the tenant, has been there for many years, holding on a tenancy which was at common law determinable by three months' notice. The premises were, however, business premises coming within the Landlord and Tenant Act, 1954, so the landlords after that Act had to give the tenant six months' notice of termination. They did so. On Oct. 4, 1955, the brothers Caesar gave a notice to Mr. Biles to terminate his tenancy to expire on Apr. 6, 1956. In that notice they gave their reasons for refusing the tenant a new tenancy. They said:

"We would oppose an application to the court . . . for the grant of a new tenancy on the ground that on the termination of your tenancy we intend to demolish and reconstruct the whole of the premises comprised in your holding."

Thereupon the tenant took them to court: on Jan. 30, 1956, he made application against them for a new tenancy in accordance with the Act of 1954. Before the case came on for hearing one of the brothers, Percy Joseph Caesar, died on Feb. 13, 1956. He made a will in which he had appointed his son, Cyril John Caesar, to be one of his executors and an accountant, Mr. Waldron, to be the other executor. Those two gentlemen applied to come into the proceedings as respondents in place of their testator. They sought to put in an answer which followed the exact words of s. 30 (1) (f) of the Act of 1954; but when the case came on for hearing on Mar. 27, 1956, they were required by the judge to confine their answer to the very terms of the notice to quit which I have read, namely, that they intended to demolish and reconstruct *the whole* of the premises. The case was heard on that day but the judge did not give judgment straight away because the two executors had not taken out probate: they did not take out probate till May 25, 1956. Eventually they were joined in the suit as personal representatives. On July 24, 1956, the judge gave judgment in favour of the landlords.

The tenant appeals to this court. He takes two points. The first point he takes is that the landlords did not prove an intention to reconstruct *the whole*

A of the premises. The tenant says that, although the landlords intend to pull down a large part of these premises, they do not intend to pull down the whole of them. There is one flank wall which is not going to be taken down. Another wall is going to be left standing although a window in it is going to be bricked up. Some part of the ceiling of the shop is to be left. The point that is taken by the tenant is a very technical one. It is quite clear that, if the landlords had given a notice of opposition in comprehensive terms, they would have been in order. Section 30 (1) (f) provides that a landlord is entitled to refuse a new tenancy on the ground that

C “on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises . . .”

C Although the landlords here do not intend to reconstruct the whole, they certainly intend to reconstruct a substantial part. Counsel for the tenant says that they ought not to be allowed to avail themselves of the sub-section because in their notice of opposition and in their answer they relied on “the whole” of the premises; and they ought not to be allowed, he says, to rely on “a substantial part”.

D In my judgment, the tenant’s argument on this point is not correct. It is sufficient for the landlords in their notice of opposition to specify the particular paragraph—(a), (b), (c), (d), (e), (f) or (g) of s. 30 (1) on which they rely. It is not necessary for them to specify any of the subsidiary portions of a paragraph, so long as they make clear which is the paragraph on which they rely. It seems to me quite plain that the landlords in their notice and in their answer were relying on para. (f). Although they did not prove the full extent of their notice—they did not prove that *the whole* was to be reconstructed—nevertheless they proved a sufficient portion to entitle them to refuse a new lease. It is a settled rule of pleading that if a pleader alleges more than is necessary, he is entitled to rely on any lesser facts covered by that allegation which are sufficient for the purpose

F he has in hand. So here, it seems to me, that as long as the landlords prove (as they did) that they intend to reconstruct a substantial part of the premises, that is sufficient. The greater allegation includes the less.

The second point was this. It was said that the landlords had not proved the necessary intention because probate had not been taken out at the time of the hearing. The surviving brother, Francis George Caesar, went into the witness-box and gave evidence of his intention to reconstruct a substantial part of the premises. The executor named in the will, Mr. Cyril John Caesar, the son of the dead man, went into the witness-box and confirmed that intention on his part. To my mind that was sufficient evidence of the intention of the landlords, for two reasons: first, in regard to this para. (f), the “landlord” means the landlord with the legal title to the land. At this date the legal landlord was the surviving brother, Francis George Caesar. He and his deceased brother had been joint owners, and when the deceased brother died the surviving brother became in law the sole owner. He was a trustee, no doubt, but in law he was the sole legal owner, and his intention was all that mattered. Secondly, even if the intention of the executors was material, it has to be remembered that the title of the executor derives from the will and speaks from the will, as LORD PARKER of WADDINGTON pointed out in *Meyappa Chetty v. Supramanian Chetty* (1) ([1916] 1 A.C. 603). In this case the executor, the son, was well qualified and entitled to go into the witness-box at the hearing of the case and give evidence of the intention of the executors, although probate was not taken out until some time afterwards. The judge, I think, did quite rightly to adjourn the case before any formal order was made until probate had been obtained, because until probate had been obtained the court could not enter judgment. It seems to me

that the intention of the landlords was sufficiently established, and I would therefore dismiss the appeal. A

HODSON, L.J.: I agree. I think that the tenant fails on both the grounds which have been raised in this court. The landlords gave notice of their objection to a new tenancy on the ground that on the termination of the existing tenancy they intended to demolish and reconstruct the whole of the premises comprised in the holding. It is submitted that in the evidence given at the hearing they fell short of proving that. Although we have not heard the landlords on this point, I am prepared to assume that that is right and that the evidence given at the hearing fell considerably short of proof of an intention to demolish and reconstruct the whole of the premises. The tenant argues that if the landlord has not set out the grounds as directed by s. 30 (1) of the Landlord and Tenant Act, 1954, and proved that ground as set out in his notice, he must fail. Section 30 (1) is as follows: B C

“ The grounds on which a landlord may oppose an application under s. 24 (1) of this Act are such of the following grounds as may be stated in the landlord’s notice under s. 25 of this Act . . . ” D

and then there are set out the grounds (a) to (g). The correct interpretation of s. 30 (1) is that the grounds are indicated separately in the paras. (a) to (g) and that the landlord is not accordingly bound to sub-divide each ground further. When one looks at para. (f), the ground relied on here, one finds that the words are: E

“ that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof . . . ”

There is no use of the word “ whole ” there, although in the notes on the back of the form which is in the appendix to the Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954 No. 1107), the word “ whole ” appears. No doubt the right construction of para. (f) is to contrast the demolition of the whole of the premises or the reconstruction of the whole of the premises with a similar operation in the case of a substantial part, and all that the landlords have proved here is an intention to demolish and reconstruct a substantial part as against the whole. In my judgment there is no difficulty in the landlords’ way on that account. All that they had to do was to indicate the ground—that is, para. (f)—and that they have done. The fact that they did not go the whole way and prove the widest extent to which para. (f) went does not mean that they failed because they only succeeded in proving the “ substantial part ”, which means that they travelled a lesser distance than the distance which they would cover by their notice. In other words, I agree that the greater includes the less, as it would in the case of an ordinary pleading; and I see no reason why a different argument should apply on the construction of this particular section. F G H

On the second point I also agree. What happened here was this. There were joint landlords, and one of the landlords had died before the hearing. When the answer was put in in accordance with the Rules*, although the executors of the dead landlord had not obtained probate, the answer was headed as if they were substituted already for the deceased landlord, and when the matter came on for hearing the surviving landlord and his nephew gave evidence. The latter was executor of the brother who was one of the original joint landlords, and evidence of intention having been given by both those persons, the second deposing that I

* See C.C.R., Ord. 40, r. 8 (2); County Court Practice, 1956, p. 1583.

he intended to continue the intention which had been formed by his predecessor, the judge reserved his judgment and did not deliver his judgment until the executors had obtained probate and had, therefore, confirmed the position which had been taken up by one of the executors in evidence.

If it were right to say that in view of the way in which this case went it would be wrong to rely solely on the evidence of the survivor of the joint landlords on whom the legal tenancy devolved because of the answer put in by the one remaining landlord and the two executors, I would say that the executors were entitled to prove their intention before obtaining probate. It is an a fortiori case compared with *Meyappa Chetty v. Supramanian Chetty* (1) ([1916] 1 A.C. 603), to which reference has been made, from which it is clear that an executor derives his title and authority from the will so that he can institute an action in the character of executor before he proves the will. If he can do that, surely he can give evidence of an intention which he has in his capacity as an executor before probate has been obtained? I agree, therefore, that the appeal must be dismissed.

MORRIS, L.J.: I agree. By the notice of termination and by the answer, which was amended to accord with the notice of termination, the landlords were clearly referring to para. (f) of s. 30 (1). I think that para. (f) of s. 30 (1) constitutes one ground of opposition that may be satisfied in a variety of ways. Counsel for the tenant submits that a landlord may discard something, but may not add to what he has asserted. It does not seem to me that the landlord is adding anything in this case. It seems to me that the greater includes the less, and that the landlord here has proved enough to bring him within para. (f) of s. 30 (1). On the other part of the case I do not desire to add anything. I am in agreement with the judgments which my Lords have delivered.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Reid Sharman & Co.*, agents for *Herrington & Carmichael*, Aldershot (for the tenant); *Foster, Wells & Coggins*, Aldershot (for the landlords).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BALFOUR v. BARTY-KING AND ANOTHER (HYDER & SONS (BUILDERS), LTD. Third Parties).

[COURT OF APPEAL (Lord Goddard, C.J., Morris, L.J., and Vaisey, J.), December 5, 6, 14, 1956.]

Negligence—Escape—Fire—Escape to adjoining premises—Liability of occupier for acts of independent contractor—Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3 c. 78), s. 86.

Premises which formed part of a large mansion house had been converted into four houses. The plaintiff owned one of these and the defendants, who were husband and wife, occupied the adjoining converted premises. A pipe in the loft of the defendants' premises became frozen and two workmen in the employment of the third parties came on the defendants' premises at the request of the defendants, made to the third parties as independent contractors, to unfreeze the pipe. The workmen proceeded to thaw the pipe by applying to it the flame of a blow-lamp. Most of the pipes in the loft were lagged with felt, and the use of a blow-lamp, in the circumstances, was a highly dangerous operation. Some of the lagging caught alight and in turn ignited other inflammable material in the loft, causing an extensive fire which spread to the plaintiff's premises. The plaintiff claimed against the defendants in respect of the damages to his premises caused by the fire.

Held: the defendants were liable to the plaintiff because the fire, originating in their house, was caused by the negligence of the contractors who were invited by them to do the work, and, therefore, the fire did not begin "accidentally", within the meaning of s. 86* of the Fires Prevention (Metropolis) Act, 1774, nor was it the act of a stranger for which the defendants would not be responsible.

Musgrove v. Pandelis ([1919] 2 K.B. 43) applied.

Decision of *HAVERS, J.* ([1956] 2 All E.R. 555) affirmed.

[As to negligence in regard to fire, see 23 HALSBURY'S LAWS (2nd Edn.) 624-627, paras. 875-881; and for cases on the subject, see 36 DIGEST (Repl.) 76, 77, 406-414.]

As to the defence that the work was done by an independent contractor, see 23 HALSBURY'S LAWS (2nd Edn.) 710, para. 1002.

For the Fires Prevention (Metropolis) Act, 1774, s. 86, see 13 HALSBURY'S STATUTES (2nd Edn.) 10.]

Cases referred to:

- (1) *Beaulieu v. Finglam*, (1401), Y.B. 2 Hen. 4, fo. 18, pl. 6; 36 Digest (Repl.) 78, 416.
- (2) *Turberville v. Stamp*, (1697), 1 Com. 32 (92 E.R. 944); 1 Ld. Raym. 264 (91 E.R. 1072); 12 Mod. Rep. 152 (88 E.R. 1228); 36 Digest (Repl.) 164, 870.
- (3) *Musgrove v. Pandelis*, [1919] 2 K.B. 43; 88 L.J.K.B. 915; 120 L.T. 601; 36 Digest (Repl.) 285, 345.
- (4) *Filliter v. Phippard*, (1847), 11 Q.B. 347; 17 L.J.Q.B. 89; 10 L.T.O.S. 225; 11 J.P. 903; 116 E.R. 506; 36 Digest (Repl.) 76, 407.
- (5) *Black v. Christchurch Finance Co.*, [1894] A.C. 48; 63 L.J.P.C. 32; 70 L.T. 77; 58 J.P. 332; 34 Digest 162, 1266.
- (6) *Dalton v. Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, 1234.
- (7) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, 334.
- (8) *Perry v. Kendricks Transport, Ltd.*, [1956] 1 All E.R. 154.

* Section 86 provides: "And . . . no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . accidentally begin . . ."

Appeal.

This was an appeal by the defendants, Hugh David Barty-King and Jennifer Barty-King, his wife, from an order of HAVERS, J., dated May 8, 1956, and reported [1956] 2 All E.R. 555.

By his action the plaintiff, Elliott Archibald Balfour, claimed damages against the defendants in respect of damage done to his premises by a fire which originated on the defendants' premises and spread to his premises. The fire was caused by the negligence of workmen employed by the third parties, Hyder & Sons (Builders), Ltd., who were engaged in unfreezing pipes at the defendants' premises. HAVERS, J., gave judgment for the plaintiff against the defendants, and for the defendants against the third parties.

Melford Stevenson, Q.C., and G. H. Crispin for the defendants.

John Thompson, Q.C., and Bernard Caulfield for the plaintiff.

Cur. adv. vult.

Dec. 14. **LORD GODDARD, C.J.**, read the following judgment of the court: This is an appeal from a judgment of HAVERS, J., who entered judgment for the plaintiff against the defendants, and also gave judgment for the defendants against the third parties. It arises out of a disastrous fire which took place at a house called Bitchett Wood near Sevenoaks, and for which there is no doubt, on the findings of the learned judge, the third parties were responsible. Unfortunately, they have gone into liquidation and are, apparently, hopelessly insolvent. They have entered no appeal, and what this court has to determine is whether or not the plaintiff is entitled to maintain the action against the defendants.

Bitchett Wood is, we understand, a large country house which, like so many others, has been divided into separate dwelling-houses, and in the part known as Tudor Wing Mr. and Mrs. Barty-King lived. The plaintiff occupied another part, known as White Cottage, which adjoined and, indeed, was contiguous to Tudor Wing. At the end of January, 1954, there was a severe frost, and on Jan. 29 Mrs. Barty-King discovered that the pipes and also the cistern that supplied water to her house (I shall refer to these two parts of Bitchett Wood as the plaintiff's and defendants' houses) had frozen. Being afraid that, as the central heating was on, the freezing-up of the water supply might cause an explosion, she was naturally desirous of getting the system thawed out. It so happened that the third parties, who were builders, were engaged in erecting some houses in the neighbourhood, and she went to the site and asked the foreman or some person in authority if they could assist her by sending somebody to do the necessary work. Whoever she interviewed on behalf of the third parties agreed to do this, and the learned judge found that there was an employment by Mrs. Barty-King of the third parties, and that the service, or as it turned out disservice, which they rendered her was not a mere matter of courtesy but a matter of business. They undertook to do the work. They sent two men to the defendants' house. They came, provided with a blow-lamp, some wire and perhaps some other tools, but neither of the men who came was a plumber. One of them, the one who eventually used the blow-lamp, seems to have been a young apprentice carpenter, and, no doubt, if he had been a man of more experience, he would not have attempted to do this small job in the highly dangerous way that caused the disaster.

The cisterns were in a loft, and Mrs. Barty-King directed the men there. She knew that they had a blow-lamp. She assumed, naturally enough, that they were men fit to do the work, and she gave them no special instructions. This loft, however, had a great deal of combustible material in it. In addition to a certain amount of straw and rubbish, the pipes were, at any rate for the most part, lagged with felt. Mrs. Barty-King supplied the men with an electric lamp, and, as one would expect, she did not go up into the loft. The men traced the

pipe and came to the conclusion, no doubt correctly, that the ice in the pipe was in the part that was lowest in the loft running along what they called the valley. There was a steady draught all the time in the loft, and it seems clear, and the learned judge found, that to apply a blow-lamp to or near the pipe, even if the particular piece to which the heat was applied was unlagged, was a hazardous and dangerous way of doing the job, as the flame and heat necessarily came into contact with the felt lagging. At any rate, the felt lagging caught fire, the men tried to beat it out with their hands, the draught caused sparks to fly, and in an exceedingly short time the whole loft was on fire. The roof caught fire and it very quickly spread to the plaintiff's house and caused a great amount of damage to that house, amounting to over £3,000. A B

It should perhaps be mentioned that in her evidence Mrs. Barty-King said that she thought that what was to be thawed out was the tank, as water was still coming through the pipes. No point was really made of this at the trial. The statement of claim alleged that these men were employed to thaw out the pipes and that was admitted in the defence. In view of what happened, we do not think that it would really have made any difference, as the use of this blow-lamp in the loft anywhere in the neighbourhood of the felt lagging was clearly a highly dangerous operation. The use of a blow-lamp is, no doubt, a very common method of freeing frozen pipes. There are other methods, and methods which should be used where it is dangerous to use a blow-lamp, as it must be if it is used in the neighbourhood of combustible material. A heated brick, for instance, placed under the pipe at the spot where ice had formed would have been safe and equally efficacious. Mrs. Barty-King would naturally not concern herself with the way these men who had been sent to do the job set about it, nor, as we have said, was she, nor would one expect her to be, present in the loft when they were doing the work. C D E

The question which this court has to consider is whether HAVERS, J., was right in holding that for the spread of the fire from their premises to those of the plaintiff the defendants are responsible, although the fire was caused by the negligence of independent contractors brought on to the defendants' premises to do the work which I have described. On this matter there seems to be no direct authority. From very early times it seems to have been recognised in our law that there is a special duty to guard against an escape of fire. It is perhaps not without interest to observe that in dealing with the meaning and derivation of "curfew", the OXFORD DICTIONARY points out that its imposition was not an act of political repression. It was a precautionary measure, so that people should not retire for the night and leave their fires burning. The ENCYCLOPAEDIA BRITANNICA says that curfew was rung at Oxford in the days of Alfred the Great. In days when houses were built mainly of timber and when thatch was the commonest roofing, a spark might, and, indeed, in a country village may still, do almost incalculable damage. F G

The earliest case on the subject which the industry of counsel or our own researches have discovered is *Beaulieu v. Finglam* (1) ((1401), Y.B. 2 Hen. 4, fo. 18, pl. 6), conveniently translated in FIFOOT'S HISTORY AND SOURCES OF THE COMMON LAW (1949) at p. 166. It will be noticed that the writ was founded on a common custom of the realm and alleges that the defendant so negligently kept his fire (*ignem suum*) that the goods and chattels of the plaintiff were burnt. The court held that a man shall answer to his neighbour for each person who enters his house by his leave or knowledge, or is a guest, if he does any act, with a candle or aught else, whereby his neighbour's house is burnt. H I

"But [says the court] if a man from outside my house and against my will starts a fire in the thatch of my house or elsewhere, whereby my house is burned and my neighbours' houses are burned as well, for this I shall not be held bound to them; for this cannot be said to be done by wrong on my part, but is against my will."

The next case to be found in the books is better known, *Turberville v. Stamp* (2) ((1697), 1 Ld. Raym. 264; 12 Mod. Rep. 152). The declaration, which is set out in full in 3 Ld. Raym. at p. 250, alleged that, according to the law and custom of England, every man is bound to keep his fire safely and securely by day and by night, lest for want of due keeping any damage in any manner happen, and then goes on to allege that the defendant so negligently and improvidently kept his fire in a close of heath that for want of the due keeping the plaintiff's heath and furzes were burnt.

In both these cases the first part of the declaration appears to assert an absolute duty to keep the fire safe, but by the latter words to claim in negligence. The court in *Turberville v. Stamp* (2), after saying (12 Mod. Rep. 152) that "the fire which a man makes in the fields is as much his fire as his fire in his house", says that "he must at his peril take care that it does not, through his neglect, injure his neighbour", but adds:

"If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground . . . this is fit to be given in evidence. But . . . here it is found to have been by his negligence . . ."

SIR WILLIAM HOLDSWORTH in his HISTORY OF ENGLISH LAW, Vol. 2, at p. 607, thinks that by 1698, the time when this case was decided, lawyers were beginning to think that it was anomalous that a man should be liable for fire damage not caused by negligence, and that this was one of the reasons for the Act of 1707, 6 Anne c. 31*, which provided that no action should lie against any person in whose house a fire should accidentally begin. This provision was re-enacted in the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3 c. 78), s. 86, an Act which has been held to extend to the whole country. That it was necessary to give this measure of exemption to householders seems to show that by the common law there was an absolute duty to prevent the escape of fire, and this was the opinion of BLACKSTONE, who says (1 BLACKSTONE'S COMMENTARIES (1765) at p. 419) that the common law was altered by the statute 6 Anne c. 31.

The two cases cited above, however, show that at common law the act of God and the act of a stranger were exceptions, and in *Musgrove v. Pandelis* (3) ([1919] 2 K.B. 43) it was held that the statute which protects the householder in the case of an accidental fire leaves the other heads of liability at common law untouched. The citation in that case by BANKES, L.J. (ibid., at p. 46) from the judgment of LORD DENMAN, C.J., in *Filliter v. Phippard* (4) ((1847), 11 Q.B. 347 at p. 354) shows that in his opinion the common law was that a person in whose house a fire originated and which afterwards spread to his neighbour's house was responsible for the damage, and it was to that liability that the statute was directed.

The precise meaning to be attached to "accidentally" has not been determined, but it is clear from these last two cited cases that where the fire is caused by negligence, it is not to be regarded as accidental. Although there is a difference of opinion among eminent text writers whether at common law the liability was absolute or depended on negligence, at the present day it can safely be said that a person in whose house a fire is caused by negligence is liable if it spreads to that of his neighbour, and this is true whether the negligence is his own or that of his servant or his guest, but he is not liable if the fire is caused by a stranger.

Who then is a stranger? Clearly a trespasser would be in that category, but, if a man is liable for the negligent act of his guest, it is, indeed, difficult to see why he is not liable for the act of a contractor whom he has invited to his house to do work on it, and who does the work in a negligent manner. We do not get much assistance from *Black v. Christchurch Finance Co.* (5) ([1894] A.C. 48), although SIR WILLIAM HOLDSWORTH cites that case in support of his opinion that there is liability for the acts of a contractor in this respect†. In that case the

* This statute is cited in RUFFHEAD as 6 Anne c. 31 and in the STATUTES OF THE REALM as 6 Anne c. 58.

† HOLDSWORTH'S HISTORY OF ENGLISH LAW, Vol. 2, pp. 608, 609.

fire was certainly the fire of the defendants, for the contractor had been employed by them to make a fire to burn the scrub and saplings on the land, and in carrying out the work the contractor did a negligent act and one which was in breach of a stipulation in the contract. He started the fire in unfavourable weather. The lighting of the fire was not a casual, or, as it is sometimes put, a collateral act of negligence; it was the very thing that he was employed to do, and LORD SHAND's judgment is really mainly concerned with whether, as the contractor had disregarded a special term in the contract, the employers were liable. A
B

The argument of counsel for the defendants was that in the present case it was not the defendants' fire, as the contractor was not employed to light a fire or to use a blow-lamp or any other form of fire. That, however, is answered by the fact that the use of a blow-lamp is an ordinary way of freeing frozen pipes. The negligence was in using the lamp in proximity to inflammable material. Counsel also relied on the dictum of LORD WATSON in *Dalton v. Angus* (6) ((1881), 6 App. Cas. 740 at p. 831), where he said: C

"When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor." D

This observation, no doubt, states the general rule with regard to liability, or the lack of it, for the negligence of an independent contractor; but the noble and learned Lord was not dealing with the case of the escape of a dangerous thing from land to which it has been brought or on which it has been created. We do not think that it is necessary to consider the doctrine of *Rylands v. Fletcher* (7) ((1868), L.R. 3 H.L. 330) as a separate head of liability. No doubt the doctrine of that case applies to fire, and is subject to the exception of the damage being caused by a stranger. E

In *Perry v. Kendricks Transport, Ltd.* (8) ([1956] 1 All E.R. 154 at p. 161), PARKER, L.J., referred to a stranger as a person over whom the defendant had no control. From one point of view it may be said that the test of an independent contractor is that he is left to carry out the work in his own way, but that is not the sense, I think, in which the lord justice was using the word "control". The defendants here had control over the contractor in that they chose him, they invited him to their premises to do work, and he could have been ordered to leave at any moment. It was left to the men who were sent how to do the work, and in our opinion the defendants are liable to the plaintiff for this lamentable occurrence, the more lamentable in that the persons ultimately responsible are insolvent. The appeal must be dismissed with costs. F
G

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Boodle, Hatfield & Co.* (for the defendants); *Barlow, Lyde & Gilbert* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

THOMPSON v. THOMPSON.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 6, 7, 8, December 11, 1956.]

Divorce—Estoppel—Same allegations raised in wife's answer to petition for divorce as previously raised by wife in unsuccessful application to High Court for maintenance—Husband's allegation in petition that wife had made untrue charges—Whether wife estopped from repeating charges in answer.

Divorce—Practice—Striking out pleading—Estoppel—Proximity and want of reasonable cause—Answer to petition for divorce—Pleading based in part on same matters as had been raised on previous unsuccessful application for maintenance—Defects invited by similar defects in petition.

On the hearing in July, 1955, of a wife's application to the High Court for an order for maintenance under s. 23 of the Matrimonial Causes Act, 1950, the divorce commissioner rejected the wife's charge of cruelty against the husband and accepted the evidence of the husband, but made no finding as to allegations of cruelty and desertion by the wife made by the husband in an affidavit refuting her charges. In November, 1955, the husband filed a petition for divorce on the ground of cruelty, in which he specified many instances of nagging and unreasonable complaints and other allegations, and charged the wife with testifying falsely in the maintenance proceedings that he had treated her with cruelty. In her answer denying cruelty and seeking a judicial separation, the wife denied the husband's charges in detail and charged him with cruelty, repeating allegations that she had made in the maintenance proceedings and reciting further incidents in detail. On an application by the husband to strike out the parts of the answer relating to his alleged cruelty as *res judicata*, or as disclosing no reasonable cause of action or as being embarrassing,

Held: the allegations in the wife's answer should not be struck out for the reasons stated below and, in the circumstances, the appropriate course was to direct the case to be tried by the commissioner who had heard the previous proceedings for maintenance. The reasons were—

(i) although the wife might herself be estopped from re-opening the issue of the husband's alleged cruelty which already had been determined by the Divorce Court, the court was not debarred by any estoppel between the parties from discharging its statutory duty (under s. 4 (1) of the Matrimonial Causes Act, 1950) of inquiring into the truth of a petition or countercharge (*Harriman v. Harriman*, [1909] P. 123, approved and applied), and

(ii) in the present case the court, not being bound by any estoppel, should leave the wife's allegations open for trial because (a) (per DENNING and MORRIS, L.JJ.) the husband had charged her with making false allegations of cruelty in the maintenance proceedings and she should be allowed to defend herself against this charge, and (b) (per HODSON and MORRIS, L.JJ.) the subject of litigation in the present case and the subject of litigation in the previous proceedings were not the same (*Winnan v. Winnan*, [1948] 2 All E.R. 862, adopted and applied; *Finney v. Finney*, (1868), L.R. 1 P. & D. 483, distinguished), and

(iii) although the pleadings infringed rules of pleading the defects of the answer had been invited by the similar defects of the petition.

Per DENNING, L.J.: once an issue of a matrimonial offence has been litigated between the parties and decided by a competent court, neither party can claim as of right to re-open the issue and litigate it all over again if the other party objects; but the Divorce Court has the right, and indeed the duty in a proper case, to re-open the issue, or to allow either party to re-open it, despite the objection of the other party (see p. 165, letter E, post).

Observations on pleading (per DENNING, L.J., with the concurrence of MORRIS, L.J.; see p. 169, letters B to F, and p. 176, letter H, post).
Appeal dismissed.

[Editorial Note.] The judgments touch on the question whether findings of magistrates in matrimonial proceedings before them give rise to an estoppel in subsequent proceedings in the High Court. At p. 166, letter A, post, DENNING, L.J., intimates that, in general, the rules of estoppel are not applied within the category of cases that he there discusses and that the High Court investigates the matter afresh; but HODSON, L.J., stresses that in principle the fact that the previous proceedings were before magistrates is not a ground of distinction excluding estoppel (see p. 170, letters G and H, post). Compare per MORRIS, L.J., at p. 175, letter I, to p. 176, letter A, post.

As to estoppel as a bar in divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 277, para. 533, note (s), 294, para. 581; 15 HALSBURY'S LAWS (3rd Edn.) 183, 184, para. 356; and for cases on the subject, see 27 DIGEST (Repl.) 375, 376, 3089-3098.]

Cases referred to:

- (1) *Hoystead v. Taxation Comr.*, [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354; Digest Supp.
- (2) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest (Repl.) 363, 3005.
- (3) *Bland v. Bland*, (1866), L.R. 1 P. & D. 237; 35 L.J.P. & M. 104; 27 Digest (Repl.) 308, 2563.
- (4) *Pratt v. Pratt*, (1927), 96 L.J.P. 123; 137 L.T. 491; Digest Supp.
- (5) *Hudson v. Hudson*, [1948] 1 All E.R. 773; [1948] P. 292; [1948] L.J.R. 907; 2nd Digest Supp.
- (6) *Finney v. Finney*, (1868), L.R. 1 P. & D. 483; 37 L.J.P. & M. 43; 18 L.T. 489; 27 Digest (Repl.) 375, 3092.
- (7) *Bright v. Bright*, [1953] 2 All E.R. 939; [1954] P. 270; 117 J.P. 529; 3rd Digest Supp.
- (8) *Hill v. Hill*, [1954] 1 All E.R. 491; [1954] P. 291; 118 J.P. 163; 3rd Digest Supp.
- (9) *Dixon v. Dixon*, [1953] 1 All E.R. 910; [1953] P. 103; 3rd Digest Supp.
- (10) *James v. James*, [1948] 1 All E.R. 214; 112 J.P. 156; 2nd Digest Supp.
- (11) *Winnan v. Winnan*, [1948] 2 All E.R. 862; [1949] P. 174; [1949] L.J.R. 345; 2nd Digest Supp.
- (12) *Crewe v. Crewe*, (1800), 3 Hag. Ecc. 123; 162 E.R. 1102; 27 Digest (Repl.) 389, 3220.
- (13) *Cooper v. Cooper*, [1954] 3 All E.R. 358; [1955] P. 168; 118 J.P. 549; 3rd Digest Supp.
- (14) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.
- (15) *Henderson v. Henderson*, (1843), 3 Hare, 100; 1 L.T.O.S. 410; 67 E.R. 313; 21 Digest 174, 276.

Appeal.

The husband appealed against an order of COLLINGWOOD, J., made on July 23, 1956, dismissing the husband's appeal from an order of Mr. Registrar LONG made on June 28, 1956, refusing the husband's application to strike out certain parts of the wife's answer* to the husband's petition for divorce. The grounds submitted for striking out the parts of the answer were: (i) that the wife was estopped from raising allegations contained in specified paragraphs by proceedings on an application by the wife for an order for maintenance made to the High Court under s. 23 of the Matrimonial Causes Act, 1950, and by the determination of Mr. Commissioner GRAZEBROOK, Q.C., dismissing the application on July 29,

* The answer was not drafted by counsel who appeared for the wife.

A 1955; (ii) that under R.S.C., Ord. 25, r. 4, certain specified paragraphs disclosed no reasonable cause of answer and were frivolous and vexatious, except in so far as they consisted of bare denials of allegations contained in the petition; (iii) that, under R.S.C., Ord. 25, r. 4, passages in specified paragraphs disclosed no reasonable cause of action and were frivolous and vexatious; and (iv) that, under R.S.C., Ord. 19, r. 27, the whole answer, except two paragraphs and part of a third, was unnecessary and contrary to the rules of pleading and tended to prejudice, embarrass and delay the fair trial of the action. The grounds of the appeal were that the learned judge was wrong in holding that the wife was not estopped from pleading the facts and matters referred to in (i) and that the matters referred to in (ii) and (iii) disclosed a reasonable cause of action, and in refusing to strike out the whole answer except the two paragraphs and part of a third paragraph referred to in (iv). The husband sought to have the parts of the answer struck out to that extent.

R. S. Boyd for the husband.

H. Morris for the wife.

Cur. adv. vult.

D Dec. 11. The following judgments were read.

DENNING, L.J.: This is an interlocutory appeal which raises some important points of practice. The parties married on Oct. 6, 1945. The husband was a widower aged forty-nine, and the wife a spinster aged forty-five. The husband had two children by his previous marriage, a son, Neville, aged sixteen and a half, and a girl, Janet, barely eleven. They lived together until E July 25, 1954, when the wife left the matrimonial home, and they have never lived together since. On Jan. 18, 1955, the wife made an application to the High Court for maintenance under s. 23 of the Matrimonial Causes Act, 1950. She alleged that her husband had wilfully neglected to provide reasonable maintenance for her. Inasmuch as she had herself left the home, she had forfeited any right to maintenance unless she had good reason for leaving; F so she alleged in her affidavit

“ that the [husband] since the celebration of the said marriage has treated me with cruelty and has caused me by his conduct to leave the matrimonial home aforesaid ”;

G and she went on to allege one specific assault on July 25, 1954, and no more. The husband made an affidavit in reply in which he denied the wife's allegations and said:

“ Since the celebration of the said marriage the [wife] has treated me with cruelty and she has now deserted me ”;

I and he went on to give his version of the incident on July 25, 1954, saying that she assaulted him. The wife made an affidavit in reply giving more details about the incident, but making no other allegations.

I On July 4, 1955, the summons for maintenance came on for hearing before Mr. Commissioner GRAZEBROOK, Q.C. The wife went into the witness-box and proceeded to give a long and detailed history of the married life, bringing up many matters of complaint which had not been mentioned in her affidavit at all. The husband's counsel took objection, whereupon the commissioner ruled that the wife should give her evidence in chief “ so that her case could be finally elaborated and given in detail ”. She did this, and the commissioner then adjourned the hearing so as to give the husband an opportunity to meet the charges thus made against him. The case came on for hearing again on July 27, and was heard then for three more days, July 27, 28 and 29, 1955. The wife was cross-examined and re-examined. She called her sister and her sister's husband in support of her case. The husband gave his evidence. He called his son and

daughter and also a builder in support of his case. There was thus a full investigation into all the wife's charges against her husband. In the result, the commissioner found for the husband. He described the wife as "somewhat of a dragon" and her evidence as "totally unreliable and indeed quite untruthful in many respects". He described the husband as a "quiet type of man" who gave his evidence very fairly, and his son and daughter as a "very nice type" of lad and girl, who gave their evidence very well. He accepted their evidence. He held that

"the [wife] has not made out a case of cruelty and has not made out a case justifying her in leaving her husband."

Accordingly he dismissed the application.

The commissioner did not make any finding whether the wife had been cruel to the husband. It was unnecessary for him to do so. It is to be noted, however, that, in accepting the husband's evidence, he accepted the husband's version of the incident of July 25, 1954, according to which the wife for no sufficient reason started to punch at the husband's face, the husband caught hold of her wrists to stop her, whereupon she spat in his face, and he said: "That is the end; I will see my solicitor in the morning". It is to be further noted that the husband was asked:

"Q.—Did you make any effort whatever to get her back? A.—No.
Q.—Do you want her back now? A.—I have no objection at all. Q.—No objection at all? A.—None at all. Q.—You told us earlier you do not love her? A.—Quite true."

The position was, therefore, that the wife on July 29, 1955, found herself separated from her husband with no claim on him for maintenance. She soon tried to put herself right. From August to November, 1955, she made many efforts to return to him. Her solicitors wrote many times seeking a reconciliation. She wrote herself and she went herself to the home. But the husband refused to have her back. Eventually on Nov. 10, 1955, he filed a petition for divorce from her on the ground that she had treated him with cruelty. In April, 1956, she filed an answer denying cruelty, and seeking a judicial separation. We are concerned today with the pleadings in these proceedings, and particularly with the question whether the parties, having already fought for four days before the commissioner, should be allowed to fight the battle all over again.

The pleadings stand in this way: The petition fills seven and a half pages of foolscap. The answer fills seventeen pages. In the petition the husband has alleged in one sentence that the wife treated him with cruelty. He follows that by nineteen paragraphs in which he gives many instances when he says his wife "nagged" him and the children, and made unreasonable complaints. There is one long paragraph about the incident of July 25, 1954, then a paragraph alleging that she deserted him, then a paragraph alleging that she gave false and malicious evidence in the maintenance proceedings. Now for the wife's answer. In the first twenty-three paragraphs she denies the husband's charges in detail, and goes on to give her version of what took place on the occasions mentioned by him. In the next paragraph, No. 24, she turns to the attack and charges him with cruelty. It covers five pages. In it she repeats all she has said in the earlier paragraphs and goes on to recite in great detail incidents that took place in the home, including the conduct of the children. In addition she sets out the full terms of all the correspondence in which she offered to return to her home.

The pleadings do not stop there. The wife has applied for further particulars of the petition. Her application fills five pages. The husband voluntarily gave one and a half pages of particulars. The wife then applied to the registrar for an order for further particulars, and he made an order for further particulars

A of fourteen paragraphs of the petition. They have not yet been delivered, but experience suggests that they will fill many pages.

The husband has not yet applied for particulars of the wife's answer. He has taken a bolder course and applied to strike out a large part of it. That is the application which is before us today. The registrar and the judge have refused to strike out any part of the wife's answer. The husband appeals to this court.

B The first ground of the application is estoppel by res judicata. The husband says that the wife's allegations of cruelty were all fought out in the maintenance proceedings; and that she is estopped from raising them again now. There is no doubt, to my mind, that, if the doctrine of res judicata applies in its full force to the Divorce Division of the High Court, the wife is so estopped. The issue of C cruelty has already been the subject of litigation by a court of competent jurisdiction, to wit, the court which tried the wife's claim for maintenance, and the court would not, according to the ordinary principles, permit her to open the same subject of litigation again: see *Hoystead v. Taxation Comr.* (1) ([1926] A.C. 155 at p. 170). The question in this case is, however, whether those ordinary principles do apply to the Divorce Division. The answer is, I think, that they D do apply, but subject to the important qualification that it is the statutory duty of the Divorce Court to inquire into the truth of a petition—and of any counter-charge—which is properly before it, and no doctrine of estoppel by res judicata can abrogate that duty of the court. The situation has been neatly summarised by saying that in the Divorce Court “estoppels bind the parties but do not bind E the court”: but this is perhaps a little too abbreviated. The full proposition is that, once an issue of a matrimonial offence has been litigated between the parties and decided by a competent court, neither party can claim as of right to re-open the issue and litigate it all over again if the other party objects (that is what is meant by saying that estoppels bind the parties): but the Divorce Court has the right, and indeed the duty in a proper case, to re-open the issue, or to F allow either party to re-open it, despite the objection of the other party (that is what is meant by saying that estoppels do not bind the court). Whether the Divorce Court should re-open the issue depends on the circumstances. If the court is satisfied that there has already been a full and proper inquiry in the previous litigation, it will often hold that it is not necessary to hold another inquiry all over again. But if the court is not so satisfied, it has a right and a G duty to inquire into it afresh. If the court does decide to re-open the matter, then there is no longer any estoppel on either party. Each can go into the matter afresh.

Such being the principles, let me show how they have been applied. The cases fall into three categories. The first category consists of those cases where a charge of a matrimonial offence has been established in previous proceedings. One party has been found guilty. In such a case, as between the parties, the H strict rules of res judicata would seem to apply; but the Divorce Court, being bound by no estoppels, often allows a departure from them. The best illustration is where a party has obtained a decree of judicial separation on the ground of cruelty and follows it up with a petition for divorce on the same ground. In the subsequent divorce proceedings, the court may treat the prior decree as sufficient proof of the cruelty, but it is not bound to do so. The court can, if it I thinks fit, inquire into the charge of cruelty all over again. It will admit the prior decision as evidence of the cruelty, but not as conclusive. That was fully established in *Harriman v. Harriman* (2) ([1909] P. 123 at pp. 142 and 144), and it has since been given statutory force by s. 6 of the Matrimonial Causes Act, 1937, and s. 7 of the Matrimonial Causes Act, 1950. In cases in this category, the practice of the court is this: When the previous proceedings have been in the High Court for judicial separation, the Divorce Court usually accepts the prior decision as sufficient proof: see *Bland v. Bland* (3) (1866), L.R. 1 P. & D.

237). But, where the previous proceedings were before the magistrates for maintenance, the court usually thinks it right to inquire into the matter afresh, in which case it allows the accused party to defend himself for the second time: see *Pratt v. Pratt* (4) ((1927), 96 L.J.P. 123); *Hudson v. Hudson* (5) ([1948] 1 All E.R. 773). In the present case the prior proceedings were in the High Court for maintenance. If the wife had succeeded in showing that her husband had treated her with cruelty, I should have thought that, if the wife subsequently brought divorce proceedings based on the self-same cruelty, the court would have inquired into the matter afresh. It would have allowed the husband to defend himself from the charge a second time, but it would give all proper weight to the previous decision.

The second category is where a charge of a matrimonial offence has been made unsuccessfully *in the High Court*. The charge has failed and the accused person has been acquitted. The complainant then repeats the charge in a subsequent suit for divorce. The court will not as a rule allow him to do this. The best illustration is where a wife petitions for judicial separation on the ground of cruelty and fails. She afterwards petitions for divorce, alleging the self-same acts as cruelty. The doctrine of estoppel by *res judicata* applies, so that she cannot claim as of right to litigate the matter all over again. The Divorce Court, being bound by no estoppels, is not bound to act on that estoppel. Nevertheless it will as a rule do so. The court thinks it unfair to put the husband to the burden of defending himself a second time on the same charge on which he has already been acquitted, especially when it is remembered that he will usually have had to bear the costs of the first suit. This was made clear in *Finney v. Finney* (6) ((1868), L.R. 1 P. & D. 483), where LORD PENZANCE struck out the charges of cruelty. Another case in this category is *Bright v. Bright* (7) ([1953] 2 All E.R. 939), where a wife petitioned for divorce on the ground of cruelty and failed. She afterwards petitioned for divorce on the ground of constructive desertion, and, in order to show that she had been driven out by his conduct, she raised the very same allegations as she had previously raised in the cruelty proceedings; and in addition she made other allegations which could well have been raised as part of her case of cruelty. WILLMER, J., refused to allow her to raise those allegations. The third case is *Hill v. Hill* (8) ([1954] 1 All E.R. 491) where a wife, who had left her husband, petitioned for divorce on the ground of cruelty. She failed. The husband then brought a petition for divorce on the ground of desertion. In her answer the wife said that she was justified in leaving him because of his conduct, relying on substantially the same allegation as she had made in her cruelty petition. She was seeking to make again a charge on which she had already failed. DAVIES, J., refused to allow her to raise those allegations. In those three cases the court recognised the rule of estoppel by *res judicata* and did not think it right to depart from it. There is one case, however, where the court did allow a departure. It is *Dixon v. Dixon* (9) ([1953] 1 All E.R. 910), where in previous proceedings a wife's petition for cruelty had been dismissed, and in subsequent proceedings she sought to charge him with constructive desertion based on substantially the same allegations. DAVIES, J., allowed her to do it because the findings in the previous proceedings were not at all clear. In so doing I think he was exercising the right of the Divorce Court to re-open the matter if it should think fit so to do, because estoppels do not bind the Divorce Court.

In drawing the foregoing distinction between the first and second categories, I am following the guidance given by LORD MERRIMAN, P., in *James v. James* (10) ([1948] 1 All E.R. 214 at pp. 217 and 218), and *Hudson v. Hudson* (5) ([1948] 1 All E.R. at p. 775), and by WILLMER, J., in *Bright v. Bright* (7).

The third category is where a charge of a matrimonial offence has been made unsuccessfully *before the magistrates*, and the complainant afterwards repeats the charge in a subsequent suit for divorce. In such a case, as between the

A parties, the rules of estoppel would seem to apply: but the Divorce Court, which is bound by no estoppels, almost invariably investigates the charge afresh. The reason is because it is known that magistrates are inclined to concentrate more on the question: Ought this husband to pay maintenance to the wife, and less on the other issues, however relevant they may be? At any rate, the Divorce Court does not consider it satisfactory to allow the matter to be conclusively
B determined by the magistrates. The Divorce Court regards their finding as evidence, but not as conclusive, on the issue. This is well shown by the case of *Winnan v. Winnan* (11) ([1948] 2 All E.R. 862), a decision of this court. It was a case where a wife kept twenty-five or thirty cats in the house, and this made life so intolerable for the husband that he left. The wife brought maintenance proceedings before the magistrates. In order to resist the claim, the husband
C put forward the facts about the cats—which amounted to a charge of constructive desertion—and he failed before the magistrates. They ordered him to pay maintenance. Subsequently he brought divorce proceedings against his wife based on the self-same facts as constructive desertion. He was allowed to raise them all again and he succeeded, thus in effect contradicting the decision of the magistrates. The court was obviously influenced by the fact that the magis-
D trates only decided “ incidentally and by inference ” that the wife was not guilty of constructive desertion. The court felt itself therefore at liberty to depart from the strict rules of estoppel by *res judicata*. It is a good illustration of the principle that, whilst the Divorce Court recognises estoppels by *res judicata*, it is not bound by such estoppels and can in a proper case depart from them.

To come now to the present case, the question is whether the wife should be
E allowed to raise again in these proceedings the allegations of cruelty which were all thrashed out at great length in the maintenance proceedings before Mr. Commissioner GRAZEBROOK. At first sight it would seem that she should not be allowed to do it. The court should, it would seem, act on the strict rule of estoppel by *res judicata*. If the wife had herself brought a petition for divorce on the ground of her husband's cruelty, I should have thought it plain that she
F should not be allowed to harass him again with the self-same charges on which she has already failed. The case would come within the second category. But the trouble in this case is with the husband's own petition. He has in his petition charged his wife with perjury in the prior maintenance proceedings. He has said that she falsely and maliciously swore that he treated her with cruelty and so forth. His charge of perjury is so comprehensive that, in order to investigate
G it, the court will have to go into her allegations all over again. He has set up this charge of perjury in order to revive any condoned cruelty. If he is bringing up the allegations in this way, I do not see why she should not be allowed to keep them in her answer. The court should allow a departure from a strict estoppel to enable her to do so. It is very unfortunate that all this expense
H should be incurred all over again, but he has brought it on his own head by his own pleading.

Apart from the question of estoppel by *res judicata*, the husband seeks to strike out many paragraphs of the answer, on the ground that they disclose no reasonable cause of action and are frivolous and vexatious; and are unnecessary and contrary to the rules of pleading and tend to prejudice, embarrass and delay
I the fair trial of the action. At first sight it seemed that we ought to accede to this application. The answer offends many of the rules of pleading. It includes a great deal of evidence, and a lot of matter which is irrelevant, and it is intolerably prolix. But the trouble is that the petition itself is nearly as bad. It almost invites an answer in kind. It is a case of the pot calling the kettle black. This was the view held both by the registrar and also by the judge. They both thought that the pleadings were a disgrace, but as the petitioner had brought it on himself they declined to strike out the answer.

In fairness to the wife's counsel, I should say how he came to plead at such length. He said that in the maintenance proceedings the wife was severely cross-examined on the familiar lines: "Why did you not put this in your affidavit?" To save her from another cross-examination on those lines, her counsel on this occasion put into her answer everything that the wife wished to say when she went into the witness-box. The husband's counsel seems to have proceeded on the same lines. He put in everything the husband wished to complain about. So we find that these pleadings contain a full account of all the sources of friction which disturbed the calm of this household throughout the ten years of marriage. Let me give an instance. The petition alleges in para. 9

"that during the years 1948 and 1949 whenever the [husband's] son visited the matrimonial home on leave from the army the [wife] continually nagged and unreasonably complained of the extra work cast upon her and made it clear that she wished the [husband's] son to leave the matrimonial home."

Just see what that comes to. It simply means that seven years ago the wife made some complaints which the husband considered unreasonable. Is that cruelty, or is it not rather part of the wear and tear of married life? Some practitioners seem to think that, whenever a wife objects or complains of anything, her complaint has only to be described as "nagging" and it becomes cruelty. It almost makes me wish that the courts had never allowed "nagging" to be introduced as a head of cruelty. But, the allegation being introduced, see how the wife answers it.

"She denies the allegation set forth in para. 9 of the petition and says that the comforts of the matrimonial home were always freely available to the said Neville during the period of the said Neville's national service. She says further that during the twelve months when the said Neville was stationed at Catterick he sent his washing home for the [wife] to do and that the [wife] always did the said Neville's laundry personally and returned the same to him promptly. The [wife] says further that when the said Neville was stationed at Pirbright during a period of ten months he visited the matrimonial home every third or fourth day and was warmly welcomed by the [wife]".

That is a bad piece of pleading. It was quite unnecessary for the wife to say how much kindness she showed to Neville. All that was needed was a denial of the charge of cruelty. To make matters worse, the wife repeats this paragraph as part of her charge of cruelty against the husband, which is ridiculous. Her kindness to Neville is not cruelty by the husband to her.

What is to be done with pleadings like this? At one time I was inclined to think we ought to make both parties start all over again and plead properly; but that would involve a lot more time and money, and enough has been wasted already in all conscience. It would not matter so much if both parties were spending their own money: but the wife here is legally aided and is spending the country's money. It would be more excusable if the married life was being examined in court for the first time; but it has been already investigated for four days in court over the maintenance proceedings.

In all the circumstances, I think the right thing is to put a stop to all these interlocutory proceedings and bring the present case on for trial as soon as possible before the judge who tried the previous case, Mr. Commissioner GRAZEBROOK. The husband must comply with the existing order for particulars to the best of his ability as briefly as possible, but then all interlocutory proceedings must stop. The wife will no doubt object to Mr. Commissioner GRAZEBROOK trying the case because he has already described her as "somewhat of a dragon": but it must be remembered that, if the divorce case had been started earlier,

- A it would have been ordered to be tried at the same time as the maintenance proceedings or immediately afterwards. They would both have been tried by the same judge then. So they can both be tried by the same judge now. It is the only way to keep this litigation within reasonable limits of time and expense. It would be intolerable to expect another judge to have to listen for days to the trivial incidents of this married life when one judge has already done it. When
- B the case comes before the same judge, both sides will realise that he knows all about them. He will need only to have his memory refreshed as to the previous proceedings and to be given evidence as to what has happened since. In this way much time and money will be saved.

- This case shows how necessary it is for the rules of pleading to be observed. Perhaps I may be permitted to stress some points. Counsel for the husband
- C should remember that, to constitute cruelty, the conduct complained of must be of a grave and weighty character. It is no good pleading trivial incidents which are only the ordinary wear and tear of married life or do no more than show that the parties are at arm's length. He should confine the pleading to substantial matters of complaint and give the time and place when they occurred. If he brings in a lot of trivial incidents, it weakens the force of substantial matters.
- D The court will think that, if the husband complains of trivial things, it is because he is not ready to do his part in the give and take of married life. On the other hand, counsel for the wife should remember that it is often bad policy to ask for further particulars of the cruelty alleged in the petition. The court takes no notice of general allegations of "cruelty" or "nagging" unless they are supported by specific instances, coupled with time and place. If the respondent
- E asks for particulars, he may force the petitioner to become specific on a matter which otherwise he would have left vague and useless to him. The respondent should also remember that in his answer he need only deny that he is guilty of cruelty. He need not go on to say what happened on the occasion in question. A wise maxim for every pleader is: "Do not leap before you come to the stile". Above all, neither side should plead evidence. They should confine themselves
- F to the material facts. It is only in this way that pleadings can be kept within manageable bounds.

In the result, I think the appeal should be dismissed: but the case should be tried, as soon as possible, before Mr. Commissioner GRAZEBROOK.

- HODSON, L.J.:** This is an appeal by leave from an order of COLLINGWOOD, J., dismissing an appeal from Mr. Registrar LONG's order of June 28, 1956, refusing an application by the petitioner husband to strike out part of the answer of the respondent wife to the petition. The history of the matter is as follows: On Jan. 18, 1955, the wife issued a summons against the husband under s. 23 of the Matrimonial Causes Act, 1950, claiming that he had wilfully neglected to provide reasonable maintenance for her. In support of the summons
- H the wife swore an affidavit alleging, inter alia, that her husband had treated her with cruelty and caused her by his conduct to leave the matrimonial home, thus anticipating his defence, which was that he was willing to receive her and maintain her in the home. In his affidavit in answer, the husband denied that he had treated his wife with cruelty and alleged in his turn that she had treated him with cruelty. He also alleged that she had deserted him.

- I The matter was heard by Mr. Commissioner GRAZEBROOK, Q.C., on July 4, 27, 28 and 29 on oral evidence, and the summons of the wife was dismissed. By his judgment the commissioner expressly rejected the wife's allegations of cruelty, found that she was not justified in leaving her husband, and made no finding on the husband's allegations of cruelty.

The husband's attitude at the trial was that he was prepared to have his wife back, so that it was unnecessary to decide the case of cruelty raised by him. The only material question for the commissioner was whether the wife was

justified in remaining away from her husband. This question having been decided adversely to the wife, the summons was dismissed. A

The husband did not receive his wife back, but in his turn instituted proceedings against her by a petition dated Nov. 10, 1955, on the ground of her cruelty to him. By her answer, the wife denied cruelty and pleaded condonation. She also countercharged the husband with cruelty, which, if condoned, she said had been revived, inter alia, by the husband's refusal to live with her since the disposal of the previous proceedings instituted by her against him. B

The husband seeks to strike out those parts of the wife's countercharges which have been dealt with in the previous proceedings on the ground of estoppel per rem judicatam.

In my judgment, there is no estoppel here binding on the court. The previous proceedings were not divorce proceedings, and in exercising divorce jurisdiction the court is not bound by the ordinary rules of estoppel. This has been recognised since the decision of *Harriman v. Harriman* (2) ([1909] P. 123) in the words of SIR HERBERT COZENS-HARDY, M.R. (ibid., at p. 132): C

"The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied": D

See the discussion as to the practical effect of this decision contained in the judgment of LORD MERRIMAN, P., in *Hudson v. Hudson* (5) ([1948] 1 All E.R. 773 at p. 775); see also *Winnan v. Winnan* (11) ([1948] 2 All E.R. 862). In the latter case a wife had obtained a maintenance order against her husband on the ground of his wilful neglect to maintain her. The husband subsequently petitioned for divorce on the ground, inter alia, of constructive desertion by the wife and succeeded on the very ground on which he had failed before the court of summary jurisdiction, namely, that by her conduct she had driven him from the home. It was held that, though the justices must have decided that the wife was not guilty of constructive desertion, the husband was not estopped by their decision from petitioning for divorce on the ground of such desertion. The ratio decidendi of the court is stated in the headnote to be: (i) that the rule of estoppel does not apply where proceedings in a court of summary jurisdiction are followed by proceedings for divorce, and (ii) that the subject-matter of the litigation was not the same in the two cases. E F

So far as the first point is concerned, it has been argued that there is no such obstacle to the husband's claim to strike out in the present case because here the proceedings raising the estoppel are High Court proceedings, not proceedings in a court of summary jurisdiction. I do not think that this is a distinction of substance. As LORD MERRIMAN, P., pointed out in *James v. James* (10) ([1948] 1 All E.R. 214 at p. 216), *Harriman v. Harriman* (2) made it clear that no estoppel between the parties binds the court; but he continued (ibid.): G

"In my opinion, that decision does not depend on the fact that what was being put forward as an estoppel in the High Court was a decision of a court of summary jurisdiction." H

I respectfully agree with those observations, and I cannot see any basis for distinguishing *Winnan v. Winnan* (11) from this case on the ground that there proceedings before a court of summary jurisdiction were concerned, whereas here proceedings of the same kind were instituted in the division of the High Court which has divorce jurisdiction. I

The second ground stated in *Winnan v. Winnan* (11), namely, that the subject of the litigation was different in the two proceedings in question, seems to me to be applicable here. The court in its divorce jurisdiction has duties to perform in the public interest which are not paralleled in other litigation between parties, even when those parties are the same husband and wife who are subsequently engaged in divorce litigation. I think, therefore, that, following this decision, this court should not strike out the allegation of cruelty put forward by the wife

A in divorce proceedings, on the ground that she has previously failed to establish the same charges in the maintenance proceedings.

I have not overlooked the decision of LORD PENZANCE in *Finney v. Finney* (6) ((1868), L.R. 1 P. & D. 483) which has been recognised as authoritative in this court, and in which the previous proceedings raising the estoppel were proceedings for judicial separation, not divorce. The wife there sought to repeat in divorce proceedings charges of cruelty which she had previously made in proceedings for judicial separation and was held to be estopped from doing so. This decision is, in my opinion, consistent with what I have said, since proceedings for judicial separation are on the same footing for practical purposes as proceedings for divorce between the same parties. A decree of judicial separation affects status and the rights of property: see now s. 14 and s. 21 of the Matrimonial Causes Act, 1950. At the time when that case was decided, the Matrimonial Causes Act, 1857, was in force, and, in accordance with s. 22, the court was guided by the principles and rules of the ecclesiastical courts in all proceedings for judicial separation.

It is to be noted that collusion was a bar to divorce a mensa et thoro (now called judicial separation): see per LORD STOWELL in *Crewe v. Crewe* (12) ((1800), 3 Hag. Ecc. 123 at p. 135). It is now a statutory bar also and has been since the passing of the Supreme Court of Judicature (Consolidation) Act, 1925: see s. 185 (1) of the Act. I therefore express no doubt as to the correctness of the decision of *Finney v. Finney* (6), which was based on estoppel. See now, however, the Matrimonial Causes Act, 1950, s. 7 (2), which replaces s. 6 of the Matrimonial Causes Act, 1937, as to the duty of the court in divorce proceedings after a decree of judicial separation has been pronounced in favour of the party applying for divorce.

Bright v. Bright (7) ([1953] 2 All E.R. 939) and *Hill v. Hill* (8) ([1954] 1 All E.R. 491) were cases where there had been previous divorce proceedings in which judgment had been given against parties, who were held to be estopped from again raising in later divorce proceedings issues which had been decided in the earlier divorce proceedings. In such cases there is no difficulty in applying the ordinary principles of estoppel. It has been argued that *Bright v. Bright* (7) assists the husband's argument to this extent, that it was there suggested by WILLMER, J., that in divorce proceedings a litigant can escape from being bound by estoppel when he is denying charges made against him, but not when he is repeating allegations which have been the subject of previous proceedings and which have already been determined against him.

Then it is argued that this case can be distinguished from *Winnan v. Winnan* (11), because here the wife is seeking to do the latter, whereas the husband in *Winnan v. Winnan* (11) was putting forward charges for the first time by way of attack, having previously put forward and failed to establish these same charges by way of defence to his wife's claim. Therefore, it is said *Winnan's* freedom from estoppel is no justification for giving the wife in the present case the same liberty. She is attacking now as she was in the previous proceedings.

For my part, I think that, whether the charges are used as a shield or a sword makes no difference, and I respectfully agree with the observations of DAVIES, J., in *Hill v. Hill* (8) ([1954] 1 All E.R. at p. 495). For purposes of estoppel, allegations put forward in answer to a petition or other claim still remain allegations just as much as if they had appeared in the original petition or claim. I do not draw any distinction between the two cases on the basis that in the earlier proceedings in one case allegations were made by a party seeking to obtain maintenance, whereas in the other the allegations were made in an attempt to resist maintenance.

I cannot therefore escape from the view that *Winnan v. Winnan* (11) is a binding authority on this court which should be followed, on the ground that there, as here, the subject-matter of the previous proceedings was different in

that they were not divorce proceedings. Hence there is no estoppel which binds the court from investigating the charges made in the previous suit. In dealing with the decision of WILLMER, J., in *Bright v. Bright* (7), I have not overlooked the observations of the Divisional Court in *Cooper v. Cooper* (13) ([1954] 3 All E.R. 358), which, however, do not touch the particular aspect of estoppel raised in this appeal. A

The second ground of the application to strike out applies to a large number of paragraphs which, it is said, ought to be struck out under R.S.C., Ord. 25, r. 4, or Ord. 27, r. 19. The first comment made, namely, that many of the allegations could not possibly amount to cruelty, is perhaps best answered by saying that it is undesirable, if not impossible, by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred; see the speech of LORD TUCKER in *Jamieson v. Jamieson* (14) ([1952] 1 All E.R. 875 at p. 887). B C

It is true that the pleader has included a number of matters which on the face of them can be treated with contempt, but the same may be said of the husband's own pleading; and if the parties have included matters of no significance in support of their cases it may well be, as the learned registrar seems to have thought, that the very futility of these charges may recoil on their own heads and produce a result the opposite of that for which allegations of cruelty are *prima facie* designed. D

I had thought at one time that several paragraphs of the answer might be struck out as embarrassing. Certainly many of them are unnecessary and drawn without any regard to the rules of pleading, which provide that facts, not evidence, are to be pleaded. For example, several paragraphs are devoted to a précis of correspondence passing between solicitors—obviously a waste of time, print and money. However, I cannot see that there is anything embarrassing to the husband in the answer, and I think that the husband by his own pleading has been at any rate partly responsible for bringing on himself a prolix and unimpressive answer. The court can protect itself to some extent against being inundated with words by pleadings such as these by visiting the defaulters so far as possible with the payment of the costs unnecessarily incurred. E F

I therefore see no reason to interfere with the learned judge's order in so far as the application is based on the Rules of the Supreme Court. I would dismiss the appeal and direct that the suit be heard before Mr. Commissioner GRAZEBROOK.

MORRIS, L.J.: The issue which was raised by the wife's summons of Jan. 18, 1955, was whether the husband had wilfully neglected to provide reasonable maintenance for her. The wife in her supporting affidavit sworn on Jan. 17, 1955, said that her husband had treated her with cruelty which had caused her to leave the home on July 25, 1954. In an affidavit of Mar. 2, 1955, the husband denied that he had treated her with cruelty. He said that his wife had treated him with cruelty and he said that she had deserted him on July 25, 1954. G H

The hearing of the wife's summons occupied the time of the court for some days in July, 1955. The summons was dismissed. The issue raised was whether the husband had wilfully neglected to provide reasonable maintenance. He said that he had maintained her until she deserted him. She said that she had not deserted him but that she had been forced to leave him because of his cruelty. These questions relating to her alleged desertion and his alleged cruelty became incidentally involved in the determination of the issue whether there had been wilful neglect to maintain. The contentions advanced by the wife in support of her allegations of cruelty were rejected by the learned commissioner. The husband's allegations of cruelty were not fully formulated and were not investigated. I

A After the dismissal of the wife's summons, the husband in November, 1955, presented a petition for dissolution on the ground of his wife's cruelty. As he had alleged cruelty in his affidavit of March, 1955, it seems a pity that he was not able to make up his mind whether he wished to present a petition so that if he did it could be heard at the time of the hearing of the wife's summons; so also the wife might have decided whether she wished to present a petition on the ground of her husband's cruelty. It is clear, however, that there is no bar to the presentation of the husband's petition. The wife is clearly entitled to defend herself against the charges of cruelty made against her. She goes further, however, and by her cross-prayer asks for a decree of judicial separation on the ground of her husband's cruelty: she says that he was cruel in the ways that she suggested during the hearing in July, 1955, although her suggestions were then dealt with and were rejected by the court.

C One question which arises is whether she is now precluded from presenting her cross-prayer. By reason of the course adopted by the husband it is clear that his petition must be heard. When it is heard the court must discharge its statutory duty of inquiry. The court will have to inquire so far as it reasonably can into the facts alleged and whether there has been any condonation. The court has a duty under s. 4 (1) of the Matrimonial Causes Act, 1950, "to inquire into any countercharge which is made against the petitioner". These words by themselves cannot, however, require a court to inquire into a countercharge if the court has already inquired into it. But after inquiring into the husband's allegations, assuming that the court is satisfied that his petition has been proved, the court will not be bound to pronounce a decree in his favour and may dismiss his petition if in the opinion of the court he has been guilty of cruelty towards his wife or if he has been guilty in other ways set out in s. 4 of the Act.

E When the husband's petition is heard, it seems clear that an investigation of the married life will have to be made. But can the wife actually prefer her countercharge? And need the court consider whether the husband was guilty of cruelty in any of the respects negatived in July, 1955? It is to be noted that, on the hearing under s. 23, the wife introduced the topic of her husband's cruelty in order to rebut his defence that she had left him and accordingly that he had not wilfully failed to maintain her; but the "subject of litigation" was whether the husband had wilfully failed to maintain. The wife could not re-open that very issue and assert that for various reasons she had not put forward the full strength of her case. This is made clear by the well-known passage in *Hoystead v. Taxation Comr.* (1) ([1926] A.C. 155).

G If in the maintenance proceedings the wife had succeeded, and if the decision had been that her husband had been cruel to her and had forced her to leave, and if later she had presented a petition for dissolution based on cruelty, she would have had to prove her case to the satisfaction of the court. Her husband would not, I think, have been debarred from defending himself if he could; but the previous decision could be relied on by the wife for its evidential value.

H This is, I think, a consequence of the statutory obligations imposed on matrimonial courts. In ordinary litigation a party may be defeated by a plea of *res judicata*. If in a suit it can be shown that the precise dispute between the parties has already been adjudicated on in an earlier suit between the same parties where the same dispute was also in issue as a basis for relief—then there may be a successful plea of *res judicata*. An estoppel may also arise even if in successive suits between the same parties the causes of action are different, if it can be plainly shown that a precise point was a direct issue in the first suit and was decided. These principles are, I think, of general application and may apply in matrimonial proceedings; but in matrimonial proceedings they cannot apply so as to absolve the court from duties statutorily imposed or so as to bring about any alteration of status not otherwise warranted and directed.

In *Harriman v. Harriman* (2) ([1909] P. 123) FLETCHER MOULTON, L.J., in A
his judgment (at p. 142) referred to s. 31 of the Matrimonial Causes Act, 1857,
which made relief dependent on the court being satisfied on the evidence that the
case of the petitioner had been proved. He said:

“ ‘Proved’ here means proved as a fact, and not merely proved inter
partes. Hence no estoppels binding the parties are necessarily sufficient B
to entitle a party to such relief. The court is not bound to be satisfied of
the necessary facts because the one party is estopped as against the other
from denying them. Hence the production of a decree for a judicial separa- C
tion on the ground of cruelty is not as a matter of law sufficient to make it the
judicial duty of the court to accept as a fact that the respondent has been
guilty of such cruelty: and if the circumstances under which the decree was
obtained are such as to raise a doubt in the mind of the court as to whether
the cruelty was in fact committed, it would be entitled and bound to require
such additional evidence as should be sufficient to convince it of the fact.
But, although this is so, the respect paid to a judicial determination of a
fact between parties (which in civil actions is evidenced by its creating a
binding estoppel) would, I should presume, in ordinary cases lead the court D
to consider the fact of the cruelty to be adequately established by the
production of the decree.”

See now s. 7 of the Matrimonial Causes Act, 1950.

So in *Hudson v. Hudson* (5) ([1948] 1 All E.R. 773) LORD MERRIMAN, P., held E
that, where a wife petitioned for dissolution on the ground of her husband's
cruelty, it would not be sufficient merely to rely on a determination of a court
of summary jurisdiction, though upheld on appeal to the Divisional Court, that
the husband had been guilty of cruelty. LORD MERRIMAN held that it was
competent for the husband to contest the wife's petition.

In *James v. James* (10) ([1948] 1 All E.R. 214), LORD MERRIMAN, P., said (at F
p. 217):

“ When it is a question of seeking to oblige a court to decide something
contrary to its own belief on the facts because some other court has decided
in the affirmative, there is the consideration that so to oblige the court
would be running contrary to the statutory duties imposed on the court,
whereas where a party who has already been defeated in bringing a claim for
relief is trying to do exactly the same thing again, the same consideration
does not apply to prevent him from being estopped from bringing that
evidence before the court at all.” G

I respectfully agree with this statement of the position. It seems to me that
reason and authority alike show that the special directions and obligations
imposed by statute on the matrimonial courts are not to be avoided merely
because as between the parties themselves a plea of estoppel might otherwise H
be raised.

The reasons for this are apparent. Matrimonial courts which deal with the
status of parties have jurisdiction which is to be exercised in strict conformity
with the statutory codes enacted by Parliament. Respect for the law and other
features of the public interest require that there should neither be side-stepping
of the obligations of proving a charge which is preferred nor a denial of a right I
to prefer a new claim for relief if the subject of litigation differs from that in
some previous proceedings.

It seems to me that, so long as the duties of the court are in no way impaired,
there can be recognition of the principle of estoppel inter partes. On this basis
in *Finney v. Finney* (6) ((1868), L.R. 1 P. & D. 483), LORD PENZANCE held that,
where a wife who had petitioned for judicial separation on the grounds of her
husband's cruelty and who had failed in her charges subsequently petitioned for
dissolution on the ground of her husband's adultery coupled with cruelty, the

A allegations of cruelty being the same as those previously preferred, her allegations of cruelty should be struck out. He said (*ibid.*, at p. 484):

B “In both suits the husband is charged with the same matrimonial offence, that of cruelty. That issue having been tried, and found in the husband’s favour in the former suit, the wife now seeks to have it tried over again, and it is argued that she is entitled to reiterate those identical charges, because she has tacked on to them a charge of adultery. I think that cannot be allowed. According to the practice of every court, after a matter has once been put in issue and tried, and there has been a finding or a verdict on that issue, and thereupon a judgment, such finding and judgment is conclusive between the same parties on that issue. In all courts it would be treated as an estoppel.”

C In *Bright v. Bright* (7) ([1953] 2 All E.R. 939), WILLMER, J., indicated (at p. 946) the limits of the application of the principle of estoppel when he pointed out that a petitioner cannot get relief in the Divorce Court merely by relying on a submission that the respondent is estopped from denying what is alleged. He said:

D “In that case the public interest, no doubt, does intervene to see that relief is not improperly obtained by a petitioner merely through some technical rule. But it is quite another thing to say that a petitioner, who is . . . the party bringing the charges, is entitled to persist in repeating allegations which have already been the subject of previous proceedings and have already been determined against him or her . . . merely for the purpose of obtaining relief for himself or herself. In such circumstances, as I see it, no interest of the public is infringed by saying that the petitioner is estopped per rem judicatam from repeating allegations that have previously been the subject of judicial determination.”

E
F How then does the matter stand in the present case? As I have said, I think that the wife must be allowed freely and fully to defend herself against the charges of cruelty made against her. These have never been investigated. But when she repeats the charges which she previously made, it would seem on first approach to be unreasonable to require the court to traverse ground already covered. It may be that the plea of *res judicata* in its strict form cannot avail. The actual “*res*” on the hearing in July, 1955, was whether the husband had wilfully refused to maintain his wife; the “*res*” which she now presents is whether there should be a judicial separation because her husband was guilty of cruelty. But, as to estoppel in its wider form, it would seem that the wife’s charges of cruelty were fully heard in July, 1955, and were the subject of judicial determination. The basis of this estoppel is perhaps expressed in the words *Nemo debet bis vexari pro una et eadem causa*. Furthermore, the court will not allow its processes to be abused. These considerations might lead towards the view that a plea of estoppel should prevail, but the decision in *Winnan v. Winnan* (11) ([1948] 2 All E.R. 862) shows that the court exercises care to see that there is no impairment of the jurisdiction of the Divorce Court. In that case a wife obtained a maintenance order against her husband in a court of summary jurisdiction on the ground that he had wilfully neglected to provide reasonable maintenance for her, although the husband had defended himself by alleging that his wife kept an intolerable number of cats in the house and had refused to get rid of them, and so had made life impossible for him in the matrimonial home. Later the husband petitioned for dissolution and alleged that by what she had done his wife had constructively deserted him. It was held that there was no estoppel which precluded the husband from obtaining a decree. In that case the allegations of the husband were in the court of summary jurisdiction advanced by way of defence to allegations made by the wife, whereas in the Divorce Court his allegations were put forward substantively by him: but no

point as to this was made in the judgments in this court. The case proceeded on the basis as stated by BUCKNILL, L.J. (*ibid.*, at p. 865), that the justices

“ . . . must have applied their minds to the question whether the wife had been guilty of constructive desertion and its legal effect on her claim for maintenance, and that their order of 10s. a week proves that they decided that the wife had not been guilty of constructive desertion.”

BUCKNILL, L.J., said (*ibid.*, at p. 868):

“ Now, if the argument of *res judicata* put forward by the wife . . . is to prevail the right given by the statute of 1937 to the husband for a decree of divorce on the ground of his wife's desertion will be of no value to him because the order of the justices . . . incidentally and by inference also decided that his wife was not in desertion at the time when the order was made. Can it be said in these circumstances that the issue of the wife's desertion, assumed to have been considered by the justices, and the right of the husband to petition for a divorce on the ground of her desertion is the ‘ same subject of litigation ’ within the definition of *res judicata* by WIGRAM, V.-C., [in *Henderson v. Henderson* (15) ((1843), 3 Hare, 100 at p. 114] . . . ”

Another decision which illustrates that it is necessary carefully to examine whether the “ subject of litigation ” is the same in separate proceedings is *Cooper v. Cooper* (13) ([1954] 3 All E.R. 358). In his judgment LORD MERRIMAN, P., points out the limitations in the application of the principle of estoppel.

It might be said that in the present case, though in July, 1955, the actual decision was that the husband had not wilfully neglected to maintain his wife, that decision was founded on a further decision clearly made that the husband had not been guilty of cruelty. There is some force in the view that *Winnan v. Winnan* (11) ([1948] 2 All E.R. 862) might be distinguished; but on the whole I think that *Winnan v. Winnan* (11) applies in the present case. It must also be borne in mind that it is only in perfectly clear cases that a pleading should at this stage be struck out on the basis of an estoppel. Furthermore, the husband has in this case himself chosen to allege that his wife made false charges of cruelty in the previous proceedings. If he decides to put the matter in this way, the wife must at least be entitled to defend herself. She must be entitled to endeavour to refute a charge that previously she “ falsely and maliciously ” swore that her husband had treated her with cruelty. It would be difficult at this stage to impose rigid limits on the scope of her defence to this charge. I therefore think that the decision of the learned judge in this case should not be disturbed; but the justice of the case will I think be met if the hearing comes on before Mr. Commissioner GRAZEBROOK.

In regard to the pleadings generally and in regard to the applications to strike out on the other grounds relied on I desire to express my concurrence with the observations made and the conclusions expressed by my Lord, DENNING, L.J.

Appeal dismissed. Order for trial of suit before Mr. Commissioner Grazebrook.

Solicitors: *Leonard Kasler & Co.* (for the husband); *Alec Woolf & Turk* (for the wife).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

Re DAWSON'S WILL TRUSTS. NATIONAL PROVINCIAL BANK, LTD. v. NATIONAL COUNCIL OF THE Y.M.C.A. INCORPORATED AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), December 13, 14, 21, 1956.]

Will—Legacy—Amount of legacy—Legacy of such a sum as with moneys given inter vivos will amount to stated sum—Moneys given inter vivos liable to estate duty on death of testator.

By his will dated Feb. 12, 1955, a testator appointed a bank to be his executor and trustee and gave a number of pecuniary legacies expressed to be "free of duty" including a legacy "To the bank upon the trusts of The Ernest and Minnie Dawson Cancer Trust such a sum as will with the moneys I have already given to the bank upon the same trusts amount to £27,000". The testator gave his residuary real and personal estate to the bank on trust for sale and conversion and "after payment . . . of my debts funeral and testamentary expenses and the legacies bequeathed by this my will and the duties thereon to stand possessed of the residue thereof upon trust" as therein provided. The Ernest and Minnie Dawson Cancer Trust was not in existence at the date of the will, but it was constituted by a trust deed dated Mar. 29, 1955, made between the testator and the bank, in which it was recited that the testator had paid £100 to the bank and might thereafter pay or bequeath other sums or assets to the bank. On Mar. 29, 1955, the testator paid £6,000 to the bank to be held on the trusts of the trust deed and on May 29, 1955, he transferred assets to the bank of the value of some £15,072. On May 31, 1955, the testator died and estate duty became payable at the rate of forty per cent. on all the money and other assets paid or transferred to the bank on the trusts of the trust deed by virtue of the Finance Act, 1894, s. 2 (1) (c). The amount of estate duty so payable out of the trust property was £8,468, and the question arose whether the legacy to the trust was of such an amount as would make up to £27,000 the assets subject to the trust deed as they stood before the estate duty exigible under s. 2 (1) (c) had been paid out of them or as they remained after the duty had been paid, i.e., whether the legacy was of £5,927 or £14,395.

Held: the legacy was of £14,395 because the will as a whole disclosed an intention that the trust should be in possession of a clear sum of £27,000.

Re Beddington ([1900] 1 Ch. 771) applied, but doubted.

Charity—Gift for general purposes of named charity—Charity amalgamated with another having similar purposes—Lapse.

The testator bequeathed a share of the proceeds of sale of his residuary estate "for the general purposes of the Church Association of 13-14 Buckingham Street Strand London W.C.2." and he directed that the share should be applied "for the exclusive use and benefit of the work" of the said association in the City of Leeds. Until 1950, the Church Association existed as an unincorporated body for charitable purposes, viz., to maintain protestant principles and to combat ritualism in the Church of England; and until June, 1950, its offices were at the address mentioned in the will. In 1950 the Church Association amalgamated informally with the National Church League (Incorporated) which had similar objects, and the resultant body was called "Church Society". The premises in Buckingham Street have never been occupied by Church Society, which carries on elsewhere, possibly with other activities, the work formerly done by the Church Association and the National Church League (Incorporated). On the question whether the gift to the Church Association failed,

Held: Church Society (the objects of which were charitable) was entitled to receive the bequest because either (a) Church Society was the Church

Association under a new name, or (b), although the objects of Church Society were not shown to be identical with those of the Church Association (so that a gift merely to the latter body, as distinct from a gift for its purposes, might have failed), yet the general purposes of the Church Association were identifiable charitable purposes and the bequest should be applied by Church Society for those purposes by way of scheme or otherwise.

Re Joy ((1888), 60 L.T. 175), *Re Pritt* ((1915), 85 L.J.Ch. 166) and *Re Rymer* ([1895] 1 Ch. 19) considered.

[As to the ademption of a legacy by gifts in a testator's lifetime, see 34 HALSBURY'S LAWS (2nd Edn.) 126, para. 162.

As to a gift to a charitable institution which has not wholly ceased to exist but has changed its name, etc., see 4 HALSBURY'S LAWS (3rd Edn.) 280, para. 581; and for cases on the subject, see 8 DIGEST (Repl.) 414-416, 1068-1079.]

Cases referred to:

- (1) *Re Beddington, Micholls v. Samuel*, [1900] 1 Ch. 771; 69 L.J.Ch. 374; 82 L.T. 557; 21 Digest 34, 215.
- (2) *Re Crocker, Crocker v. Crocker*, [1916] 1 Ch. 25; 85 L.J.Ch. 179; 114 L.T. 61; 21 Digest 34, 216.
- (3) *Re Campden Charities*, (1881), 18 Ch.D. 310; 50 L.J.Ch. 646; 45 L.T. 152; 8 Digest (Repl.) 467, 1678.
- (4) *Re Lucas, Sheard v. Mellor*, [1948] 2 All E.R. 22; [1948] Ch. 424; [1948] L.J.R. 1914; 8 Digest (Repl.) 419, 1103.
- (5) *Re Joy, Purday v. Johnson*, (1888), 60 L.T. 175; 8 Digest (Repl.) 414, 1072.
- (6) *Re Pritt, Morton v. National Church League*, (1915), 85 L.J.Ch. 166; 113 L.T. 136; 8 Digest (Repl.) 411, 1039.
- (7) *Re Rymer, Rymer v. Stanfield*, [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590; 8 Digest (Repl.) 420, 1108.
- (8) *Re Withall, Withall v. Cobb*, [1932] 2 Ch. 236; 101 L.J.Ch. 414; 147 L.T. 526; 8 Digest (Repl.) 418, 1093.
- (9) *Re Hutchinson's Will Trusts, Gibbons v. Nottingham Area No. 1 Hospital Management Committee*, [1953] 1 All E.R. 996; [1953] Ch. 387; 8 Digest (Repl.) 415, 1079.

Adjourned Summons.

The plaintiff, National Provincial Bank, Ltd., as executor and trustee of the will of Ernest Dawson, deceased, applied to the court by originating summons for the determination of the following questions: (i) whether the legacy given by the will of the testator on the trusts of The Ernest and Minnie Dawson Cancer Trust of such a sum as would, with the moneys the testator had already given to the bank on the same trusts [viz., £21,072 6s. 6d.], amount to £27,000 was a legacy of (a) £14,395 16s. 11d. (viz., without regard to the £8,468 3s. 5d. paid for estate duty) or (b) £5,927 13s. 6d. (viz., with deduction of the sum paid for estate duty) or (c) some other sum; (ii) whether the gift in the will of one fourth part of the residue for the general purposes of the Church Association of 13-14, Buckingham Street, Strand, London, W.C.2, took effect in favour of the defendant, "Church Society", or whether the gift failed and passed as on intestacy, or whether it ought to be administered cy-près. The first and second defendants were the National Council of the Young Men's Christian Association Incorporated and the Young Women's Christian Association of Great Britain. The Church Society was the third defendant. The fourth, fifth and sixth defendants were the Trustee of the Salvation Army, Lilian Dawson one of the testator's next of kin, and Her Majesty's Attorney-General. The first four defendants claimed to be beneficially interested under the testator's will and the fifth defendant was beneficially interested in any property of which he might have died intestate.

Nigel Warren for the plaintiff, the bank.

J. G. Monroe for the first, second and fourth defendants, the residuary legatees.

K. J. T. Elphinstone for the third defendant, Church Society.

J. Monckton for the fifth defendant, one of the next of kin of the testator.

H. R. Williams for the sixth defendant, H.M. Attorney-General.

Cur. adv. vult.

Dec. 21. **VAISEY, J.:** The testator in this case, Mr. Ernest Dawson, made his will on Feb. 12, 1955, and died on May 31, 1955. The plaintiff, the National Provincial Bank, Ltd., in the will and in this judgment referred to as "the bank", was appointed executor and trustee by the will and proved it on Aug. 13, 1955.

The present summons raises two quite distinct and separate questions on the construction of the said will which provides, so far as material to these questions, as follows. By cl. 5 thereof the testator gave a number of pecuniary legacies expressed to be "free of duty", one of which was in these terms:

"To the bank upon the trusts of The Ernest and Minnie Dawson Cancer Trust such a sum as will with the moneys I have already given to the bank upon the same trusts amount to £27,000."

Clause 6 of the will is in these terms :

"I give devise and bequeath all my real and personal estate not hereby otherwise disposed of unto the bank upon trust to sell call in and convert the same or such part thereof as shall not consist of money into money and after payment out of the proceeds of such sale calling in and conversion and of my ready money of my debts funeral and testamentary expenses and the legacies bequeathed by this my will and the duties thereon to stand possessed of the residue thereof upon trust as to one fourth part thereof for the National Council of the Young Men's Christian Association Incorporated of 112 Great Russell Street London W.C.1. as to one other fourth part thereof for the Young Women's Christian Association of Great Britain of Great Russell Street aforesaid as to one other fourth part thereof for the general purposes of the Church Association of 13-14 Buckingham Street Strand London W.C.2 and as to the remaining one fourth part thereof for the Salvation Army of 101 Queen Victoria Street London E.C.4 and I direct that the shares of residue hereby bequeathed shall be applied for the exclusive use and benefit of the work of the said three associations and of the Salvation Army in the City of Leeds. I declare that the receipt of the treasurer of the said associations and of the Salvation Army shall be a full discharge to the bank."

The questions raised by the summons are, first, whether the before-mentioned legacy to the bank on the trusts of The Ernest and Minnie Dawson Cancer Trust is a legacy of a sum required to make up to £27,000 the moneys already given to the bank on the same trusts (a) without regard to, or (b) after allowing for the depletion of such moneys by the estate duty which became payable thereout under s. 2 (1) (c) and s. 2 (3) of the Finance Act, 1894, by reason of such gifts having been made less than one year before the testator's death. Secondly, whether the gift "for the general purposes of the Church Association" takes effect in favour of the defendant society sued as the Church Society or fails or ought to be administered *cy-près*.

On the first of those questions the relevant facts are as follows. At the date of the testator's will The Ernest and Minnie Dawson Cancer Trust had not then come into being, but by trust deed dated Mar. 29, 1955, and made between the testator, therein called the founder, of the one part and the bank of the other part, after reciting that the testator had paid £100 and might thereafter

pay or bequeath other sums or assets to the bank to the intent that the fund should be dedicated

“to the prevention and cure of cancer by promoting and encouraging general medical practitioners of Lancashire and Yorkshire to take a special interest in its diagnosis causes prevention and treatment”,

he proceeded to constitute a trust with the bank as trustee known as The Ernest and Minnie Dawson Cancer Trust the objects whereof were stated in para. 5 of the trust deed as follows. The capital and income of the trust fund should be used “to prevent treat and (so far as possible) cure cancer” and that the said objects should be pursued by giving prizes

“to such selected practitioners as from time to time make the most valuable contribution to the early diagnosis prevention and treatment of cancer and to knowledge of its causes.”

It is further declared by para. 7:

“If at any time a resolution of the panel [therein defined] shall declare that a cure for cancer has been found or that for any other reason whatsoever it is no longer practicable to carry out the object of the trust by the means hereinbefore specified the bank shall transfer the trust fund or the unused balance thereof . . . to such of the following charities as may then be in existence and if more than one in equal shares . . .”

The testator then enumerated the same four institutions and organisations as are named as residuary legatees by his said will and directed that the shares of the trust fund so received shall be applied for the exclusive purposes of their work in the City of Leeds.

On Mar. 29, 1955, the testator paid £6,000 (which included the £100 mentioned in the deed) to the bank to be held on the trusts of the trust deed and on May 29, 1955, two days before his death, he transferred certain assets to the bank of the value of £15,072 6s. 6d. those funds to be held on the trusts aforesaid. Therefore, at the testator's death property to the amount of £21,072 6s. 6d. was in possession of the bank as trustee of the trust deed. It may be stated that the rate of duty on the testator's estate was forty per cent. and because the gifts to the bank under the trust deed were made within the statutory period* before the testator's death estate duty became payable on the gifts made to the amount of £8,468 3s. 5d. which has been paid to the Revenue by the bank.

The question is whether the bank as trustees of the trust deed are entitled in respect of and before payment of the legacies to retain the sum required to make up the sum of £21,072 6s. 6d. to £27,000, or to make up the remainder of the sum of £21,072 6s. 6d. after deducting therefrom the sum of £8,468 3s. 5d. In other words, is the legacy £14,395 16s. 11d. or only £5,927 13s. 6d.? I have come to the conclusion that the proper amount of the legacy is the larger sum of £14,395 16s. 11d.

My reasons for coming to the conclusion I have mentioned are as follows. First, I think that it must be inferred from the general scheme of the will that the testator wanted the trust which he had founded to be put into possession of a clear sum of £27,000 and not any smaller sum. Secondly, I think that the words “free of duty” at the beginning of cl. 5 of the will indicate an intention that no deductions or reductions for duty were to be made. Those words as they stand are otiose and inoperative, except in so far as they may be read as indicative of such an intention as I have mentioned. Shortly, I think that

* Customs and Inland Revenue Act, 1889, s. 11 (1); Finance (1909-10) Act, 1910, s. 59 (1), proviso.

the case is in principle covered by the decision of BYRNE, J., in *Re Beddington, Micholls v. Samuel* (1) ([1900] 1 Ch. 771), in which the headnote is as follows:

"A testator, within one year of his death, spent £4,000 on the purchase of a house, which he settled on one of his daughters, and contributed £4,320 towards the purchase of another house for another daughter; the court having decided that these gifts must be considered as an ademption pro tanto of the daughters' shares in the testator's residuary estate, which must be brought into account: Held, that the amount for which the daughters were accountable was the sums so advanced, less the amount they were liable to pay for estate duty by reason of the death of the testator within one year of the gift."

That decision was approved and followed by SARGANT, J., in *Re Crocker, Crocker v. Crocker* (2) ([1916] 1 Ch. 25), and I think I also ought to follow it though I share to some extent the doubts of SARGANT, J., as to its correctness.

Coming to the second point which raises the question concerning the gift "for the general purposes of the Church Association of 13-14 Buckingham Street Strand London W.C.2" followed by the proviso that the subject-matter of the gift is to be applied for the exclusive use and benefit of the work of the Church Association in the City of Leeds, I have to rely for what I know of the Church Association on the affidavit of the Reverend Thomas Hewitt who was a member of the Church Association during the period of its unincorporated existence down to its alleged "amalgamation" in 1950 with another body known as the National Church League (Incorporated) to which I will refer as "N.C.L." Such amalgamation is said to have resulted in the formation of a body known as Church Society, the defendant in these proceedings sued as "*the Church Society*". It appears that the Church Association was an unincorporated body of persons formed at a meeting held in London in November, 1867, at which meeting a certain declaration was read and approved and the objects and constitution of the association adopted. Stated generally, the Church Association was formed to maintain the principles which are generally described as protestant principles and to combat what is known as ritualism in the Church of England. In 1909 a company called the Church Association Trust was formed to act as trustee for the Church Association. It was a company limited by guarantee and it had vested in it all the property of the Church Association. For many years down to June, 1950, the offices of the Church Association were at 13-14 Buckingham Street, the address mentioned in the will. The leases of those premises were vested in the Church Association Trust in trust for the association. The N.C.L. was a company incorporated on Apr. 13, 1926, also limited by guarantee. Its objects are said to have been similar to those of the Church Association.

In 1949 and 1950 negotiations took place between the Church Association and the N.C.L. for the amalgamation of the two bodies into a single organisation which is called "Church Society." This amalgamation was carried out without any order of the court or any reference to the Charity Commission. It was indeed a purely informal operation: see *Re Campden Charities* (3) ((1881), 18 Ch.D. 310), and compare *Re Lucas, Sheard v. Mellor* (4) ([1948] 2 All E.R. 22).

The Church Association Trust proceeded to change its name to the Church Society Trust and continued in existence as a trustee holding company for the amalgamated body, and on June 14, 1950, at the annual general meeting of the Church Association the amalgamation was irregularly brought into effect in the somewhat informal manner in which the affairs of the Church Association seem to have been handled from its inception. The premises in Buckingham Street have never been occupied by Church Society which carries on elsewhere, possibly with other activities, the work formerly carried on by the Church Association and the N.C.L. From the rather vague terms of Mr. Hewitt's affidavit I think that Church Society may well be the Church Association under

a new name and be entitled to succeed in its claim under the principle of *Re Joy, Purday v. Johnson* (5) ((1888), 60 L.T. 175) and *Re Pritt, Morton v. National Church League* (6) ((1915), 85 L.J.Ch. 166).

It seems clear that the former Church Association had a branch in Leeds which appears to have been closed about seven years ago. So far as I am aware, Church Society act in accordance with the principles of the Church Association and promulgate what I hope I may call without offence the low church tenets with which the Church Association for many years has been identified. It cannot be doubted, I think, that its purposes are charitable in the legal sense of the word and I think that the charitable purposes for which this share was given are identifiable charitable purposes. I am not sure that they are identical with all the purposes of Church Society. If this had been a gift to the Church Association and not a gift "for its general purposes" I might have been compelled to hold that the gift failed altogether: compare *Re Rymer, Rymer v. Stanfield* (7) ([1895] 1 Ch. 19).

It was urged that at the date of the testator's will the Church Association had ceased to exist and had no general purposes and was carrying on no work in the City of Leeds. Such an argument would have carried a good deal of weight but for *Re Lucas* (4) and *Re Withall, Withall v. Cobb* (8) ([1932] 2 Ch. 236). I think that all I can do at present is to exclude the next of kin as was done in *Re Hutchinson's Will Trusts, Gibbons v. Nottingham Area No. 1 Hospital Management Committee* (9) ([1953] 1 All E.R. 996).

It may be that Church Society ought to prepare a scheme for the approval of the court or the Charity Commissioners unless indeed the Attorney-General be willing that the share should be handed over to Church Society to be applied for such of its purposes as are identical with the purposes of the Church Association at the time of its so-called amalgamation with the N.C.L. in 1950.

[HIS LORDSHIP stated that he would stay all further proceedings against the first, second, fourth and fifth defendants, and would adjourn the summons to chambers.]

Order accordingly.

Solicitors: *A. F. & R. W. Tweedie*, agents for *Cook, Fowler & Outhet*, Scarborough (for the plaintiff); *H. B. Nisbet & Co.* (for the first, second and fourth defendants); *Wainwright & Co.* (for the third defendant); *Biddle, Thorne, Welsford & Barnes*, agents for *Willey, Hargrave & Co.*, Leeds (for the fifth defendant); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

TAYLOR v. NATIONAL ASSISTANCE BOARD AND ANOTHER.

[COURT OF APPEAL (Denning and Hodson, L.JJ., and Ormerod, J.), December 4, 19, 1956.]

Legal Aid—Assessment of resources—Exclusion of subject-matter of dispute—Divorce—Application by wife for legal aid to defend petition, to cross-petition and to claim maintenance—Alimony pending suit ordered subsequently—Whether alimony taken into account in computing wife's disposable income—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), s. 4 (3)—Legal Aid (Assessment of Resources) Regulations, 1950 (S.I. 1950 No. 1358), reg. 2.

On June 14, 1955, a wife applied to the local committee for a civil aid certificate to defend proceedings for divorce, to cross-petition and to claim maintenance. She had no capital assets and her only income was a voluntary allowance of £4 per week received from her husband and 8s. a week family allowance. On June 27, 1955, she obtained an order for interim alimony pending suit at a yearly rate of £450 less tax, which, after deduction of tax, was less than £420 yearly. The voluntary payments by the husband ceased. On Aug. 18, 1955, the National Assistance Board determined that the wife's disposable income was £370 (i.e., an income computed by taking account of the alimony), and the Law Society offered her a civil aid certificate on that footing. On the question whether the alimony should have been excluded in computing the wife's rate of income, as being "the subject-matter of the dispute" within s. 4 (3) of the Legal Aid and Advice Act, 1949*, and reg. 2 of the Legal Aid (Assessment of Resources) Regulations, 1950*, by which the "value of the subject-matter of the dispute" was to be excluded,

Held: the amount of the alimony pendente lite was properly included by the board in their computation in August, 1955, for the following reasons—

(i) the words "subject-matter of the dispute" in s. 4 (3) of the Act of 1949 and reg. 2 of the regulations referred to some specific thing or identifiable property which, but for reg. 2, would properly form part of the resources of an applicant, and therefore did not include the wife's claim to alimony or her right to it after the order of June 27, 1955, had been made, and

(ii) when the order for the alimony pendente lite was made the alimony became part of the wife's resources available for contribution, and this change called for the consideration of a new period of computation beginning from the date of the order (*Moss v. Moss*, [1956] 1 All E.R. 291 applied).

Decision of LORD MERRIMAN, P. ([1956] 2 All E.R. 455) reversed, on a concession being withdrawn.

Per DENNING, L.J.: the remedy by declaration is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determinations in accordance with the law; and this is so no matter whether the determinations are judicial or disciplinary, or, as here, administrative determinations. The remedy is not excluded by the fact that the determination of the board is by statute made final (see p. 185, letter E, post).

[**Editorial Note.** The possibility that a consequence of the present decision would be an increase in alimony, because contribution would have to be paid out of it, was put before the Court of Appeal; it was intimated that the mere ground that contribution became payable and that some part of it would have to be discharged out of the alimony pendente lite was not of itself ordinarily likely to lead to the amount of the alimony being increased (see p. 186, letter I, p. 189, letter F, post).

* The relevant terms of these enactments are at p. 187, letters F and H.

For the Legal Aid and Advice Act, 1949, s. 4 (3), see 18 HALSBURY'S STATUTES (2nd Edn.) 538; for s. 2 (1), s. 3 (1), see *ibid.*, 535, 537.

For the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2, see 5 HALSBURY'S STATUTORY INSTRUMENTS 195.]

Cases referred to:

- (1) *R. v. London County Council, Ex p. Schonfeld*, [1956] 1 All E.R. 753n.
- (2) *Vine v. National Dock Labour Board*, [1956] 3 All E.R. 939.
- (3) *Moss v. Moss*, [1956] 1 All E.R. 291; [1956] P. 373.
- (4) *Thorogood v. Thorogood*, (Oct. 19, 1955), *The Times*.

Appeals.

Appeals by the National Assistance Board and the Law Society from a decision of LORD MERRIMAN, P., dated May 14, 1956, and reported [1956] 2 All E.R. 455. The plaintiff, Millicent Alexander Taylor, who had applied for a civil aid certificate in connection with divorce proceedings instituted against her by her husband, asked by originating summons for the determination of the question whether, on the proper construction of the Legal Aid and Advice Act, 1949, s. 4, and the regulations made thereunder, the amount of alimony pending suit should be taken into account in assessing her disposable income, and for a declaration that the determination of the board was ultra vires. The board took the preliminary objection that their decision was, by virtue of reg. 9 (2) of the Legal Aid (Assessment of Resources) Regulations, 1950, final, and that it could only be challenged by way of certiorari, and not by applying for a declaration. Before LORD MERRIMAN, P., it was conceded by the board that alimony pending suit raised a subject-matter of dispute. His LORDSHIP held that the court had power to make the declaration sought and would in the circumstances do so, since the date at which the wife's disposable income was to be computed was the date of her application for legal aid, and at that date her claim for alimony was a subject-matter in dispute which should accordingly have been excluded by virtue of reg. 2 of the regulations.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and Rodger Winn for the National Assistance Board.

John Latey and B. H. Anns for the Law Society.

J. E. S. Simon, Q.C., and R. F. G. Ormrod for the wife.

Cur. adv. vult.

Dec. 19. The following judgments were read.

DENNING, L.J.: In this case a husband has brought a suit for divorce against his wife. She seeks legal aid to enable her to defend the case. She is entitled to legal aid from the state according to her means. If her disposable income is less than £156 a year, she is entitled to legal aid free of any contribution by herself. If her disposable income is more than £156 but less than £420 a year*, she is entitled to legal aid, but she has to make a contribution herself towards the costs. If her disposable income is more than £420 a year, she is not entitled to legal aid at all. The computation of her disposable income is entrusted to the National Assistance Board.

The material facts are these: The husband is a consultant psychiatrist earning a salary of £2,750 a year. He owns the matrimonial home. There are three children, two living at home and one at boarding school. About Mar. 4, 1955, the husband left the home and went to live elsewhere, leaving the wife and children in the home. He made her a voluntary allowance of £4 a week and she received 8s. a week family allowance. Apart from that she had nothing except 19s. in the Post Office Savings Bank. On Mar. 10, 1955, the husband filed a petition for divorce. On June 14, 1955, the wife applied for legal aid and made the necessary statement of her financial circumstances. In it she said: "I hope my solicitors will obtain reasonable alimony". On June 27, 1955, she obtained

* See s. 2 (1), s. 3 (1), of the Legal Aid and Advice Act, 1949.

an order for interim alimony pending suit at the rate of £450 a year, less tax, so long as she remained at the matrimonial home. When tax was deducted the £450 a year would become less than £420 a year. The voluntary payments, of course, ceased. On Aug. 18, 1955, the National Assistance Board determined that the wife's disposable income was £370*: that her disposable capital was nothing; and the board fixed her maximum contribution at £107. On Aug. 20, 1955, the Law Society offered her a civil aid certificate on that footing.

It is quite plain that, in determining the wife's disposable income, the National Assistance Board have included the alimony as part of her resources, for without it she would have nothing. She contended that this is not legitimate. She says that her alimony should be excluded from the computation. She has brought the present proceedings to test the position. She has taken out an originating summons against the National Assistance Board asking for a declaration that her alimony should not be taken into account and that their determination was ultra vires. The National Assistance Board in making their computations act as an administrative body under s. 4 of the Legal Aid and Advice Act, 1949, and the Legal Aid (Assessment of Resources) Regulations, 1950. At the outset I must observe that under reg. 9 (2) of those regulations "... every decision or determination of the board shall be final"; and in the court below it was submitted by counsel on behalf of the National Assistance Board that their determination could not be challenged in these proceedings. LORD MERRIMAN, P., overruled this objection, and the Solicitor-General did not pursue it before us. I would like to say in passing that I entirely agree with the President on this point. The remedy by declaration is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determinations in accordance with the law; and this is so, no matter whether the determinations are judicial or disciplinary, or, as here, administrative determinations: see *R. v. London County Council, Ex p. Schonfeld* (1) ([1956] 1 All E.R. 753n.) and the recent decision of the House of Lords in *Vine v. National Dock Labour Board* (2) ([1956] 3 All E.R. 939). The remedy is not excluded by the fact that the determination of the board is by statute made "final". Parliament gives the impress of finality to the decisions of the board only on the condition that they are reached in accordance with the law; and the Queen's courts can issue a declaration to see that this condition is fulfilled.

The point before us is whether, in computing the disposable income of the wife, the board are in law entitled to include the alimony of £450 a year, less tax, as part of her resources, or whether they are bound to exclude it. It is plain that if this married woman were involved in litigation with her dressmaker or any person other than her husband, the alimony would be part of her resources and would have to be included in computing her rate of income; but it is said by the wife that it is to be excluded in this divorce suit because it is "the subject-matter of the dispute". This contention is based on s. 4 (3) of the Act, which says that

"... the resources of a person seeking or receiving legal aid shall be treated as not including the subject-matter of the dispute";

and reg. 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, which says that

"In computing the rate of income or the amount of capital of the person concerned there shall be excluded the value of the subject-matter of the dispute in respect of which application has been made for a certificate."

When this case was before the President, counsel for the National Assistance Board conceded that an application for alimony pending suit does raise a subject-matter of dispute; but before us the Solicitor-General sought leave to withdraw

* Income tax is deducted in computing disposable income; see Legal Aid and Advice Act, 1949, s. 4 (1) (a) and the Legal Aid (Assessment of Resources) Regulations, 1950 (S.I. 1950 No. 1358), reg. 7, Sch. 1, Part 2, para. 2.

that concession and we allowed him to do so. He contended that such an application was not a "subject-matter of the dispute" any more than a claim for damages would be. He said that the words "the subject-matter of the dispute" referred only to cases where a specific piece of property was in dispute. If the words "the subject-matter of the dispute" were to be read in isolation out of their context, they would, I think, cover the alimony pending suit. When, however, the words are read in their context, it seems to me plain that they only refer to a "subject-matter of the dispute" which falls within the "resources" of the person and has a "value" which can be assessed. The task of the board is to ascertain the "resources" of the applicant, dividing those resources into "income" and "capital"; and, having done so, then if the board find that any item in that computation is "the subject-matter of the dispute" the board must exclude it. It is only when an item comes *prima facie* within the "resources" of the applicant that any question arises about "the subject-matter of the dispute." The position is best seen by some examples. Take a claim for damages for personal injuries quantified as £500 special damages and, in addition, general damages. The claim is no part of the resources of either side. It is not available to or at the disposal of either of them. It does not come within the computation of capital or income at all. It is not to be added to the plaintiff's capital on the assumption that he will win the case, nor deducted from the defendant's capital on the footing that he will lose it. It is excluded not because it is "the subject-matter of the dispute", but because it does not come into the resources of either. Now take a case where £500 is standing in a bank in the name of the defendant, and the plaintiff claims that it is held by the defendant in trust for him, which the defendant denies. The £500 is certainly part of the "resources" of one or other of them, but no one can tell to which it belongs until the action is decided. It is excluded from the computation of "resources" on both sides because it is "the subject-matter of the dispute". These examples convince me that the words "the subject-matter of the dispute" in the Act and regulations refer only to a specific thing or a specific fund which would properly form part of the resources of the applicant except for the fact that it is the very subject-matter of the proceedings and is for that reason to be excluded.

Applying this meaning, I am satisfied that when the wife applied on June 14, 1955, for a certificate for legal aid, the claim for alimony pending suit was no part of her resources, and was not at that date to be included in the computation; but when, on June 27, 1955, she obtained an order for alimony of £450 a year, less tax, it was part of her resources, and it called for the consideration of an entirely new period of computation beginning from that date (see *Moss v. Moss* (3), [1956] 1 All E.R. 291, per WILLMER, J.). It was part of her income from that time and was properly included by the board in their computation. It did not fall to be excluded as being "the subject-matter of the dispute" any more than a claim for damages would be excluded. It was not a specific thing or a specific fund, but merely a claim which had been successfully pursued to judgment. It is interesting to notice that the voluntary allowance made by the husband was part of the resources of the wife and would clearly have had to be included as her income (see the Legal Aid (Assessment of Resources) Regulations, 1950, Sch. 1, Part 1, para. 7). So also would an allowance payable under a separation deed. It would be strange if an allowance, payable voluntarily or by deed, was to be included and the compulsory alimony excluded. Each has intrinsically the same quality, namely, to provide for the wife.

Counsel for the wife urged that if the alimony were included and the wife had to pay contributions out of it, it would mean that she could then go back to the court and ask for her alimony to be increased; and that after the increase in alimony the board then would increase her contribution and so on until her alimony exceeded the limits for legal aid. This prospect is more theoretical than practical. I do not think that alimony should be increased simply because a wife

A has to use some of it to pay contributions for legal aid. Counsel also argued that the alimony must be "the subject-matter of the dispute" because it would be "property recovered" and would be the subject of a charge in favour of the legal aid fund under s. 3 (4) of the Legal Aid and Advice Act, 1949, and it could not be supposed that the alimony should also be made a ground for making her pay contributions to the legal aid fund. The answer is, however, that alimony has never in practice been treated as the subject of a charge: and it is now expressly exempted by the regulations*. There is, therefore, no duplication as feared by counsel.

I ought to mention *Thorogood v. Thorogood* (4) ((1955), Oct. 19, *The Times*) where a wife obtained from the magistrates a maintenance order for £5 a week, and the husband appealed to the Divisional Court asking for it to be reduced. C The wife applied for legal aid, and the National Assistance Board took the £5 into account as part of her income. The President said that that was "utterly wrong", because the amount of the order was the actual subject of the litigation. When the present case was before the President all counsel assured him that those observations were perfectly correct in connection with that particular case. I am afraid that, having heard argument, I do not agree. The £5 a week was part of D the resources of the wife; and there was no reason to exclude it. There was no specific thing or specific fund involved in the proceedings. There was simply a claim that had materialised.

In the result, I come to a different conclusion from LORD MERRIMAN, P., but this is largely because the National Assistance Board made concessions before him that were erroneous. I would allow the appeal, and refuse the declaration E sought by the wife.

HODSON, L.J.: The question for determination on this appeal is whether the sum of £450 per annum, less tax, payable to the wife pursuant to an interim order for alimony pending suit, is to be taken into account by the National Assistance Board in assessing the disposable income of the wife for the purposes of the Legal Aid and Advice Act, 1949.

F The wife has applied for a civil aid certificate to enable her (inter alia) to present and defend proceedings for divorce and to obtain alimony. The question turns on the construction of s. 4 (3) of the Act which reads as follows:

"The regulations shall include provision for securing that the resources of a person seeking or receiving legal aid shall be treated as not including the subject-matter of the dispute";

G and on reg. 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, made in accordance with the direction contained in s. 4 of the Act. Regulation 2 reads as follows:

"In computing the rate of income or the amount of capital of the person concerned there shall be excluded the value of the subject-matter of the dispute in respect of which application has been made for a certificate."

H The contention of the wife is that, on the true construction of the regulation, alimony pending suit is not to be taken into account in assessing disposable income because it is to be excluded from consideration as being the subject-matter of the dispute in respect of which application is being made for a certificate. I The National Assistance Board said that alimony pendente lite was not the subject-matter of the dispute within the meaning of the regulation and, alternatively, if it was the subject-matter of the dispute in respect of which the application was made, then there was no dispute at the time when the rate of income of the wife was computed, since once the amount of alimony was determined by order, as had happened in the present case, there was then no subject-matter of dispute in this respect. The Law Society further contended that, even

* See reg. 16 (8) of the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), as added by S.I. 1954 No. 166.

before the determination of the amount of alimony, there was no subject-matter of dispute because it was a mere claim which might or might not succeed and did not exist in monetary form so as to be capable of valuation. A

It is to be noted that alimony paid to a wife does not form part of the husband's resources, since in matrimonial suits husband and wife are not assessed as one, and alimony paid by a husband is a valid deduction for the purposes of any assessment for legal aid made on him: see the Legal Aid (Assessment of Resources) Regulations, 1950, reg. 4 (2) and Sch. 1, Part 2, para. 5 (ii). The contention of the wife is a startling one, for it involves that, however large an income a wife may be receiving, provided that she receives it solely in the form of alimony pendente lite she will not be asked to make any contribution towards the cost of litigation with her husband; whereas, if she were in receipt of payments in another form, as, e.g., by way of an allowance from her husband or some other person, or by way of income under a settlement or deed, or derived from investments, she would be bound to contribute in accordance with her means. One's surprise is enhanced by the language of the preamble to the Act, which shows that it is an Act to make legal aid in England and Wales more readily available for persons of small or moderate means, to enable the cost of legal aid for such persons to be defrayed wholly or partly out of moneys provided by Parliament, and for purposes connected therewith. Nevertheless, if the words to be construed are plain, the wife, although not a person for whom this form of public assistance was apparently designed, is entitled to succeed. B C D

The argument before LORD MERRIMAN, P., proceeded on the basis advanced by the wife, and conceded by counsel on behalf of the National Assistance Board, that an application for alimony pending suit does raise a subject-matter of dispute within the meaning of the regulation. This concession was made on the attention of counsel being called to the unreported case of *Thorogood v. Thorogood* (4) ((1955), Oct. 19, *The Times*), a decision of the Divisional Court, in which the President had expressed himself as of opinion that the amount of a current order for maintenance of a wife made by a court of summary jurisdiction is for the purposes of the Act and regulation "the subject-matter of the dispute". Such payments are clearly in *pari materia* with the payments for alimony pendente lite under consideration, and it appears to me that the order for maintenance made in *Thorogood v. Thorogood* (4) raises the same considerations as those which are raised by the order for alimony pendente lite in the present case. Once this concession is made, I respectfully agree with the conclusion and the reasons for the conclusion reached by the learned President, that the subject-matter of the dispute was one in respect of which application had been made for a certificate, and that it does not cease to fulfil those words of description because at some stage the dispute has been determined. The argument runs that the subject-matter of the dispute is ascertained at the date of the application for the certificate, and remains constant throughout notwithstanding that its value has been ascertained before the computation is made. I agree. I agree also that on this footing an undetermined application for alimony pendente lite would be a subject of dispute. E F G H

In this court, however, the Solicitor-General has, by leave, presented the case on an entirely different basis, and argument has been directed to overthrow the agreed basis that an application for alimony pendente lite does raise a subject-matter of dispute within the meaning of the regulation. No doubt the ordinary use of the words "subject-matter" would be apt to include alimony, but in their context these words are not, in my opinion, susceptible of so wide a meaning. It is not the subject-matter of the dispute but its "value" which has to be taken into account, and this value is to be considered in assessing the resources of the applicant for legal aid in pursuance of s. 4 of the Act. The words, therefore, cannot have such a wide meaning as would include all issues between the parties. The disputed issue in a suit often has no monetary value at all. Instances can I

be multiplied; one obvious example being the issue raised in suits for divorce. The use of the word "value" points to a thing or piece of property which can be identified, and, if necessary, maintained by injunction in its undisturbed state pending the litigation between the parties. This could apply to a sum of money in the hands of a third party about which a dispute arose but not, if my construction of the regulation is correct, to a money claim for damages, liquidated or unliquidated; nor to claims for alimony or maintenance in proceedings between husband and wife. The words "subject-matter of proceedings" appeared in the rules formerly regulating poor persons procedure. In R.S.C., Ord. 16, r. 23, there appeared:

"(1) that the poor person is not worth a sum exceeding £50 (excluding wearing apparel, tools of trade and the subject-matter of such proceedings . . ."

In this context the words "subject-matter" would seem to have the meaning of a specific thing, since otherwise one would not expect to find them included in the list of capital items to be disregarded.

Counsel on behalf of the wife did not contend that by reason of its inalienable quality alimony pendente lite could not be treated as part of the available resources of a person seeking legal aid, since he recognised that other inalienable resources, such as officers' retired pay, could be so treated, and there is no question of creating a charge on or otherwise alienating the alimony of the plaintiff. He did, however, urge as an aid to construction that this quality of alimony would make it at least unlikely that the legislature would intend alimony, which is intended for the support of the wife, to be used for such purposes as legal aid. He argued that there would be practical difficulties if the registrar in performing his duty of allotting alimony had to take account of the fact that the recipient would be treated as having resources available for her legal aid, and the court might be faced with applications for further alimony to meet the burden imposed. I do not think applications of that kind for further alimony ought readily to be entertained. A wife who has no other resources but alimony may be called on to bear certain costs which are not recoverable on taxation quite apart from legal aid considerations, and it is never possible to control the way in which alimony, though intended for the support of the wife, is in fact spent by her.

Counsel further argued that alimony fell into the class of property recovered for an assisted person dealt with by reg. 16 of the Legal Aid (General) Regulations, 1950, as subsequently amended, and, accordingly, is *prima facie* subject to a charge for costs and ought not to be treated as resources in the applicant's hands for the purpose of assessing her contribution. It is true that by reg. 16 (8) (which came into force in 1954*) this charge does not attach to alimony so recovered, but this is irrelevant to the argument, for the necessity for the exception confirms that alimony is "property recovered" within the meaning of the regulation as it originally stood. It is said that if alimony is "property recovered", it ought not to be also regarded as "resources" available to the person receiving aid.

These considerations do not shake my opinion that, on the true construction of reg. 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, alimony pendente lite never at any time comes within the words of exclusion contained in reg. 2 or s. 4 (3) of the Legal Aid and Advice Act, 1949. When the wife obtained an order for alimony pendente lite on June 27, 1955, the money payable under that order became part of her resources available for contribution and called for a new period of computation as from that date: see per WILLMER, J., in *Moss v. Moss* (3) ([1956] 1 All E.R. 291). This construction is consonant with the object of the statute as expressed in the preamble and with the general scheme of the statute as expressed in the Act itself, and in the regulations made thereunder. Accordingly, in my view the National Assistance Board and the Law Society

* Paragraph (8) of reg. 16 was added by S.I. 1954 No. 166.

are right in their contentions that alimony pendente lite is to be taken into account as a resource in assessing the disposable income of the wife for the purposes of a civil aid certificate. I would allow the appeal accordingly.

ORMEROD, J.: This case was argued before LORD MERRIMAN, P., on the footing that alimony pending suit raises a subject-matter in dispute. This was conceded by counsel on behalf of the National Assistance Board, and if he were right in this, then I would respectfully agree with the President's conclusions. The Solicitor-General, however, was given leave to withdraw this concession, and the appeal turned on the question whether, on a true construction of s. 4 (3) of the Legal Aid and Advice Act, 1949, and reg. 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, alimony pending suit should be excluded from the computation of the wife's resources as being the "subject-matter of the dispute".

Taken by themselves, the words "subject-matter of the dispute" would seem to have a meaning wide enough to include any matter the subject of the particular litigation in question. It is plain, however, on reading reg. 2 that in the context we are considering the meaning of the words must be restricted. Section 4 (3) is dealing with the "resources" of a person seeking legal aid, and there are many things which might be the subject-matter of a dispute which cannot for obvious reasons be considered as resources. Regulation 2 deals with the "value" of the subject-matter of the dispute, and it must also be clear that there are many matters the subject of litigation to which no monetary value can be attached. Without attempting an exhaustive definition of what may or may not be the subject-matter of a dispute in this context, matters such as a specific chattel or a specific fund in the control of one or other of the parties would seem to be within the regulation, and should, therefore, be excluded in a computation of resources. Equally, a liquidated or unliquidated claim for damages, although no doubt in the general meaning of the word the subject-matter of the dispute, would not come within the regulation as such damages could not be regarded as resources in the possession or control of the applicant. My view is that a claim for alimony pending suit must be considered on the same footing as a claim for damages. At the time when the wife made her application, the claim for alimony was one which she hoped would be successful but was in no sense a resource, nor was it something which at that time could be valued. On the true construction of the section and regulation, therefore, it would seem that it was not intended that a claim for alimony in these circumstances should be regarded as the subject-matter of the dispute and thereby excluded from the computation if at some future date the order for alimony was made. For these reasons, I would allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor, National Assistance Board; T. G. Lund (for the Law Society); Kenneth Brown, Baker, Baker (for the wife).*

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

LEE v. BARREY.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.J.J.), December 17, 18, 19, 1956.]

Land Registration—Boundary—Filed plan—Plan on land certificate at variance with plan attached to transfer—Which plan prevails—Land Registration Act, 1925 (15 & 16 Geo. 5 c. 21), s. 19, s. 69, s. 76—Land Registration Rules, 1925 (S.R. & O. 1925 No. 1093), r. 278.

The owner of a plot of land title to which was registered under the Land Registration Act, 1925, divided it into five smaller plots, of which he sold one to the defendant and later sold a second, adjoining the defendant's plot to the south-west of it, to the plaintiff. At the time of the defendant's purchase he went on the site with representatives of the vendor and pegs were inserted to indicate the point where certain kinks in the boundaries occurred. The plan on the instrument of transfer to the defendant correctly recorded the defendant's plot as agreed on the site, and it defined the dimensions and boundaries of the land sold to him, which was somewhat irregular in shape. Subsequently a land certificate was issued to the defendant on which the plot was identified by a plan, which was a copy of the filed plan or general map. This plan showed the defendant's land as a plot of regular shape and showed the boundary between the defendant's land and the plaintiff's land as being in places ten feet further to the south-west than was indicated by the instrument of transfer. A note was indorsed on the land certificate stating: "the boundaries shown . . . have been plotted from the transfer plan and are subject to revision on survey after erection of fences". On the back sheet of the land certificate there was a paraphrase of r. 278 of the Land Registration Rules, 1925, which provided that the filed plan or general map indicated only general boundaries. Boundaries were not fixed pursuant to r. 276. The defendant constructed a dwelling-house part of which, although it was within the boundary indicated by the plan on the land certificate, was outside the south-west boundary of his plot as indicated by the instrument of transfer to him and, if the latter were the true boundary, encroached on the plaintiff's plot. The plaintiff claimed that the defendant had trespassed on his land.

Held: the defendant had committed trespass because the true boundary of the plot acquired by him was that defined at the time of his purchase and recorded in the transfer to him, and, boundaries not having been fixed on the filed plan or general map at the Land Registry, the land certificate could not be set up to override the plain effect of the bargain and the transfer; particularly as the plan on the land certificate was intended to show what was on the plan on the transfer and as, by s. 76 of the Land Registration Act, 1925, and the Land Registration Rules, 1925, the filed plan or general map was not intended precisely to define boundaries.

Per CURIAM: s. 19 and s. 69 of the Land Registration Act, 1925, are directed to bringing registered land into the general scheme of the property legislation of 1925 and are not concerned with [a boundary dispute such as arose in] the present case (see p. 195, letter D, post).

Appeal dismissed.

[**Editorial Note.** The dispute in the present case was a dispute as to a boundary and not a dispute as to property, for it was clear that the property conveyed to the defendant had been substantially that which he had contracted to acquire, and there was no claim for rectification. Further, the present case is not an authority on what the position would have been if fixed boundaries had been indicated on the filed plan pursuant to r. 276 of the Land Registration Rules, 1925. Moreover, it may be noted, there is provision for filing the fullest

available particulars of boundaries, where physical boundaries or boundary marks do not exist (see r. 279).

For the Land Registration Act, 1925, s. 76, see 20 HALSBURY'S STATUTES (2nd Edn.) 1009.

For the Land Registration Rules, 1925, r. 272 to r. 285, see 18 HALSBURY'S STATUTORY INSTRUMENTS 198-200.]

Appeal.

Appeal by the defendant, Theodore Francis Henry Barrey, from a decision of JENKINS, L.J., sitting as an additional judge of the Chancery Division, given on July 25, 1956, whereby it was declared that the boundary between the plaintiff's land situate at and known as No. 17, Oakleigh Park South, Whetstone, in the County of Middlesex, and the defendant's adjoining land situate and known as No. 19, Oakleigh Park South aforesaid was along a line in the position of the line demarcating the south-western boundary of the defendant's said land in the plan annexed to a transfer dated Oct. 19, 1949, and made between Ernest John Morsley on the one part and the defendant on the other part, and it was ordered (i) that the defendant be perpetually restrained from trespassing on the plaintiff's said land excepting such part thereof as formed the site of the defendant's dwelling-house known as No. 19, Oakleigh Park South, Whetstone aforesaid, (ii) that the defendant remove the concrete paving and dry garden wall laid or erected by him on the plaintiff's land, and (iii) that an inquiry be made what sum was proper to be awarded to be paid by the defendant to the plaintiff by way of damages for the trespass complained of in the statement of claim.

J. A. Plowman, Q.C., and *D. A. Thomas* for the defendant.

H. E. Salt, Q.C., and *H. E. Francis* for the plaintiff.

LORD EVERSHED, M.R.: I have come to the clear conclusion in this case that the decision of JENKINS, L.J., was correct and should be affirmed.

The action was one brought by an owner of property in Oakleigh Park South, at Whetstone in Middlesex, claiming a declaration that the north-eastern boundary of the plaintiff's land ran along a line indicated on a plan attached to the statement of claim and asking for an injunction to restrain a trespass with consequential relief, including damages for trespass; in other words this was in form and in substance a trespass action—and that is a matter which is not without significance, having regard to the argument.

The land of the plaintiff and also the land of the defendant, which adjoined, formed part of a property somewhat larger, which had belonged to one Morsley and which was registered at the Land Registry. The defendant was the first to buy from Mr. Morsley a piece of his, Mr. Morsley's, land. For the purpose of that and the succeeding sales, Mr. Morsley had divided the plot which he owned into five convenient smaller lots. Looking at the plans exhibited, the plots are numbered from 1 to 5, starting from the left, and that reference will be convenient for the purposes of my judgment. The defendant's plot was numbered 4; that is the plot next but one to the right hand of the whole piece of land. His contract for purchase was made on July 6, 1949, and the instrument of transfer is dated Oct. 19, 1949. Shortly after the date of that instrument, the transfer was lodged in accordance with proper practice with the Land Registry for registration and in due course the Land Registry issued a land certificate relating to the defendant's purchase, the date which the document bears being Jan. 16, 1950. To complete the short narrative which alone is necessary for this purpose, the plaintiff became a purchaser [of the plot numbered 3] by contract of Sept. 25, 1951, and his instrument of transfer is dated Oct. 30, 1951.

The defendant had, in the meantime, begun the erection of his house and if one looks at what is called plan No. 1 (attached to the statement of claim) one sees that the house overlaps what the plaintiff alleges to be the true western boundary of the defendant's property to an appreciable extent. The extent of the overlap

A along the western boundary is not uniform, and for this reason: the whole piece which formerly belonged to Mr. Morsley is irregular in shape, i.e., although on the western side the boundary appears to be substantially at right angles both to the northern and southern boundaries, on the east, the boundary, starting from the south, proceeds for a short distance only parallel to the western boundary and then bends inwards to the west, straightening out somewhat at its finish. In order to make the plots substantially equivalent in area and for the convenience of their gardens and so on, it is clear that the original owner, Mr. Morsley, according to the plan marked A attached to the statement of claim, adopted what has been called an angled division. The result of that was, looking still for the moment at plan A, that the defendant's plot No. 4 was itself irregular in shape; starting from Oakleigh Park South it proceeded at right angles to the road for a little and then bent in a westerly direction. The point where the bend occurred has been referred to as the "kink".

The defendant's house overlapped what the plaintiff alleged to be his true boundary near the point of the kink; but the effect, as shown on plan No. 1, is that the angled dimensions which the plaintiff says must be attributed to the defendant's property produce, as contrasted with the result if the boundaries had been regular and straight, a strip widening to its maximum at the kink and tapering at each end to nothing.

The finding of the learned judge was to the effect that the defendant, having entered into his contract and received his instrument of transfer, had then no doubt what the dimensions and boundaries of the property he had bought were; and the learned judge describes how the defendant went on to the site with representatives of his vendor, Mr. Morsley, and that pegs, called "Y" and "S", were inserted both on the east and west side of his land to indicate on each side where the kink or kinks occurred. At that stage the defendant was not at all deceived or under any misapprehension as to the property which he had acquired; but as a result, unfortunately for him, of the impact of the Land Registration Act, 1925, on these matters and as a result of the plan which appears on the certificate, that which formerly was clear became obscure. For the defendant appears to have assumed when he started his building operations that what had formerly been clear to him had, so to speak, been superseded by a new design, if I may use that word, for the land he had bought, so as to enable him to build his house at a position which would be on his land if, and only if, its western boundary went direct and by a straight line from Oakleigh Park South, northwards to the rear of the property.

The case was put most clearly before us by counsel for the plaintiff, and I think I can do no better than to summarise the course which his argument took. He pointed out that looking at the transfer plan and bearing in mind the circumstances of its preparation, the visit to the site and the identification of the pegs "Y" and "S", to which I have already alluded, there could be no doubt whatever what were the boundaries of the property which the defendant had bought and had intended to buy. Therefore, said counsel, apart from any argument which can be derived from the language of the Land Registration Act, 1925, and the Land Registration Rules, 1925, made thereunder, this might be called a text-book case.

Counsel for the defendant in truth does not dissent, so far, from that argument. If this were a case of unregistered land and the question of the site of the boundaries depended on the conveyances, or their equivalent, there could be no doubt where the defendant's boundaries should be found. The case for the defendant rested on the view which he took and advanced of the Land Registration Act, 1925, and the effect of the statutory provisions on the land certificate, which is undoubtedly the defendant's document of title. Counsel for the defendant referred us to s. 19 of the Act of 1925 which provides that the transfer shall be completed by an entry on the register and to s. 69 thereof whereby when that

entry takes place and the certificate is issued in respect of it, the proprietor is deemed to have vested in him what the certificate certifies that he owns. The question of identification and boundaries is dealt with by s. 76 of the Act itself together with rules which have been made under the Act. Section 76 provides:

"Registered land may be described—(a) by means of a verbal description and a filed plan or general map, based on the ordnance map; or (b) by reference to a deed or other document, a copy or extract whereof is filed at the registry, containing a sufficient description, and a plan or map thereof; or (c) otherwise as the applicant for registration may desire, and the registrar, or, if the applicant prefers, the court, may approve, regard being had to ready identification . . ."

The section further provides:

". . . the boundaries of all freehold land . . . shall whenever practicable, be entered on the register or filed plan, or general map . . ."

The rules applicable to this case—I do not propose to take up time by reading them all—consist of the Land Registration Rules, 1925, beginning at r. 272 and going on to r. 285. Of that section of the rules, r. 284 provides:

"(1) Renewal, revision, or correction of plans . . . may be made at any time . . . (2) Revision or correction of any part of the general map may also be made at any time . . ."

In order to dispose of the matter, it is desirable to mention that apart from what is called the filed plan, or the general map, with which in this case we are concerned, there are provisions for having what is called a fixed plan, in which case there is prepared a precise map fixing precisely the boundaries. The annotators of BRICKDALE & STEWART-WALLACE'S LAND REGISTRATION ACT, 1925 (4th Edn.), at p. 450, point out that that procedure is seldom resorted to, no doubt owing in part to the cost and trouble it entails. It is sufficient to say that it was not resorted to here.

In those circumstances we are concerned with a general filed map or plan, and the sole question for us is whether, notwithstanding the transfer and the facts I have mentioned, the effect of the statutory provisions, s. 19 and s. 69 in particular, is that as matters stand what the defendant has and is entitled to say he has is a piece of land identified by reference to the map on his certificate; and the argument is that that map makes it as plain as possible that there is no question of an angled division; the piece of land of which the defendant is certified as proprietor is regular in shape. It is, in fact, identified by reference to two pegs which can be shown to be in a straight line from the respective corners and that if the plaintiff desires to say that that is wrong, then what he should do is to make application to rectify the register. That was the significance of my reading the claim in the writ and the statement of claim, for it will be recalled that no request for rectification is there contained. It seems to me, therefore, in the end of all, that in the light of the statutory provisions and looking at the land certificate the question is this: is this a case in which the defendant, as things now are, can say—"I have got a piece of land, the boundaries of which are sufficiently identified and are such that my house at no point trespasses on the plaintiff's property"? Or, on the other side, is the right answer that the identification in the certificate is not, and does not purport to be, a precise signification—a precise showing—of the boundaries, which boundaries can properly be discerned from other material in the case? That is the point.

There is no doubt that at the kink itself the divergence between the transfer plan and what appears on the face of it from the certificate plan is not negligible. On the plan marked No. 1 attached to the statement of claim, measurements indicate that it is in the region of ten feet, and it may even be that if another method of measurement were adopted, the extent of that divergence would be

A substantially greater. Since the whole frontage to Oakleigh Park South is only forty-two feet it can be seen at once that this is not a mere trifling divergence.

With all respect to counsel for the defendant's argument, which he has, if he will allow me to say so, put before us with his customary skill and force, I find myself to be in this respect of entirely the same opinion as was JENKINS, L.J. I would go with counsel this far, that a boundary dispute and a property dispute may be two quite different things. It is true that a property dispute may, and frequently does, involve boundaries, and that a boundary dispute involves in some degree a property dispute; and if the divergence is very great indeed, you may say that the matter has passed from any sensible use of the phrase "boundary dispute" and becomes something else. But applying the common-sense test if, as counsel for the defendant invited us to do, one puts the question here: C Is the plaintiff saying in truth that the defendant got the wrong property by the land certificate? I would answer the question negatively. I think, for my part, that there is no doubt that the certificate purported to give him, and gives him, the right property. What, on the evidence, it has failed to do is to indicate its boundaries with sufficient correctness and precision. I agree with counsel for the plaintiff that s. 19 and s. 69 are directed to bringing registered land into the D general scheme of the property legislation of 1925, and are not concerned with the sort of question which arises in this case. I further agree with him that the section from which I have already read extracts, s. 76, and the rules, provide, and I think provide clearly enough, that in the case of a general map or filed plan the boundaries are not intended to be more than indicated and not to be precisely defined. If there were any doubt about that, I think the matter is E really made plain beyond a peradventure by the land certificate here in question. For under the heading on the attached general map of "Friern Barnet Parish" occurs a note, which has obviously been stamped on the document, as follows:

"The boundaries shown by the dotted lines have been plotted from the transfer plan and are subject to revision on survey after the erection of fences."

F I would add that on the back sheet of the certificate are notes, and one of the notes is neither more nor less than a substantial paraphrase of r. 278 of the Land Registration Rules, 1925. There is only one dimension on this plan, viz., the frontage to Oakleigh Park South, forty-two feet. No dimensions are given showing where the corners of that frontage are to be found in relation to G any other fixed point on the surface, nor are any other dimensions as regards the property certified given. The dotted lines indicate the western and eastern boundaries of the land certified on which there were not—and substantially still are not—any fences. One is, therefore, told that this document does no more than indicate the boundaries, and one is told, what I think is far more significant, that what it is intended to do is to show what would be found on the transfer plan. When all that is added together, I am for my part left in no H doubt that this plan cannot be set up to overturn the plain effect of what otherwise would have resulted from the bargain made between the defendant and his vendor as had been recorded in his contract and in his instrument of transfer.

I The judgment of JENKINS, L.J., sitting at first instance, was a judgment which he reserved and which carefully puts all the points and deals with them. I should be quite content to have left it so by expressing my own concurrence with his judgment; but I have shortly stated my own conclusion of the points as presented out of respect for the arguments we have heard.

For the reasons I have given, I think this appeal fails and must be dismissed.

BIRKETT, L.J.: I agree with the judgment which has just been delivered by LORD EVERSHERD, M.R., and I have nothing to add.

ROMER, L.J.: I also agree, and I have only a word or two which I should like to say. It is, of course, fundamental to the defendant's case that this

dispute ought properly to be regarded not as a boundary dispute, but as a property dispute; because if it is in fact a boundary dispute, it cannot succeed for the reasons which LORD EVERSHED, M.R., stated. For myself I can only say that I have no doubt that this is a boundary dispute within the usually accepted sense of that expression.

The common vendor to the plaintiff and the defendant was a Mr. Morsley, and he divided up this land which he owned into five parts, numbered 1, 2, 3, 4 and 5, and there is no doubt at all that it was the intention of Mr. Morsley to sell and it was the intention of Mr. Barrey, the defendant, to buy, plot No. 4; and there is no doubt that in substance the defendant had plot No. 4 conveyed to him. Therefore, it seems almost impossible to my mind to say that this is a property dispute in the sense that the wrong property was conveyed to the defendant, because he had conveyed or transferred to him, the plot which he intended to have, namely, plot No. 4.

When in addition one appreciates that the discrepancy which the plan reveals between what has been called the red line and the blue line is only ten feet at one point and then both to the north and the south of that point the divergency decreases until it ceases to exist as a divergency at all, it seems to me quite plain that this in substance is a matter of boundaries and not a matter of property, although, as LORD EVERSHED, M.R., said, the two conceptions of necessity sometimes overlap. Once one arrives at the conclusion that this is a boundary dispute, it appears to me that that is inevitably the end of the defendant's case.

Accordingly I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Milnes & Milnes*, Barnet (for the plaintiff); *R. C. Bartlett & Co.* (for the defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PYRAH (INSPECTOR OF TAXES) v. ANNIS & CO., LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.JJ.), December 11, 12, 1956.]

Income Tax—Deduction in computing profits—Capital expenditure—Expenditure on abortive application for variation in road haulage licence—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Case I.

Income Tax—Appeal—Case Stated—Remission of case to commissioners—Failure to call evidence—Judge's assumption on evidence available.

The taxpayers, who were haulage contractors, applied to the licensing authority to vary their public carrier's licence under the Road and Rail Traffic Act, 1933 (an A licence), by increasing the number of articulated vehicles which it entitled them to operate from four to seven. The application was refused, and an appeal to the Transport Tribunal against the refusal was dismissed. The General Commissioners of Income Tax held that the taxpayers were entitled to deduct the legal costs of the application and appeal as a trade expense in computing the profits of their business for income tax purposes. On appeal the judge held, as contended by the Crown before the commissioners, that the sum was not deductible on general principles apart from decided cases, since the application was not part of the carrying on of the taxpayers' trade but was an attempt to improve their capital position by making their fleet of lorries more useful as income-producing assets. Although lacking detailed evidence as to the nature of the licence and of licences granted in respect of licensed premises, the judge also formed the conclusion based partly on inferences and assumptions from the materials before him that the two licences were exactly comparable

A and analogous and that the principle of the decisions relating to licences of licensed premises governed the case. On appeal to the Court of Appeal, the taxpayers sought to have the Case Stated remitted to the commissioners for evidence to be called as to the nature of an A licence under the Road Traffic Act.

B **Held:** the Case should not be remitted to the commissioners since on the evidence the judge was justified in the conclusion that he reached from the material before him, viz., that in the present case the A licence was a capital asset, and since the taxpayers had not called evidence as to the nature of the A licence when the matter was argued before the commissioners or sought an opportunity to do so at the hearing of the appeal to the High Court.

C Decision of VAISEY, J. ([1956] 2 All E.R. 858) affirmed.

[As to deduction of payments in the nature of capital expenditure in computing profits for income tax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 158-161, paras. 325-327; and for cases on the subject, see 28 DIGEST 47-49, 242-252.

D For the remission of Cases Stated to the Commissioners of Income Tax, see 17 HALSBURY'S LAWS (2nd Edn.) 363, para. 743.]

Cases referred to:

- (1) *Murphy v. Australian Machinery & Investment Co., Ltd.*, (1948), 30 Tax Cas. 244; 2nd Digest Supp.
- (2) *Burston v. Inland Revenue Comrs.*, *Halperin v. Inland Revenue Comrs.*, (1942), 24 Tax Cas. 285; 2nd Digest Supp.
- (3) *R. A. Bird & Co. v. Inland Revenue Comrs.*, (1924), 12 Tax Cas. 785.

Appeal.

F The taxpayers appealed to the General Commissioners of Income Tax for the division of Uxbridge, Middlesex, against an estimated assessment made on them under Case I of Sch. D to the Income Tax Act, 1952, for 1953-54 in the sum of £15,000 less £2,500 capital allowances in respect of the profits of their trade of haulage contractors. In the accounts which they submitted for the year ending on Mar. 31, 1953, they included a sum of £1,272 legal charges incurred on an application which they had made in 1952 before the licensing authority for the metropolitan traffic area for variation of their existing public carrier's licence as defined in s. 2 of the Road and Rail Traffic Act, 1933 (an A licence), and on an appeal to the Transport Tribunal against the licensing authority's refusal of the application. In 1939 the taxpayers had held an A licence for seven rigid tipper vehicles. After the war, when A licences had been restored, the taxpayers applied for an A licence for five articulated vehicles. In 1952, when they had an A licence for four articulated vehicles, they applied to the licensing authority for the inclusion of a further three such vehicles to bring their total number up to seven. Their application was refused and their appeal to the Transport Tribunal was dismissed.

H The taxpayers contended that the legal expenses on the application and appeal were incurred in attempts to obtain replacement of the A licence which they had held before the war and were admissible expenses in computing their income tax liability under Case I. The Crown contended that the A licence was in the nature of a capital asset and the purpose of the application and the appeal was to acquire an A licence of greater value to the taxpayers than the one they held; the legal expenses were therefore capital expenditure and were inadmissible as deductions in computing the taxpayers' Case I liability. The commissioners held that the taxpayers' claim had been established and reduced the assessment. VAISEY, J., allowed the Crown's appeal against that determination ([1956] 2 All E.R. 858), holding that the expenses were not deductible on ordinary principles, since the application was not part of the carrying on of the taxpayers' trade but an attempt to improve their capital position by making their fleet of

lorries more useful as income-winning assets; and also because the case was governed by the principles of decisions relating to licences of licensed premises, which were exactly comparable and analogous. On appeal to the Court of Appeal, the taxpayers sought to have the Case remitted to the commissioners to hear additional evidence on the nature of a road traffic licence. A

Cyril King, Q.C., and Sir Reginald Hills for the Crown.

Heyworth Talbot, Q.C., and W. Lindsay for the taxpayers. B

LORD EVERSHERD, M.R.: The question raised in this case is whether, in ascertaining the sum for which they are liable to be taxed under Sch. D in respect of their business as road haulage contractors, the appellant taxpayers, Annis & Co., Ltd., can properly deduct £1,272, the amount of legal charges fruitlessly (as it turned out) expended by them in an attempt to get a variation of what is called an A road licence in 1952 so as to enable them to operate three additional articulated vehicles under that licence. C

The Case Stated, which counsel for the Crown described as being to some extent a labour-saving operation, expressed in the following three lines only the taxpayers' contention:

"It was contended on behalf of the [taxpayers] that the legal expenses were incurred in attempts to obtain replacement of the said A licence held before the war and as such were admissible expenses." D

The reference to "replacement" arises from the fact that the A licence which the taxpayers had originally in 1939 covered seven vehicles; they were what are called rigid tipper vehicles. When the abortive application was made in 1952 their A licence, renewed in the meantime with other variations, allowed but four articulated vehicles and the taxpayers' idea was to increase the figure of four to the original seven allowed in 1939. E

The Crown's answer was that the A licence was in the nature of a capital asset and that, accordingly, the legal expenses incurred were capital expenditure not admissible in computing liability under Sch. D. The commissioners, again observing their terse form, stated their conclusion simply thus: F

"that in view of the evidence produced before us the claim of the [taxpayers] had been established."

The Crown appealed to the High Court and before VAISEY, J., made the foundation of their argument the point put to the commissioners, namely, that the A licence was a fixed capital asset in the business; the taxpayers' attempt in 1952 was to enlarge that capital asset and the taxpayers' claim to deduct the £1,272 was untenable. And so VAISEY, J., held. G

On the matter of the licence the learned judge, in the course of his judgment, made use of expressions indicating that, to his mind, there was an analogy between the A licence which a haulage contractor necessarily required in order to carry on his haulage contracting business at all and the excise licence which a publican requires to carry on the business of a public house. He had not before him any evidence as to the precise nature of an excise licence and he drew attention in one passage of his judgment to the fact that he felt some embarrassment because the Case Stated contained no material relating to publicans' excise licences. The A licence under the Road and Rail Traffic Act, 1933, was produced to him and the nature of that licence is, broadly speaking, not in doubt. H

The necessity to obtain such a licence arises under the Road and Rail Traffic Act, 1933, and, as counsel for the taxpayers explained in opening the Case, for persons carrying on trades or businesses which require the use of motor vehicles, there are three classes of licence called A, B and C. The A licence is peculiar to the requirements of a public carrier or a haulage contractor, like the taxpayers. It is required and designed to permit the use of the road vehicles which it specifies or otherwise indicates for the use of the public haulier or I

A carrier of other people's goods; without such a licence such a business cannot be carried on lawfully at all. Counsel for the taxpayers pointed out that (as is apparent from the document which I have)—certainly as regards the actual power-driven vehicles—the practice is to specify in the licence the precise vehicles which the haulage contractor desires to use. When it comes to the trailers which may be attached to the power-driven vehicles, I understand that more commonly (as in this case), without specifying or identifying the exact trailers which the haulage contractor desires to use, the licence will authorise the use of a certain number—four, five or whatever it may be—and the contractor may only carry on his trade as a haulage contractor on the roads by use of the power-driven vehicles specified and with the limited number of trailers allowed.

We have also been told that strict control is kept in this matter (as the experience of the taxpayers makes manifest), and it is not possible to intrude into this business with any high prospects of success. Apparently the licensing authority is concerned to see that no more persons than are really necessary for the economy of the trade carry on the business and that no more vehicles are used in the business than are really required. So in this case the taxpayers, who had carried on the business for some years, failed to get the authority to add to their fleet any one of the three additional articulated vehicles which they sought.

One other matter of obvious fact may be mentioned in regard to licences. Like other vehicles, these articulated vehicles in course of time wear out or may come to grief in other ways. Occasions may therefore arise when a carrier's licence which operates on the face of it for five years requires to be varied by substituting one vehicle for another.

All that material was before the judge and, having had his attention drawn to several cases, including cases relating to excise licences, the judge at the end of his judgment said ([1956] 2 All E.R. at p. 862):

"It seems to me that, quite apart from the cases, the matter must turn on ordinary principles. If a man buys and sells stocks and shares and it is his business to buy and sell stocks and shares, then any losses which he incurs or profits which he makes in the conduct of that business are brought in as income profits or as part of his losses in the computation of his income in carrying on that business. On the other hand, if his purchasing of stocks and shares is not his business but is something which cannot be treated as the carrying on of a trade, the profit or loss which he makes in buying an investment is not part of his profit or loss in carrying on any business."

So far it is conceded that those observations are unimpeachable. He continues (*ibid.*):

"Here the purpose for which this sum of £1,272 was expended is an attempt to make the fleet of lorries owned by the taxpayers more useful and more advantageous as income-winning assets, which is not part of the carrying on of the business at all. It was designed to improve the taxpayers' capital position, and I think that this unsuccessful attempt to better the capital position by obtaining the desired variation of the A licence was properly attributable in the accounts to capital and not to income."

Counsel for the taxpayers drew attention to the words "which is not part of the carrying on of the business at all". On a strict scrutiny that view is not perhaps expressed with complete accuracy, for the operation of improving one's capital assets in one sense may well be part of the conduct of one's business. Apart, however, from that slight criticism (which, I think, is simply a criticism of terminology), as a statement of principle that paragraph again seems to me to be unimpeachable. Then come these final sentences (*ibid.*):

"I have hesitated about this case, because I have had to draw inferences

and make assumptions which may rest on rather insecure foundations, but, having regard to all the circumstances of the case, I think I am justified in dealing with the matter on the materials before me and forming the conclusion that this A licence is exactly comparable with and analogous to the licence granted in respect of licensed premises under the licensing Acts. I think that the principle of the cases to which I have referred really governs my decision in the present case. It is unfortunate that I have not some better information about these A licences, although one has been produced to me."

Those cases were *inter alia* of licences for licensed premises.

Counsel for the taxpayers has really limited himself to this single point—that that judgment is based on an assumption. The assumption is that the A licence is a capital asset, being (and counsel quotes the words the judge used) "exactly comparable with and analogous to" a publican's excise licence. Counsel says that "that assumption is not in truth well founded; if it were, I should have to concede that the judgment could not be challenged". He argues that the analogue is not really justified and that, in any case, the question (which he says in part, at any rate, was one of fact) was never put before the commissioners and there is no finding on it to the effect that an A licence is a fixed capital asset. He has therefore confined his argument to a request that we should direct this matter to go back to the commissioners for further hearing and a finding on that matter.

Whether an A licence in the hands of one carrying on the business that the taxpayers carried on is a fixed capital asset or not, I think, would be a question of law rather than fact or, at least, of mixed law and fact; but counsel for the taxpayers said there were matters of fact which would be relevant to the conclusion. Asked to what matters the evidence would be directed if the question were further debated, he said, first, that it would be directed to the importance of such a licence to a business of this sort. Something might be said about that, though I cannot imagine that there would be much difficulty about it, bearing in mind that the haulage contracting business could not be carried on at all without such a licence. Secondly, he said that evidence would be directed to show how frequently these applications were made. I have said something about that already; but I can see that, if it could be shown that licences of this sort really required annual renewal, though expressed to be for five years, it might be said that the licence had lost its quality of an enduring capital asset. Thirdly, he said that it would be material to consider the likelihood of opposition when these applications are made. I say no more about that than to point out that in this case the opposition with which the taxpayers found themselves faced unfortunately prevailed over all their attempts to get the further variation.

Speaking of my impression of the matter as it has been presented, with all respect to counsel for the taxpayers, I should doubt whether all such evidence when given would have any material effect on the assumption which the judge made. But I do not want (and I do not think it would be right) to lay down as a rule to govern necessarily all such cases in the future that A licences in the hands of businesses of this kind must be capital assets. I think that is unnecessary for this decision and I therefore do not say it, though I must not be supposed to be encouraging the possibility of a different view.

However that may be, I am satisfied that the assumption made by the judge could be sensibly justified on the material before him and before the commissioners; in other words, that this is not a case in which I feel it is likely to involve the possibility of real injustice. That will be relevant when I consider whether we should send the case back to the commissioners.

I also add this. Although the judge did use the language (which I have already read) indicating on the face of it an exact parallel between an A licence and an excise licence, I think it would be unfair to him to say that he founded

A his judgment on that precise similarity. I think he founded it correctly on the matter of principle, though he made an assumption of fact which did undoubtedly and, I think, justifiably, depend on a fair similarity between a licence of this kind for a haulage contractor and an excise licence for a publican. Nor do I think that the fact that one is transferable and the other is not is by any means necessarily a relevant distinction. However, I need not pursue that matter.

B It suffices that, to my mind, on the material available the assumption which the judge made could fairly be made on the evidence.

Assuming in favour of counsel for the taxpayers that evidence might have been given which was not given and that it might have been such that a conclusion could properly have been reached that the A licence was not a capital asset—assuming all that—is this a case which we ought to remit to the commissioners?

C I have clearly come to a negative conclusion on that point. I have already said that I think that, on the material presented, the assumption did not make me feel a doubt whether some injustice might not have been done. Further than that, whether this was a capital asset was clearly raised before the commissioners. I have read the two passages from the Case Stated which show that it was in the forefront of the Crown's case that it was a capital asset. The opportunity was

D there presented for the taxpayers, if they wished, to give all this evidence and on the facts which they could prove to challenge the premise of the Crown's contention. They did not do it. Before VAISEY, J., again no attempt was made to introduce further evidence, nor did counsel for the taxpayers ask for the case to be sent back. When the judge expressed the slight embarrassment caused him by the paucity of the evidence and thought he might have to send it

E back, not unnaturally Mr. Lindsay, as a competent counsel, seized on that possible relief, as well he might, and said he would welcome it. But the suggestion was not formally put to the judge; nor, as we have been informed, was it really made a basis of the appeal to this court until shortly before the case came on. In all those circumstances, I do not think it would be right now to give to the taxpayers, after hearings before the commissioners, the judge and the Court of

F Appeal, an opportunity to start all over again and try to present on the facts an entirely different case.

The principles on which this court will remit to the commissioners in order that they may, in effect, allow the taxpayer to start again were stated in *Murphy v. Australian Machinery & Investment Co., Ltd.* (1) ((1948), 30 Tax Cas. 244). Counsel for the Crown referred to the language used by TUCKER, L.J., SOMERVELL, L.J., and COHEN, L.J., in that case and I need not refer to it again. The members

G of this court made it plain that in circumstances such as arise in this case it would not be in accordance with the proper practice of this court to exercise our discretion in the taxpayers' favour. Something much more special would have to be presented than has been presented in this case to justify the court taking such a course. I have not forgotten what LAWRENCE, J., said in *Burston v. Inland Revenue Comrs.* (2) ((1942), 24 Tax Cas. 285 at p. 291) but I do not think that the

H learned judge in that case qualified by his language anything which emerges from the judgments in the Court of Appeal in *Murphy v. Australian Machinery & Investment Co., Ltd.* (1).

For those reasons, even if it could in the end be fruitful (which, I repeat, I very much doubt, though I forbear from deciding the matter), I do not think it

I would be right for us now to accede to the request of counsel for the taxpayers and remit this case for further hearing to the commissioners and I would accordingly dismiss the appeal.

BIRKETT, L.J.: I am of the same opinion. It seems to be agreed that the real issue in this case is whether the A licence was a fixed capital asset of the business or not. But the question which we have to determine is not quite that. As presented by counsel for the taxpayers the real question is "In all the circumstances, ought this case to be remitted in order that that matter might be the

subject of further evidence? ” That suggestion is based on the contention that VAISEY, J., in the court below made an unwarranted assumption that there was a perfect identity or, at least, an analogy between the A licence in this case, under the Road and Rail Traffic Act, 1933, and the excise licence commonly known as a public house licence. A

Although the language of the learned judge, no doubt, in an extempore judgment is not quite as exact as in a considered judgment, he does say ([1956] 2 All E.R. at p. 862): “ It seems to me that, quite apart from the cases, the matter must turn on ordinary principles ”. Those cases were introduced by counsel for the Crown, who was saying, in support of the argument which he presented to the learned judge: “ This is a fixed capital asset: witness the position of the excise licence; this is what has been said about that ”, and no doubt he argued that there was really no distinction in principle between the two. There were certainly distinctions and if this case were to be remitted evidence could be called to show that the A licence under the Road Traffic Act, 1930, and the excise licence differed in certain respects. The learned judge says ([1956] 2 All E.R. at p. 862): “ It seems to me that, quite apart from the cases, the matter must turn on ordinary principles ”. He discusses the ordinary principles, and says (*ibid.*): B C D

“ . . . this A licence is exactly comparable with and analogous to the licence granted in respect of licensed premises under the Licensing Acts. I think that the principle of the cases to which I have referred really governs my decision in the present case.”

That looks as though he was referring to the fact that he had discussed it on general principles, quite apart from the cases, and they really governed his decision. E

If he had had the opportunity of thinking longer about it, the judge might have phrased it rather differently, but he was really saying: “ I think there is the closest analogy between the A licence and the excise licence; there is identity between the two and I think that governs my decision; but I also think that, if those cases were left out of consideration and we discussed the matter on general principles, I should arrive at exactly the same conclusion.” F

Counsel for the taxpayers thereupon says: “ This case ought to be remitted to the General Commissioners because they really did not give that matter any consideration and the learned judge was not warranted or entitled to make the assumption he did on the material before him ”. Indeed, passages from the judgment made it plain that VAISEY, J., was in some little perplexity as to the paucity of the material in certain parts of the case. He did come to a conclusion, however, and I think that there was evidence on which he could so do, putting it in these words (*ibid.*): G

“ Here the purpose for which this sum of £1,272 was expended is an attempt to make the fleet of lorries owned by the taxpayers more useful and more advantageous as income-winning assets, which is not part of the carrying on of the business at all. It was designed to improve the taxpayers’ capital position, and I think that this unsuccessful attempt to better the capital position by obtaining the desired variation of the A licence was properly attributable in the accounts to capital and not to income.” H

Even were we to accede to the request of counsel for the taxpayers that this case should be remitted to the General Commissioners and that he should be permitted to call evidence, I think, as counsel for the Crown said, that “ he would find great difficulties ”. I should be inclined to say that he would find it impossible. I agree with my Lord that there was evidence on which VAISEY, J., could find as he did, and I incline to the view that, even if we were to send the case back and allow evidence to be given, no evidence could be given which would establish that this was not a fixed capital asset. I

A The other point is one of substance, too. When the matter came before the General Commissioners it is quite plain, from the Case Stated and the extracts that my Lord has read, that the taxpayers' case was that these legal expenses were incurred in an attempt to obtain replacement of the A licence which they had formerly had and the Crown, in answer to that, said "This A licence is in the nature of a capital asset". At this stage, the case having gone from the commissioners to VAISEY, J., and now to this court, the words of the Lord President (LORD CLYDE) in *R. A. Bird & Co. v. Inland Revenue Comrs.* (3) ((1924); 12 Tax Cas. 785) are peculiarly apposite. He said (*ibid.*, at p. 794):

C "It is quite plain from the Case, and from what the parties say, that the appellant did not put before the commissioners any material other than is reproduced in the Case, bearing on the alleged inadequacy. It seems to me that if we were to send this Case back for further inquiry about this, we might be exposed, as far as I can see, in almost any case, to an exactly similar application—whenever, in short, the appellant has not presented his case to the commissioners in a way which brings out the point he ultimately desires to make before the Court of Appeal. That would never do. No doubt, if there has been a misunderstanding, we would strain a point to put that right; and if the commissioners had failed to include or to allude sufficiently to some topic that was brought before them by way of evidence we should remit to put that right. But on the grounds I have indicated it is impossible to grant the appellant the indulgence which he asks in this case."

E Those words are peculiarly apposite to the facts of the present case and I agree with the decision already announced by LORD EVERSHED, M.R.

F **ROMER, L.J.:** I also agree and I only want to say this. Although it would perhaps be going too far to say—and it would certainly be going further than the decision of this case requires—that no evidence could possibly be adduced to support the view that an A licence is not a capital asset of a haulage contractor's trade, it appears to me that, *prima facie*, it bears every characteristic and feature of a fixed capital asset. It is an asset which is retained by the taxpayers and which produces income. It is quite impossible to suggest that it could form part of the taxpayers' circulating capital, because these companies do not trade in A licences, and, accordingly, I think that *prima facie* an A licence has a strong complexion of being an item of fixed capital. I do not think it is necessary, however, to proceed from that to a decided view that the contrary could not possibly be shown. For the rest, I entirely agree with what my Lords have said.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Stanley Wise & Co.* (for the taxpayers).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

FARRANT v. FARRANT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), December 12, 19, 1956.]

Divorce—Attachment—Maintenance order—Order that husband pay children's school fees—Breach of order—"Default in payment of a sum of money"—Jurisdiction—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4.

By an order of the registrar the husband was ordered to make payments to the wife as maintenance for herself and the children of the marriage and was also ordered to "pay the school fees of the three younger children at their present school". The wife alleged that the husband had failed to pay certain of the school fees, and applied for a writ of attachment against him.

By the Debtors Act, 1869, s. 4, it is provided that subject to the exceptions therein set out (none of which applied to the present case) "no person shall . . . be arrested or imprisoned for making default in payment of a sum of money."

Held: the court had no power to order a writ of attachment to issue in the present case, since the husband's obligation was to pay a certain sum of money when it had been ascertained and any default in payment of that ascertained sum was a "default in payment of a sum of money" within the meaning of the Debtors Act, 1869, s. 4.

[As to attachment for disobedience to orders of the Divorce Division for the payment of money, see 12 HALSBURY'S LAWS (3rd Edn.) 468, para. 1049, note (e); 472, para. 1056, note (i); and for cases on the subject, see 27 DIGEST (Repl.) 675-677, 6434-6454.]

For the Debtors Act, 1869, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 293.]

Cases referred to:

- (1) *R. v. Pratt*, (1870), L.R. 5 Q.B. 176; 39 L.J.M.C. 73; sub nom. *Ex p. Cole*, 21 L.T. 750; 34 J.P. 150; 5 Digest 1022, 8345.
- (2) *Leavis v. Leavis*, [1921] P. 299; 90 L.J.P. 302; 125 L.T. 28; 27 Digest (Repl.) 675, 6438.
- (3) *Bates v. Bates*, (1888), 14 P.D. 17; 58 L.J.P. 85; 60 L.T. 125; 27 Digest (Repl.) 676, 6451.

Summons.

The wife applied for a writ of attachment to be issued against the husband in respect of his non-compliance with an order of Mr. Registrar FORBES, dated June 18, 1956. On Feb. 21, 1955, the wife obtained an order for alimony pending suit; and on July 6, 1955, she was granted a decree absolute of divorce. On June 18, 1956, Mr. Registrar FORBES discharged the order of Feb. 21, 1955, and ordered the husband to pay to the wife interim maintenance for herself and the four children of the marriage; and he further ordered that the husband "do pay the school fees of the three younger children at their present school" together with certain other payments to an insurance company. The wife now alleged that there had been wilful default on the part of the husband in paying certain of the school fees.

K. B. Campbell for the wife.

The husband did not appear.

SACHS, J.: This is an application on behalf of the wife, who was the petitioner in the original proceedings, to attach the husband on the ground of his default in complying with an order of this court made by Mr. Registrar FORBES on June 18, 1956. The order was one by which the husband was to pay to the wife certain sums by way of maintenance for herself and the children of the marriage, and by which also the husband was ordered to keep up certain quarterly payments to an insurance company and to pay the school fees of the three

A younger children at their present school; and the attachment was sought in respect of non-compliance with that part which is in the terms:

“ . . . do pay the school fees of the three younger children at their present school.”

B It was alleged that there had been wilful default on the part of the husband in paying certain of these fees. When the application first came before me, I raised the point whether attachment was a procedure to which resort could properly be made for a default of this particular type. The matter was then adjourned for further argument on that point and for the filing of certain additional evidence.

C Before the court can properly deal with the merits of the application it now seems correct first to decide whether there is any jurisdiction to entertain the application at all. It is, of course, well known that s. 4 of the Debtors Act, 1869, commences by enacting:

“ With the exceptions hereinafter mentioned, no person shall . . . be arrested or imprisoned for making default in payment of a sum of money.”

D Incidentally, those words are reflected in R.S.C., Ord. 42, r. 7, which concerns the enforcement by attachment of judgments requiring persons to do acts “ other than the payment of money ”. After commencing in the terms just mentioned, the Act proceeds to state what the exceptions are. It is, however, rightly conceded that none of those exceptions applies to the present case, and accordingly the sole question is whether the default, if any, on the part of the husband constitutes a “ default in payment of a sum of money ”.

E No case relating to non-compliance with an order to pay school or other fees or sums such as insurance premiums has been cited to me; but the general principle applicable appears from cases such as *R. v. Pratt* (1) ((1870), L.R. 5 Q.B. 176), when LUSH, J., said (at p. 182):

F “ The words in the enacting part,—‘ default in payment of a sum of money,’ —are advisedly used instead of ‘ debt ’, in order to include cases which might not properly have been called cases of debt, such as costs on a judgment of nonsuit, or costs on a verdict for the defendant, or damages in an action of tort, or costs under a rule of court.”

G Of the various cases which have been decided on particular points relating to the above section, it is to be noted that attachment cannot lie in respect of an order for costs awarded by this court (cf. *Leavis v. Leavis* (2), per HILL, J., [1921] P. 299 at p. 300), but that on the other hand an order to give security for costs can be the subject of an attachment (see *Bates v. Bates* (3) (1888), 14 P.D. 17, where emphasis was laid on the fact that the order related also to the giving of a bond).

H In my view, one has to look at the substance of the matter in the light of what was intended when the Debtors Act was enacted. That intention does not depend so much on the precise words of the order of the court as on whether or not the real obligation of the person sought to be attached was one “ to pay money ”. As regards these school fees it seems clear that in substance the husband’s obligation was to pay a certain sum when it had been ascertained. The moment that sum had been ascertained his obligation was clearly to pay money, and any default on his part was in truth a “ default in payment of a sum of money ” within s. 4 of the Debtors Act, 1869. Thus the court has in the present case no power to order a writ of attachment to issue. Accordingly no useful purpose can be served by going into the merits of the case. It has been suggested to me that on the terms of this particular order it may not be possible for proceedings for default in paying the school fees properly to be taken by way of judgment summons: and that if that be so the position of the wife in regard to enforcing so much of the order as relates to school fees may prove to be difficult. That may or may not be so; that is an aspect of the matter with which I am not

at présent concerned. The position today is that the wife has sought to employ a procedure of a penal nature which impinges on the liberty of the subject. Unless, therefore, she can strictly establish that she is entitled to avail herself of that procedure her application must fail. A

Application dismissed.

Solicitors: *Langlois, Harding & Co.* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.] B

NOTE.

R. v. SHIPTON, *Ex parte* DIRECTOR OF PUBLIC PROSECUTIONS. C

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Ormerod, JJ.), December 17, 1956.]

Criminal Law—Autrefois acquit—Manslaughter—Accused found not guilty of manslaughter and jury not agreed on alternative verdict of dangerous driving—Case sent by judge to quarter sessions for trial of dangerous driving—Whether quarter sessions had jurisdiction to try issue of dangerous driving on indictment for manslaughter—Road Traffic Act, 1934 (24 & 25 Geo. 5 c. 50), s. 34. D

Road Traffic—Dangerous driving—Whether jurisdiction in quarter sessions to try issue of dangerous driving after jury at assizes found accused not guilty of manslaughter—Road Traffic Act, 1934 (24 & 25 Geo. 5 c. 50), s. 34.

[As to directing trial before another court, see 10 HALSBURY'S LAWS (3rd Edn.) 426, para. 785; and as to not joining a second count with a count for manslaughter, see *ibid.*, 391, para. 708, text and note (d).] E

Application for leave to move for mandamus.

One William George Shipton was tried, before HAVERS, J., and a jury, at Dorchester Assizes on Oct. 12, 1956, on an indictment containing one count charging him with manslaughter in connection with the use of a motor car on Aug. 20, 1956, in the County of Dorset. The jury acquitted Shipton of manslaughter, but were unable to agree as to the possible alternative verdict of dangerous driving contrary to s. 11 of the Road Traffic Act, 1930, which they might have given pursuant to the Road Traffic Act, 1934, s. 34*, and accordingly they were discharged. An order was then made by HAVERS, J., directing that Shipton be re-tried on the issue of dangerous driving before the next quarter sessions for the county borough of Bournemouth. On Oct. 17, 1956, an application on behalf of the Director of Public Prosecutions was made to HAVERS, J., for leave to prefer a voluntary bill of indictment charging Shipton with dangerous driving. It was contended by counsel that as Shipton had been acquitted on the only charge contained in the existing indictment, viz., that of manslaughter, no charge remained on which he now stood indicted and on which he could be tried at quarter sessions; it was further contended that the power of the jury under s. 34 of the Act of 1934, to bring in a verdict as to dangerous driving on the indictment for manslaughter did not import into that indictment a separate count charging dangerous driving. The judge refused the application. On Oct. 18, 1956, the recorder of Bournemouth Quarter Sessions, N. R. FOX-ANDREWS, Esq., Q.C., after considering s. 34 of the Act of 1934 and the facts before him expressed the conclusion that he had F

“no jurisdiction to indict or cause the said William George Shipton to be indicted, or to try, or cause him to be tried, for the alleged offence of dangerous driving.” G

The Director of Public Prosecutions now applied *ex parte* for leave to move for an order of mandamus directing the recorder of Bournemouth Quarter Sessions H

* Section 34 is set out at p. 207, letter C, post. I

A to try Shipton on the issue whether he drove a motor car in a manner dangerous to the public on Aug. 20, 1956. The grounds of the application were that, the jury having failed to agree on the issue of dangerous driving at the trial of Shipton on Oct. 12, 1956, on indictment for manslaughter, that issue was left undetermined, that s. 14 (2) of the Criminal Justice Act, 1925, applied as the trial had not been "brought to a final conclusion", and that, therefore, HAVERS, J., B had lawfully directed that the remaining issue, viz., dangerous driving, should be tried at Bournemouth Quarter Sessions.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and Rodger Winn for the applicant, the Director of Public Prosecutions.

C LORD GODDARD, C.J., delivering the judgment of the court, stated the facts and continued: Section 34 of the Road Traffic Act, 1934, provides:

"Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under s. 11 of the [Road Traffic Act, 1930] (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of s. 21 of the [Act of 1930] (which relates to notice of prosecutions) have been satisfied as respects that offence."

That is entirely a permissive section. It says that when the jury have a man in charge on manslaughter, if they come to the conclusion that he is not guilty of manslaughter they may return a verdict of dangerous driving, and one knows that they very often do so. In this case the jury have found the accused not guilty of manslaughter and have not agreed on a verdict of guilty of dangerous driving. E There was no separate count for dangerous driving. I think, with all respect to the learned judge, the recorder of Bournemouth took a proper view. He had no jurisdiction to try an indictment which was an indictment for manslaughter. It might be desirable if this matter was cleared up in some way by legislation. The learned judge more than once when an application was made to allow a F voluntary bill for dangerous driving to be preferred, referred to the case of wounding with intent. We all know that on the charge of wounding with intent it is open to a jury to return a verdict of malicious wounding. In the opinion of the court exactly the same position arises there as it does here. If a jury find a man not guilty of the offence charged in the indictment and do not go on to say "but we find him guilty of malicious wounding", there is an end of the matter. G Perhaps it is a pity that the learned judge did not give leave to prefer a voluntary bill. If a voluntary bill had been preferred, whether the accused would have been able to plead autrefois acquit or not I do not know. There was no count for dangerous driving in the indictment, but there have been expressions of this court* that another count should not be joined in an indictment for manslaughter. If it were not for the Road Traffic Act, 1956, which makes a considerable H difference by providing a separate offence of causing death by reckless or dangerous driving†, I should have liked to consider those cases. I think, however, that it is perfectly clear, and the Solicitor-General has not been able to show us any authority to the contrary, that the present position is that as the jury acquitted the accused of manslaughter and did not see fit to return a verdict of dangerous driving, the learned recorder had no jurisdiction to try the indictment; I the court, therefore, refuses leave to apply for mandamus.

Application dismissed.

Solicitor: *Director of Public Prosecutions.*

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

* See, e.g., *R. v. Stringer*, [1933] 1 K.B. 704; *R. v. Large*, [1939] 1 All E.R. 753.

† See s. 8 of the Road Traffic Act, 1956, which came into force on Nov. 1, 1956, by virtue of the Road Traffic Act, 1956 (Commencement No. 1) Order, 1956 (S.I. 1956 No. 1491).

HALL v. MEYRICK.

[QUEEN'S BENCH DIVISION (Ashworth, J.), November 22, 23, 28, December 18, 21, 1956].

Solicitor—Negligence—Damages—Solicitor instructed to draft wills for two clients, man and woman, wishing to confer benefits on each other—Failure to advise clients in regard to revocation of wills on marriage—Marriage of clients after wills executed—Damage suffered by wife on death of husband intestate—Remoteness of damage—Measure of damages.

In 1949 the plaintiff, who was then a widow, and Mr. H. each wished to make a will conferring benefits on the other, and on Nov. 29, 1949, they visited the defendant, a solicitor, at his office and instructed him to prepare drafts of wills to be executed by them. The instructions were given separately, although at the same interview. During the interview the question of marriage between Mr. H. and the plaintiff was raised in a manner which should have indicated to the defendant that it was a contingency with an aspect of reality, but the defendant did not warn either the plaintiff or Mr. H. that marriage would involve revocation of the wills for which they had given instructions, nor did he mention the possibility of drafting the wills in a form which would leave them unaffected by the marriage. Wills were drafted by the defendant in accordance with the instructions received by him and were executed by the plaintiff and Mr. H., respectively, on Dec. 2, 1949. In September, 1950, the plaintiff and Mr. H. were married. The defendant, who was acting for them at the time in connection with the purchase of a house, was informed of the marriage, but did not notify them that their respective wills of December, 1949, were thereby revoked. In June, 1952, the plaintiff consulted the defendant about changing her will. He destroyed the will of December, 1949, in her presence, without informing her that it had been revoked by her marriage, and drafted a new will, which she executed on June 18, 1952. In September, 1952, Mr. H. died intestate. The value of his estate was, approximately, £3,850, and the approximate value of the property to which the plaintiff was entitled from his estate was £2,300, the difference between these values being £1,550. In an action against the defendant, the plaintiff claimed damages for loss and injury suffered by her by reason of the defendant's negligence and failure to use reasonable skill and diligence as her solicitor.

Held: (i) the defendant had been negligent in failing to point out to the plaintiff in 1949, when the wills were made and the question of her marriage with Mr. H. was raised, that the marriage would revoke the wills.

Griffiths v. Evans ([1953] 2 All E.R. 1364) distinguished.

(ii) the damage was not too remote because, the plaintiff's claim was for breach of contract (*Groom v. Crocker*, [1938] 2 All E.R. 394, applied), and (a) if the damage to the plaintiff were viewed as her lack of knowledge of the need to persuade Mr. H. to make a new will, that was a natural consequence of the defendant's negligence within the first rule in *Hadley v. Baxendale* ((1854), 9 Exch. 341), or (b) if the remoteness of the damage were tested by what might reasonably be supposed to have been in the contemplation of the defendant (in accordance with the rule in *Hadley v. Baxendale*, supra), it was not unreasonable to impute to him realisation that he was depriving the plaintiff of a chance of recovering for herself the benefits that she would, but for her marriage, have gained from Mr. H.'s will of December, 1949.

(iii) although the existence of contingencies that had to be satisfied before the plaintiff would have realised the benefits to be conferred by Mr. H.'s will did not render the damage too remote, since there was reasonable prospect of them being satisfied (dictum of FLETCHER MOULTON, L.J., in *Chaplin v. Hicks*, [1911] 2 K.B. at p. 793, applied), yet their existence

A reduced the amount at which the damages should be assessed, and, in view of this, the damages awarded would be £1,250.

(iv) the defendant, being separately instructed by the plaintiff, was under no duty to inform her either in September, 1950 (when he learnt of her marriage), or in 1952 (when he drew a new will for her), that her marriage had revoked Mr. H.'s will.

B [**Editorial Note.** If, in a future case, the death intestate occurs after 1952 it will be material, as regards damages, to consider the changes in the law of intestate succession effected by the Intestates' Estates Act, 1952, which came into operation on Jan. 1, 1953. On the death of a husband intestate after that Act, his whole estate will pass to his widow if he leaves no surviving issue, parent, brother or sister of the whole blood or issue of such brother or sister. In such circumstances a widow will not suffer damage by her husband's intestacy. The law of intestate succession on deaths after 1952 is stated in 16 HALSBURY'S LAWS (3rd Edn.) 396 et seq.

As to negligence of a solicitor in non-contentious matters, see 31 HALSBURY'S LAWS (2nd Edn.) 134, para. 181; and for cases on the subject, see 42 DIGEST 100-107, 940-1012.

D As to measure of damages in contract, see 11 HALSBURY'S LAWS (3rd Edn.) 241-243, paras. 409, 410; and for cases on the subject, see 17 DIGEST (Repl.) 91-93, 99-105.]

Cases referred to:

- (1) *Griffiths v. Evans*, [1953] 2 All E.R. 1364; 3rd Digest Supp.
- E** (2) *Groom v. Crocker*, [1938] 2 All E.R. 394; [1939] 1 K.B. 194; 108 L.J.K.B. 296; 158 L.T. 477; Digest Supp.
- (3) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest (Repl.) 91, 99.
- (4) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 17 Digest (Repl.) 92, 100.
- F** (5) *Sapwell v. Bass*, [1910] 2 K.B. 486; 79 L.J.K.B. 932; 102 L.T. 811; 17 Digest (Repl.) 120, 318.
- (6) *Chaplin v. Hicks*, [1911] 2 K.B. 786; 80 L.J.K.B. 1292; 105 L.T. 285; 17 Digest (Repl.) 89, 96.
- (7) *Richardson v. Mellish*, (1824), 2 Bing. 229; 1 C. & P. 241; 9 Moore C.P. 579; Ry. & M. 66; 3 L.J.O.S.C.P. 265; 130 E.R. 294; 17 Digest (Repl.) 87, 80.
- G** (8) *Otter v. Church, Adams, Tatham & Co.*, [1953] 1 All E.R. 168; [1953] Ch. 280; 3rd Digest Supp.

Action.

H The plaintiff claimed damages against the defendant for loss and injury alleged to have been occasioned by the defendant's negligence and failure to use reasonable skill and diligence as the plaintiff's solicitor.

The facts are stated in the judgment and are summarised in the headnote.

H. J. Phillimore, Q.C., and *J. W. Borders* for the plaintiff.

F. W. Beney, Q.C., and *A. G. Friend* for the defendant.

Cur. adv. vult.

I Dec. 21. ASHWORTH, J., read the following judgment: The plaintiff in this action is Mrs. Sheela Kathleen Hall, the widow of Robert Constable Hall, and she claims damages for the alleged negligence of the defendant, who at all material times until the summer of 1955 was practising as a solicitor in Bedford Row under the style of Greene & Underhill. The plaintiff first came into touch with that firm in 1931 when Mr. Underhill was the senior partner, but on his death in that same year the defendant took over the practice and the plaintiff from time to time consulted him during the next fifteen years or thereabouts. The plaintiff's surname was then James, and she was a widow with four children,

Mr. James having died in 1931. In her younger days she had been engaged to Mr. Robert Constable Hall, but they had parted and did not meet again until 1933. At that time the plaintiff was a widow and Mr. Hall had been divorced by his wife. It is only fair to the plaintiff to point out that no suggestion whatever was made against her in the divorce proceedings taken by Mr. Hall's wife. In 1933 or 1934 Mr. Hall began to live as a paying guest in the house at Highgate occupied by the plaintiff and her four children. I accept without hesitation the plaintiff's evidence that at no time between 1933 and September, 1950, when she eventually married him, was there any immorality between herself and Mr. Hall.

Until 1947 Mr. Hall's financial resources were small and he was not in regular employment, but in the spring of that year he had the good fortune to win no less than £25,000 in the Irish Sweepstake, and through the introduction of the plaintiff he consulted the defendant for advice as to the collection of this sum. On May 1, 1947, he executed a will prepared for him by the defendant under which he left the whole of his property to the plaintiff. In the following year or early in 1949 Mr. Hall bought a house, 60 Lichfield Grove, Finchley, and this was conveyed to the plaintiff, who went into occupation of it with her children and with Mr. Hall. Moreover, in September, 1949, Mr. Hall executed a settlement under which securities to the value of £6,000 were placed in the name of trustees on trust to pay the income to the plaintiff for her life, thereafter to Mr. Hall for his life, with remainder to the plaintiff's four children.

The events giving rise to this action occurred in and after the autumn of 1949 and they have to be considered in the light of the earlier history which I have summarised. One additional point should, however, be noted. From time to time between 1934 and 1949 the question of marriage between Mr. Hall and the plaintiff was mentioned, but no decision was reached. The plaintiff was more concerned to look after her children, one of whom was an invalid, than with the idea of matrimony.

On Nov. 24, 1949, as appears from a letter written on the following day by the defendant to the plaintiff, the plaintiff's son, Mr. Leonard James, called on the defendant and on her behalf gave oral instructions to the defendant in regard to what is described in the letter as a new will. A draft will was at once prepared by the defendant, but the document has disappeared and there was a conflict of evidence as to its contents. The defendant's recollection is that this draft was in virtually the same form as a will actually executed by the plaintiff on Dec. 2, 1949, but Mr. Leonard James, who gave the oral instructions, says that under the draft will all the plaintiff's property was left to her four children. In my view Mr. Leonard James' recollection on this point is to be preferred. However, this draft will was not executed by the plaintiff, and she and Mr. Hall decided to call personally at the defendant's office. The interview took place on Nov. 29, 1949, and it is of crucial importance in the case. [His LORDSHIP reviewed the evidence and found that the plaintiff, Mr. Hall, the defendant and Mr. Leonard James were present at the interview. His LORDSHIP continued:] The evidence as to what occurred at this interview was conflicting, which is not surprising when one remembers that it took place seven years ago. The questions which call for decision may be summarised as follows: (a) By whom were instructions given to the defendant? If instructions were given by more than one person, were those instructions given jointly or severally? (b) What were the instructions? (c) Were the instructions carried out? (d) Apart from such instructions as were given to him, was anything said at the interview which might give rise to a duty on the part of the defendant to do more than carry out the instructions?

(a) It is not disputed that as a result of the interview two wills were drafted by the defendant, one for Mr. Hall and one for the plaintiff. This result would appear to involve a finding that instructions to draft wills were given by Mr.

A Hall and by the plaintiff, and it was not seriously suggested that only one of them gave instructions. The real problem is whether instructions were given to the defendant jointly or severally. While it is true that Mr. Hall and the plaintiff arrived at the defendant's office together, and were both in his room when the instructions were given, I am satisfied that the instructions were given severally. Each of them, Mr. Hall and the plaintiff, wished to make a will, and each wished to confer benefits on the other, but in my view these were separate wishes and involved separate instructions. On this point I accept the defendant's recollection, refreshed by the note which he made at the time, that he was dealing with Mr. Hall and the plaintiff separately. Stress was laid on behalf of the plaintiff on the fact that the defendant only rendered one account to cover the preparation of the two wills, but I do not think that this fact outweighs the evidence of what took place at the interview.

C (b) and (c) I have no doubt that the instructions given by Mr. Hall and the plaintiff respectively were accurately summarised by the defendant in the note which the defendant made at the time of the meeting. Equally I have no doubt that the wills drafted by the defendant accurately carried out those instructions. In the course of her evidence the plaintiff admitted this, and as the terms of the respective wills were simple and easy to understand, I am convinced that, if there had been any discrepancy between those terms and the parties' intentions, attention would have been called to it before the documents were executed.

D (d) Evidence was given both by the plaintiff and by Mr. Leonard James that in the course of discussion at the interview he said, "Why don't you two get married?" to which the plaintiff replied, "We will one day. When we move to the country we'll have to get married as everyone knows everyone else's business". [His LORDSHIP referred to a conflict of evidence on this point, and continued:] I am satisfied that the question of marriage between Mr. Hall and the plaintiff was raised at this interview and was raised in a form which should have indicated to the defendant that marriage was not merely a fanciful possibility but was a contingency with an aspect of reality about it. It is common ground that the defendant for his part did not pursue the question of marriage between the plaintiff and Mr. Hall, either by warning the parties that marriage would involve revocation of the wills* then under discussion or by mentioning the possibility of drafting the wills in a form which would leave them unaffected by the marriage†.

F G Before I consider the legal effect of my findings in regard to the interview of Nov. 29, 1949, it is convenient to complete the story and dispose of two distinct issues in the course of doing so. On Dec. 2, 1949, Mr. Hall and the plaintiff respectively executed their wills and in the following year they began to look in earnest for a house in the country to which they could move from 60, Lichfield Grove, Finchley. After considerable exertions they found a house H at Alton in Hampshire and, after terms were agreed with the vendor, the defendant was instructed to attend to the matter. It is significant that he prepared the engrossment of the conveyance in the plaintiff's name of Mrs. James, and it was with some surprise that he learnt from Mr. Leonard James in September, 1950, that the plaintiff had just married Mr. Hall. This involved an alteration in the engrossment of the conveyance and a mortgage. So far as the present I action is concerned, the marriage of Mr. Hall and the plaintiff in September, 1950, had, of course, the effect of revoking the two wills executed on Dec. 2, 1949, but the plaintiff contends that this marriage gave rise to a further duty on the part of the defendant. On her behalf it is submitted that, on hearing

* Under s. 18 of the Wills Act, 1837 (26 HALSBURY'S STATUTES (2nd Edn.) 1339).

† By s. 177 of the Law of Property Act, 1925, a will made after the commencement of that Act, and expressed to be made in contemplation of a marriage, is not revoked by the solemnisation of the marriage contemplated.

of the marriage, the defendant should have recalled the fact that, some ten months before, he had prepared wills for each of the parties to the marriage and, irrespective of the question whether he had previously given any warning as to the effect of marriage on the wills, should have notified the parties that by the marriage those wills had been revoked. A

I am not satisfied that a duty such as is alleged has been established. I am not prepared to hold, as a rule of general application, that, if a solicitor who has prepared a will for a single client thereafter learns that the person has married, he is under any duty to communicate with that person and inform him or her that the will has been revoked by marriage. The existence of such a duty would, in my view, impose on a solicitor an intolerable burden, since the marriage might take place long after the preparation of the will, the person concerned might no longer be a client of the solicitor and the solicitor might reasonably have forgotten that he had prepared a will for that person, especially if the will itself was not in his possession. In coming to this conclusion I am fortified by the evidence of Mr. Daynes [a practising solicitor called on behalf of the plaintiff], who said: B C

“In the case of a will not made in contemplation of marriage, if I learnt that the person had married, I might or might not take action. If it was someone whom I knew well, I might telephone or write. If the person was not well known to me it might be presumptuous. To a limited extent I would be under an obligation.” D

In cross-examination he was more definite: “I should not regard myself as under any obligation to write and say that the will was revoked, when I heard of the marriage.” Cases may perhaps occur in which a solicitor would be under a duty to communicate with a person whose will he had prepared, when he learnt of his or her marriage, but, in my view, such cases would give rise to this duty only because of special circumstances. In the present case I cannot find any special circumstances which impose on the defendant a duty in September, 1950, to inform the plaintiff that as a result of her marriage to Mr. Hall both her will and his will executed in December, 1949, had been revoked. E F

After their marriage in September, 1950, the plaintiff and Mr. Hall lived at Alton, and it appears that by June, 1952, the plaintiff had formed the impression that Mr. Hall was being adversely influenced by persons who wished to exploit him financially. She, therefore, decided to alter her will and once again consulted the defendant. The interview took place in June, 1952, and the plaintiff gave evidence that in the course of the interview the will which she had executed on Dec. 2, 1949, was produced and that it was formally torn up and placed in the waste-paper basket, so as to indicate revocation. The defendant, after some hesitation, admitted that the incident may have occurred, and for my part I am satisfied that it did. What is not disputed is the fact that, although the defendant either realised or should have realised that the plaintiff's 1949 will had been revoked by her marriage and that the formal tearing-up of that document was an empty ceremony, he did not mention this to the plaintiff. His reason for not pointing out that the 1949 will was already revoked was said by him to be his concern for Mr. Hall, namely, his desire to ensure that the plaintiff did not cut him out of her new will completely as, according to the defendant, she was minded to do. He added, “I knew, of course, that the fresh will would be revoking the previous will in any event”. The will prepared by the defendant in June, 1952, was executed by the plaintiff on June 18, and under its terms the only provision in Mr. Hall's favour was the expression of a desire (without the creation of any trust) that the plaintiff's son, Reginald Lionel James, to whom she devised and bequeathed the house at Alton with all the furniture and contents therein, should look after him. G H I

It was submitted on behalf of the plaintiff that on this occasion also the defendant failed in his duty to her as her solicitor, in that he failed to point out that

A her 1949 will had been revoked by her marriage in 1950. It was urged that, whatever might be the position in regard to the defendant's duty in September, 1950, when he learnt of the plaintiff's marriage but was not directly concerned with her will, in 1952 he was undoubtedly reminded of her 1949 will since it was on the table in front of him. It was further urged that, even if reference to its revocation by her marriage might have prompted the plaintiff to complain
B that she had not been fully or properly informed before, it was none the less the defendant's duty to advise the plaintiff frankly as to the position. When considering this issue, it is, in my judgment, important to keep in mind that in June, 1952, the client with whom the defendant was dealing was the plaintiff and the plaintiff alone. She was consulting him about her own will; she was not consulting him about Mr. Hall's will, nor could she properly do so in his
C absence, and the defendant did not owe any duty to her to advise her as to the effect of marriage on Mr. Hall's will. I have come to the conclusion that, so far as the plaintiff is concerned, the defendant was not in June, 1952, under a duty to inform her that the will which he had made in December, 1949, had been revoked by her marriage. The interview of June, 1952, was, so to speak, an opportunity for the defendant to make good the effect of the plaintiff's marriage
D on the will which he had prepared for her in 1949, and I am not prepared to hold that when this opportunity presented itself he was under a duty to give advice about the previous will, which, on any view, the plaintiff herself intended to revoke.

In September, 1952, Mr. Hall died, and the defendant's actions in the following two months undoubtedly expose him to criticism. In a letter dated Sept. 30
E he stated, "I hold his will which he made in 1949, under which he gave you everything and made you sole executrix". In evidence the defendant said that he signed this letter on information supplied to him by his clerk, and that he had not read Mr. Hall's will when the letter was sent. Even if this letter can be thus explained, it is very difficult to understand how the defendant came to prepare the documents needed to obtain probate, request the plaintiff to attend
F on him in order to complete those documents, escort her to a commissioner for oaths in order to swear the necessary affidavit, and indorse the will as an exhibit to that affidavit, all apparently without realising that the will had been revoked by Mr. Hall's marriage. On this part of the case the defendant's evidence was far from convincing, but, whatever comments may be made regarding his handling of the matter in the autumn of 1952, the plaintiff cannot and
G does not rely on anything which occurred after the death of Mr. Hall as entitling her to claim against the defendant. The plaintiff's claim falls to be considered in the light of the defendant's conduct before, not after, Mr. Hall's death and, for my part, I doubt whether that claim is advanced to any material extent by reference to what the defendant did in October and November, 1952.

The writ was issued on Mar. 10, 1954, and the statement of claim was delivered
H on Apr. 9. Paragraph 2, as originally delivered, read as follows:

"In or about November, 1949, the plaintiff (then Sheela Kathleen James) and the deceased retained and employed the defendant as their solicitor to advise them in making mutual wills in contemplation of marriage and to prepare drafts of the said wills in such form as would carry out their intentions and instructions, to be executed by them."

I On May 5 a request was made for further and better particulars under this paragraph, and these were delivered on Sept. 1, 1954, in the following form:

"Under para. 2. (a) The request was made orally at a pre-arranged interview at the defendant's office at 23 Bedford Row in the county of London on a day in or about November, 1949. The plaintiff, defendant, the deceased and Leonard Martin James (son of the plaintiff) were present. The exact terms of the request was that wills should be prepared for the

deceased and the plaintiff respectively in the terms *mutatis mutandis* of the will executed by the deceased on Dec. 2, 1949. A

"(b) The intended marriage of the plaintiff to the deceased had been discussed between the plaintiff and the deceased and the defendant on several occasions prior to the above-mentioned interview. As far as the plaintiff can recollect, no *specific* request for the plaintiff's will to be expressed to be in contemplation of marriage was made by the plaintiff at the said interview, but the proposed marriage was discussed by the plaintiff, the deceased, the said Leonard Martin James and the defendant. In the presence of the defendant the said Leonard Martin James asked the plaintiff if she and the deceased really did intend to marry and the plaintiff answered 'Yes', but did not state a specific date for the marriage." B

In parentheses, I would say that it is quite clear from my previous findings that the allegations made in those particulars were not borne out by the evidence. C

Those advising the defendant were not satisfied with these particulars and took out a summons to strike out the statement of claim, but at the hearing of the summons on Oct. 4 counsel for the plaintiff stated that the retainer of the defendant on which the plaintiff relied was a joint retainer by herself and Mr. Hall. By consent, para. 2 of the statement of claim was to be treated as if the word "jointly" had been inserted in line 2 before the word "retained". The defence was delivered on Oct. 5 admitting separate retainers by Mr. Hall and the plaintiff to draw their respective wills, but denying any joint retainer or any instructions to prepare wills in contemplation of marriage. In para. 5 of the defence it was made clear that, if any negligence were established in regard to Mr. Hall's will, the defendant would contend that this would not confer on the plaintiff any right to damages. D

In the course of the final address of counsel for the plaintiff I indicated that on the evidence I should not be prepared to find that there was any joint retainer of the defendant such as was alleged in the statement of claim, or that the defendant was instructed to draw mutual wills or wills in contemplation of marriage. In those circumstances, while not conceding that my view of the evidence was correct, counsel for the plaintiff asked for leave to amend the statement of claim, alleging separate retainers by the plaintiff and Mr. Hall respectively. This request was resisted by counsel for the defendant, but he did not contend that leave should be refused on the ground that the plaintiff was seeking by amendment to put forward a claim which was statute-barred. Had he done so, I should have felt myself compelled to refuse leave to amend, but, as it was, I granted it, reserving all questions of costs and reserving to counsel for the defendant the right to make further submissions when he had seen and considered the amendment. The date when this leave was granted was Nov. 28, 1956, and the trial was not resumed until Dec. 18, when counsel for the defendant was joined by leading counsel who began with a request that I should reconsider my decision regarding the application for leave to amend the statement of claim, so that he might raise the point that the claim put forward by way of amendment was statute-barred. I felt unable to accede to this request, as the point could have been taken when the question of amendment was first raised. Indeed, although no reference had then been made to the point, much less any express statement made by counsel for the defendant that he would not rely on it, my impression at the time was that he preferred to object to the grant of leave to amend on other grounds. E F G H I

Both in its original form and in its amended form the statement of claim is, in my view, open to criticism, but I think that the pleading does sufficiently allege what I conceive to be the only ground on which the plaintiff's claim can possibly succeed. Before I deal with that ground, it is perhaps convenient

A to mention in summary form the issues on which she has failed. In my judgment the plaintiff has not established any of the following matters: (a) that the defendant was retained by Mr. Hall and herself jointly; (b) that the defendant was instructed by either Mr. Hall or herself that their respective wills were to be drafted in the form appropriate to persons contemplating marriage; (c) that the defendant failed to draw the respective wills in the terms which the parties respectively desired; (d) that the defendant was negligent in September, 1950 (when he learnt of the plaintiff's marriage to Mr. Hall), in failing to inform her that the wills made by Mr. Hall and herself in December, 1949, were revoked; or (e) that the defendant was negligent in June, 1952 (when he prepared a new will for the plaintiff), in failing to inform her that in any event her will made in December, 1949, had been revoked.

C In my view, the only ground on which the plaintiff's claim can succeed is the allegation that, in the circumstances known to the defendant before the interview of Nov. 29, 1949, and in the light of what occurred at that interview, he was negligent and in breach of a duty owed by him to his client, the plaintiff, in that he failed to advise her that, if she married Mr. Hall, the wills which were then being prepared for him and for her would be revoked. For the defendant
D it was contended that, when a solicitor is instructed to prepare a will, there is no contractual obligation on him to give advice regarding the will. In other words, the solicitor's task was said to be confined to the translation into testamentary form of the wishes of his client. In support of this argument reliance was placed on the decision of the Court of Appeal in *Griffiths v. Evans* (1) ([1953] 2 All E.R. 1364). In that case the majority of the Court of Appeal held that a
E solicitor who failed to advise a workman as to his common law rights against his employer at a time when the workman was in receipt of workmen's compensation was not guilty of negligence. In my view, that decision is not conclusive in the present case in which the facts are not only different from those in *Griffiths v. Evans* (1), but are also in themselves somewhat unusual. In support of the plaintiff's case before me Mr. Daynes, a practising solicitor, was called to give
F evidence. He proved to be a helpful and convincing witness; it is a relief to add that on the particular issue now under consideration the defendant did not disagree with him.

Having regard to Mr. Daynes' evidence and taking into consideration all the surrounding circumstances, I have come to the conclusion that a solicitor in the position of the defendant, on hearing the reference to marriage which was
G made at the interview on Nov. 29, 1949, ought to have pointed out that, if marriage were to take place, the wills then in course of preparation would be revoked. Since his instructions were given to him severally by Mr. Hall and the plaintiff, he ought, in strictness, to have pointed out to each of them severally what the effect of marriage on the wills would be. It was suggested on behalf
H of the plaintiff that, even if there had been no specific reference to marriage in the course of the discussion on Nov. 29, the defendant should have pointed out the consequences of marriage on the wills, or, at least, inquired as to the possibility of marriage. For my part, I do not think that any general rule can be laid down. The circumstances of each case fall to be considered before the scope of the solicitor's duty in regard to that particular case can be defined. Since I have found that there was a specific reference to marriage at the inter-
I view, I prefer not to express any view as to the defendant's duty in different circumstances.

In my judgment, therefore, the plaintiff has succeeded in establishing negligence on the part of the defendant in November, 1949, and the problem of damages accordingly arises. I confess that I have found it exceedingly difficult. On behalf of the plaintiff it was contended that she had lost the difference between the value of Mr. Hall's estate and the value of her interest in that estate on his intestacy. There was some conflict regarding the figure to be

taken as representing the total value of the estate. In my judgment a fair figure is the sum of £3,850. This figure is reached by valuing the preference shares in Securos, Ltd. at 10s. each [instead of £1 each] and the ordinary shares at 15s. each [instead of 30s. each], thus reducing the total of £6,000 mentioned in para. 10 of the statement of claim and the particulars thereunder to £3,850. As Mr. Hall died intestate, the plaintiff took from his estate the sum of £1,550*, also mentioned in the pleadings, and a life interest in one half of the remainder. I assess the capital value of this life interest at £750. Accordingly, instead of receiving absolutely property to the value of £3,850, the plaintiff has obtained property and interest worth in all £2,300. The most, therefore, which she can recover, is the difference between the last-mentioned figures, namely, £1,550.

It is clear from the decision in *Groom v. Crocker* (2) ([1938] 2 All E.R. 394) that, although the term "negligence" is used to describe the nature of the plaintiff's claim, that claim is, in effect, a claim for damages for breach of contract. It follows, therefore, that what is generally referred to as the rule in *Hadley v. Baxendale* (3) ((1854), 9 Exch. 341) is applicable, subject to the effect of later decisions, of which one of the most recent and important is *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (4) ([1949] 1 All E.R. 997). I do not propose to lengthen this judgment with lengthy extracts from the decision of the Court of Appeal in that last-mentioned case, but I have carefully considered all that was said in it.

For the defendant it was contended that the plaintiff was, at best, entitled only to nominal damages, and that any loss which she might have sustained owing to the facts that Mr. Hall's will, made in December, 1949, was revoked by his marriage and that he died intestate was too remote. It was said that such loss could not possibly be regarded as damage "arising naturally, i.e., according to the usual course of things" from the defendant's breach of his contract with the plaintiff, so as to come within the first part of the rule in *Hadley v. Baxendale* (3) (9 Exch. at p. 354). Further, it was said that such loss was not such as the defendant, as a reasonable man, should have contemplated as a likely result, so as to bring the case within the second part of the rule. Moreover, it was contended that the alleged loss was one which was dependent on so many contingencies that damages could not in law be awarded in respect of it, and reference was made to the decision of JELF, J., in *Sapwell v. Bass* (5) ([1910] 2 K.B. 486). That case must, however, be read in the light of the decision of the Court of Appeal in *Chaplin v. Hicks* (6) ([1911] 2 K.B. 786). The headnote to the last-mentioned case contains these words:

"The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment."

In his judgment FLETCHER MOULTON, L.J., said (*ibid.*, at p. 793):

"Mr. McCardie [counsel for the defendant] does not deny that there is a contract, nor that its terms are as the plaintiff alleges them to be, nor that it is enforceable, but he contends that the plaintiff can only recover nominal damages, say one shilling. To start with, he puts it thus: where the expectation of the plaintiff depends on a contingency, only nominal damages are recoverable. Upon examination, this principle is obviously much too wide; everything that can happen in the future depends on a contingency, and such a principle would deprive a plaintiff of anything beyond nominal damages for a breach of contract where the damages could not be assessed with mathematical accuracy. The learned counsel admitted that it was very difficult to formulate his proposition, but he ultimately said that where

* The sum of £1,550 was calculated thus: (a) personal chattels, estimated at £202 17s. 11s.; (b) Post Office Savings Bank deposit, nominated to plaintiff, £347 2s. 1d.; and (c) widow's portion; see s. 46 (1) (as originally enacted) of the Administration of Estates Act, 1925.

the volition of another comes between the competitor and what he hopes to get under the contract, no damages can, as matter of law, be given. I can find no authority for that proposition; in fact the decision in *Richardson v. Mellish* (7) ((1824), 2 Bing. 229) is obviously in the teeth of it. I do not rely, however, on that or on any other authority; I would rather consider what is the right of a plaintiff as regards damages for breach of a contract, and regarding it as a matter of broad general principle, I do not think that any such distinction as that suggested by Mr. McCardie can be drawn. The common law courts never enforced contracts specifically, as was done in equity; if a contract was broken, the common law held that an adequate solatium was to be found in a pecuniary sum, that is, in the damages assessed by a jury. But there is no other universal principle as to the amount of damages than that it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not."

There is, however, much force in the argument that, to establish her claim in full, the plaintiff must invite the court to assume (a) that she would have remembered a warning, if given, as to the revoking effect of marriage; (b) that Mr. Hall would have been willing to make a further will, either after marriage to the plaintiff or expressly in contemplation of such marriage; (c) that such will would have been wholly in her favour; and (d) that Mr. Hall would not thereafter have revoked it. All these points may be described as contingencies on which her receipt of an exclusive interest in Mr. Hall's estate depended, and in the face of so many contingencies counsel for the defendant submitted that the alleged loss must be regarded as too remote.

Counsel for the plaintiff submitted that the damages claimed were the direct and natural consequence of the defendant's breach of contract and came fairly within the first part of the rule in *Hadley v. Baxendale* (3). As I understood the argument, it came to this: owing to the absence of any warning as to the effect of marriage on the wills, the plaintiff did the very thing which a warning would have prevented, namely, married Mr. Hall and thereby, so to speak, disinherited herself. This argument seems to me to involve the conclusion that, if the defendant had warned the plaintiff, as was his duty, she would not have married Mr. Hall. I am quite unable to draw that conclusion from the evidence. In my view, the plaintiff would have married Mr. Hall in September, 1950, whether the warning was given or whether it was not given. In support of his argument on this point, counsel for the plaintiff relied on the decision of UPJOHN, J., in *Otter v. Church, Adams, Tatham & Co.* (8) ([1953] 1 All E.R. 168). He argued that the present plaintiff's marriage in 1950 was to be equated with the death of Michael, the tenant in tail in *Otter v. Church, Adams, Tatham & Co.* (8), and that the plaintiff's loss was, as he put it, crystallised on her marriage. In my view, that argument fails. In *Otter v. Church, Adams, Tatham & Co.* (8) the death of Michael intestate meant the end of any opportunity for him to make the settled property his own absolutely, whereas the plaintiff's marriage did not mean that she had no further opportunity to obtain an exclusive interest in Mr. Hall's estate. Michael's death was the loss of the opportunity to increase his estate, and the measure of damages was the loss of Michael's estate occasioned by the passing of the settled property to the next tenant in tail, due allowance being made for the possibility that Michael on being properly advised might not have disentailed.

This was, indeed, the alternative way in which the plaintiff's claim was put, namely, that, owing to the absence of any warning, the plaintiff failed to take any steps either before or after her marriage to Mr. Hall to obtain under a new will by him the same benefits as he was willing to confer on her in December, 1949; in other words, the loss which she has sustained is the loss of the chance or opportunity to secure those benefits. Expressed in this way, the claim seems

to me to be one which might well be said to fall within both parts of the rule in *Hadley v. Baxendale* (3). The plaintiff's lack of knowledge as to the effect of marriage and the consequential absence of any occasion to persuade Mr. Hall to make a new will can, I think, be regarded as the direct and natural result of the defendant's breach of contract. Alternatively, if the defendant can be regarded in imagination as contemplating the effect of his breach, I think that it is not unreasonable to impute to him realisation of the fact that he would be depriving the plaintiff of the chance of recovering for herself the benefits which she would, but for the marriage, have gained from the 1949 will. I hold, therefore, that the damage alleged is not too remote.

It does not by any means follow that the plaintiff is, on this footing, entitled to the full difference between the value of her interest under a will leaving everything to her and the value of her interest on intestacy. It is at this point that the effect of the various contingencies to which counsel for the defendant referred must be taken into account. The more the contingencies, the lower the value of the chance or opportunity of which the plaintiff was deprived. On the other hand, the contingencies must be fairly assessed, and, if there was a reasonable prospect of their being satisfied in a manner favourable to the plaintiff, the amount by which the full claim falls to be discounted is correspondingly reduced.

Having seen the plaintiff in the witness-box, I formed the impression that she was a person with a mind and a will of her own and that she was in a position to exercise strong influence over Mr. Hall. This is not said in any sense of criticism, but as one reason why I have come to the conclusion that, if she had known the true position, she would probably have made it her business to see that Mr. Hall made a new will in her favour after their marriage. I do not think that she would have forgotten the warning, if it had been given, and, while nobody can be certain what Mr. Hall's reaction would have been, I think that it is more likely than not that he would have agreed to make a new will in her favour. After all, he had been prepared in December, 1949, to leave everything to her, and there is no reason to suppose that his attitude would have changed when she had agreed to marry him. Even if by the summer of 1952 Mr. Hall was showing a tendency to invest his money unwisely, the same is not true of the year 1950 when the plaintiff married him. Any assessment of damages in a case of this sort is bound to appear somewhat arbitrary, but I have endeavoured to find a figure which fairly represents the plaintiff's loss after giving due allowance for all the uncertainties. The sum for which I give judgment in favour of the plaintiff is £1,250.

[HIS LORDSHIP then heard argument on the question of costs and continued:] If the action had finished on Nov. 28, it is very probable that it would have failed. None the less, I am quite satisfied that the evidence and the trial itself were unaffected by the amendment. It was only at a later stage that the plaintiff, so to speak, put her house in order, and I agree with counsel for the plaintiff that, although it may be perhaps a little illogical when examined closely, the fair order to make is that the plaintiff should have the costs of the action because she has succeeded in establishing negligence, but she must pay what may be a substantial sum for the unfortunate errors which caused the trial to be prolonged. I order, therefore, that the plaintiff shall have the costs of the action, but that the defendant shall have all the costs of and occasioned by the amendment, that the defendant shall have, in any event, all the costs of the further hearing on Dec. 18. For the purpose of the taxation of the costs, I express the view that it was right and proper that leading counsel should be brought in on behalf of the defendant. There will be a set-off of the costs.

Judgment for the plaintiff.

Solicitors: *Linsley-Thomas & Co.* (for the plaintiff); *J. F. Coules & Co.* (for the defendant).

[Reported by MARGARET D. ABEL, Barrister-at-Law.]

PRACTICE DIRECTION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), January 14, 1957.]

Practice—Trial—Fixing date for non-jury actions—Lists to be kept by Clerk of the Lists.

Costs—Trial—Fixed date—Fee allowable on taxation for informing Clerk of the Lists of settlement or withdrawal of action.

LORD GODDARD, C.J., made the following announcement with regard to the fixing of dates for non-jury actions.

(1) It is intended that four judges should be available each sittings to take cases for which fixed dates have been given.

(2) Four lists will be kept by the Clerk of the Lists and cases will be put in any one of the four in which there is a vacant date convenient to the parties, but no list will be allocated to a particular judge.

(3) As soon as a case is set down it will be entered in the General List. Subject to para. (9) hereof, a party may then apply to the Clerk of the Lists for a date on giving notice to the other side and after obtaining an appointment from the Clerk of the Lists. The notice should state the date proposed by the party giving it, who should also state the estimated length of trial. The party to whom notice is given may suggest an alternative date, and he also should give his estimate of the length of trial. Suitable forms of notice may be obtained at the office of the Clerk of the Lists. If neither party has applied for a date within four weeks of setting down, the case will remain in the General List subject to para. (8) hereof. If an order for a speedy trial has been made, the party who applied for a speedy trial shall apply to the Clerk of the Lists for a date within one week of the making of the order and shall give notice of the date on which he will apply to the other party or parties. It is most desirable that the views of counsel as to the probable length of a case should be ascertained.

(4) When the application is made to him, the Clerk of the Lists shall, in default of any agreement between the parties, fix a date, but either party may, on giving two days' notice to the other side, apply to the judge in charge of the lists to vary the date so fixed. An application to the judge must be made within a week of the application to the Clerk of the Lists, and the judge may vary the date fixed by the Clerk of the Lists or may order the case to remain in the General List. Where a date is given for a case estimated to last three hours or over, no other case will be entered in the same list for that day.

(5) When any fixed case is settled or withdrawn it shall be the duty of the plaintiffs' solicitors so to inform the Clerk of the Lists and a reasonable fee may be allowed on taxation for doing so. When a date has been vacated the parties in any case fixed for a later date may, if they agree, apply for their case to be fixed for the date so vacated.

(6) A list will be posted outside the office of the Clerk of the Lists (Room 419) showing the fixtures for each day as they are allocated and the free dates. The list will be brought up to date each day at or after 4 p.m.

(7) Once a date has been fixed, no alteration, except on an application to take an earlier vacated date, will be granted without the leave of the judge in charge of the lists. Leave to alter a date by postponement will be given only on exceptional and urgent grounds. The judge may in any case order as a condition of postponement that the case should go into the General List. The parties may at any time agree that a fixed case should go into the General List and they must then inform the Clerk of the Lists and the fixed date will be vacated.

(8) At any time before a case in the General List has appeared in the Warned List for the week the parties by consent may apply for a fixed date. A

(9) This scheme will not apply to cases already appearing in the printed list for the week ending Friday, Jan. 18. Applications on special grounds in respect of those cases must be made to the judge in charge of the lists. Applications may be made on or after Jan. 14 to fix a date for any other case already set down. No application to fix a date for a case not already set down will be entertained before Monday, Feb. 11, unless an order for a speedy trial has been ordered. B

I desire to add one other word. It will be remembered that LORD EVERSHED's committee were of opinion that nothing would more conduce to the saving of costs than having fixed dates for trial. This scheme has been framed with that object; it is, of course, an experiment and time will show if and what alterations may be needed. I should like to point out that fixed cases may take somewhat longer to come on for trial than do those in the list at present. In former days there were often complaints about the law's delay: during last sittings and for some time previously cases were heard within $3\frac{1}{2}$ months of being set down and, judging by the number of applications for postponement, it is clear that that interval was by no means too long for their adequate preparation. As the postponement of fixed cases will only be granted for the most compelling reasons, it will be advisable for parties to choose dates sufficiently far in advance to make sure that they will be ready when the time for trial arrives, and they will no doubt consider that, if that involves some delay, it is not too high a price to pay for the convenience and certainty of a fixed date. C D

It should also prove a great convenience for witnesses, more especially experts and medical men, to know well in advance the day that they will be required to attend. The scheme will, I hope, work without any or at least with only a minimum of formality: no summons will be required for applications either to the Clerk of the Lists or to the judge; a notice is all that is necessary. I also hope that parties will make every effort to agree on a date, having first ascertained at the office what days are open. All that then need be done is to notify the office by leaving there the convenient form which Mr. Fell has prepared. I am arranging that the same judge should for the future be in charge of both the General and Fixed Lists during the whole of a sittings, and ASHWORTH, J., will be in charge till Easter. E F

SUMMERFIELD v. HAMPSTEAD BOROUGH COUNCIL.

[CHANCERY DIVISION (Harman, J.), November 8, 9, 12, 13, 14, December 11, 1956.]

Housing—House of local authority—Rent—Increase—“ Reasonable charges ”—Differential rent scheme—Duties of local authority in fixing rents—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 51), s. 83 (1), s. 85 (5) (as substituted by Housing Act, 1949 (12, 13 & 14 Geo. 6 c. 60), s. 1, Sch. 1), s. 85 (6).

In 1934 the plaintiff was allotted a dwelling-house, consisting of four rooms, kitchenette and bathroom, on the Westcroft Housing Estate belonging to the defendants, the Hampstead Borough Council, at a rent of 13s. a week, which included 3s. for rates. By 1948 his rent had been raised to £1 2s. a week, including 7s. 3d. for rates. The defendants from 1934 to 1955 suffered an average annual loss on the estate of £1,773, the loss reaching £12,196 in 1949 and standing at £6,625 in 1955, although liability for internal repairs had been transferred to the tenants in 1951. Since 1951 the defendants had operated a differential rent scheme for new tenants and in 1954 they decided to extend this to old tenants; this would result in the plaintiff's rent being raised to £2 a week by instalments, the full figure becoming payable from November, 1956. Under the differential rent scheme a maximum rent was fixed according to the type of house, and rebates were granted to tenants who were unable to afford the full rent. The plaintiff did not qualify for a rebate. The plaintiff claimed a declaration that the new rent was unreasonable, and contended, in particular, that the rent charged was more than the “ economic rent ” of the house, viz., the rent at which a house must be let in order to cover loan interest and sinking fund contribution and the cost of maintenance and management. The defendants decided on the rent which they charged by grouping their housing estates and then ascertaining the highest economic rent chargeable for houses in that group. Exchequer housing subsidies were pooled for the purpose of the calculation. The economic rent for a house such as that of the plaintiff on the Westcroft estate was shown to be £1 9s. 6d. per week, while that for a smaller house built on another estate at a later date than the plaintiff's and more expensively, amounted to £1 19s. 6d. On this basis, the defendants considered it fair to charge £2 per week as a maximum rent for four-roomed houses in the group.

Held: the rent was reasonable and since the only financial limitation under s. 83 (1) of the Housing Act, 1936, on the charges which the defendants might impose in the management of their housing estate was that the charges must be reasonable (see p. 225, letter B, post), the rent was validly charged.

Per CURIAM: (i) there is no reason why a local authority may not spread its costs over all its [housing] properties, to an extent which is not unreasonable from a market point of view (p. 226, letter C, post).

(ii) there is not a duty on local authorities to limit the rent which they charge by reference to the prime cost of the houses that they have built (p. 226, letter E, post).

[**Editorial Note.** As regards the validity of differential rent schemes, see also *Smith v. Cardiff Corpn.* ([1955] 1 All E.R. 113).

For the Housing Act, 1936, s. 83 (1), s. 85 (5), (6), see 11 HALSBURY'S STATUTES (2nd Edn.) 522, 524; and for the Housing Act, 1936, s. 85 (5), as substituted by the Housing Act, 1949, s. 1, Sch. 1, see 28 HALSBURY'S STATUTES (2nd Edn.) 607, 644.]

Cases referred to:

- (1) *Leeds Corpn. v. Jenkinson*, [1935] 1 K.B. 168; 104 L.J.K.B. 182; 152 L.T. 126; 98 J.P. 447; Digest Supp.
- (2) *Belcher v. Reading Corpn.*, [1949] 2 All E.R. 969; [1950] Ch. 380; 114 J.P. 21; 2nd Digest Supp.

Action.

The plaintiff, Leonard Arthur Summerfield, who was a tenant to the defendants, the Hampstead Borough Council, of a dwelling-house provided under Part 5 of the Housing Act, 1936, situate in the defendants' Westeroft estate, claimed a declaration that a decision made by the defendants on Nov. 22, 1951, and amended by the defendants on Sept. 30, 1954, purporting to authorise the introduction and operation of a differential rent scheme in respect of houses provided by the defendants under Part 5 of the Act of 1936 was ultra vires and void as regards houses (including the plaintiff's house) on the said estate; and also a declaration that the maximum charges for houses provided by the defendants on their Westeroft estate, including the house of which the plaintiff was tenant, were unreasonable charges.

Dingle Foot, Q.C., R. Millner and Miss J. R. Bisschop for the plaintiff, the tenant.

Sir Andrew Clark, Q.C., and Kenneth Jones for the defendants, the borough council.

Cur. adv. vult.

Dec. 11. **HARMAN, J.**, read the following judgment: On Nov. 14, 1934, the plaintiff made a written application for a tenancy of a house on the then newly completed housing estate of the defendants called the Westeroft Housing Estate. These were houses built under the Housing Act, 1925, and did not attract any Exchequer subsidy. The plaintiff described himself as a painter and stated that he had lived in the borough for three years in two rooms at 60, Gayton Road. The reason he gave for wishing to move was convenience, and this is not surprising when one reads that his family consisted of his wife, a daughter aged five, a son aged three and a baby of a week old. He stated his income as £3 4s. 5d. a week. The plaintiff was duly allotted a house on the estate consisting of three bedrooms, a living room, kitchenette and bathroom, and the amount he paid was 13s. a week, 10s. being rent and 3s. rates. He has lived there ever since. His rent has risen, but not greatly before the events which brought about this action, the last increase of 4s. 1d. in 1948 bringing the total to 22s., consisting of 14s. 9d. rent and rates which amounted to 7s. 3d.

The 1948 revision of rents still left the landlords, as regards the income from the estate, with a deficiency payable out of the general rates. A table was produced, exhibit P.4, which showed an average annual loss on the estate from 1934 to 1955, inclusive, of £1,773. The loss reached a peak figure of £12,196 in 1949, and stood at £6,625 in 1955, notwithstanding the fact that in 1951 the defendants transferred to the tenants on the estate the liability for internal repairs or some of them, a liability amounting to perhaps £13 a year for each house. Meanwhile the plaintiff's wages have risen to £11 a week, if he suffers no stoppages; his wife works part-time and earns about £3 a week; and he has one child at home, a son, who contributes £2 10s. a week.

The house is not all that a man could desire and the plaintiff made a number of complaints about it, as any man will who knows his own home's defects; but, being a very candid witness, he said he was not so much dissatisfied with the house as with the rent which the defendants proposed to ask for it from April, 1955, and which he has refused to pay on the ground that it is unreasonable. This rent would now be 40s. a week, the maximum, there having been increments of 7s. 6d. each between April, 1955, and last month. The rates on the new assessment amount to 9s. 2d. a week. This is a stiff increase, and I am not

A surprised that the plaintiff dislikes it; but the truth is, though he has probably not realised it, that he has been living for years at the expense of his neighbours.

The Housing Act, 1936, is now the principal statute regulating what are called council houses, of which the plaintiff's is one. Part 5 of the Act (s. 71 to s. 104) before its amendment dealt with the "Provision of Housing Accommodation for the Working Classes". Section 71 laid on local authorities the duty of providing such houses in various ways, and s. 83 (1) provides:

"The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine."

It is around the words "reasonable charges" that the whole controversy turns. There is, so far as I can find, no statutory provision now giving guidance to what is meant by "reasonable". By s. 85 (5) of the Act of 1936 the following obligation was put on the local authority:

"In fixing rents the authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality, but may grant to any tenant such rebates from rent, subject to such terms and conditions, as they may think fit."

By the Housing Act, 1949*, nearly all references in the Act of 1936 to "working classes" were abolished, and s. 85 (5) of the Act of 1936, as substituted by the Act of 1949, now reads as follows:

"The authority may grant to any tenant such rebates from rent, subject to such terms and conditions, as they may think fit."

Section 85 (6) of the Act of 1936 is in the following terms:

"The authority shall from time to time review rents and make such changes, either of rents generally or of particular rents, and rebates (if any) as circumstances may require."

Beyond Exchequer contributions to council houses, s. 114 of, and Sch. 8 to, the Act of 1936 provided for certain contributions out of the rates. These included, by para. 8 of Sch. 8:

"Where in any financial year a deficit is shown in the housing revenue account, a contribution (in this Act referred to as an additional contribution) for that financial year of an amount equal to the amount of the deficit."

However, all such obligations except the last have been abolished by s. 8 of the Housing Subsidies Act, 1956†.

In or about 1950 the defendants became concerned about the rapidly rising deficiency in their housing revenue account, caused in particular by the rising costs of building and maintenance which made the expensively erected new estates a heavy burden on the rates. After much debate and inquiry the defendants decided to attempt to bridge the gap by the adoption of what has become known as a differential rent scheme. Schemes of this kind were given statutory authority by s. 85 (5) and (6) of the Act of 1936, which I have read, although they were legal before that as is shown by the decision of the Court of Appeal in *Leeds Corpn. v. Jenkinson* (1) ([1935] 1 K.B. 168). Such schemes vary in detail, but in principle are operated by fixing maximum rents for houses and granting rebates to tenants who cannot afford to pay the maximum. This has, of course, involved some inquiry into the income of the tenant and his family if he wants a rebate, and has incurred the rather unreasonable odium

* Housing Act, 1949, s. 1, Sch. 1.

† Section 114 of, and the whole of Sch. 8 (except para. 8) to the Housing Act, 1936, were repealed by the Housing Subsidies Act, 1956, s. 12 (4) and Sch. 3, Part 1, and the duty to make rate fund contributions was ended by s. 8 of the Act.

attached to the words "means test", an echo no doubt from the unhappy days in the "thirties" when so many were unemployed. In fact, however, there is no reason for this dislike, for disclosure of means is accepted by every citizen who pays income tax. A

In 1951 the rebate scheme was only applied to new tenancies on the estate; old tenants, like the plaintiff, still paid the old fixed rents. It is not surprising to find that there was almost no change of tenants. The result was that the gap, instead of closing, continued to widen, and in these circumstances the defendants decided, in 1954, to apply the scheme to all tenants. The £2 a week now demanded of the plaintiff is a maximum rent and it is admitted that his means are such that he would not qualify for any rebate. It is the same figure as has been charged to new tenants of similar houses on this estate since 1951. B

The burden of his complaint is: first, that the rent asked is more than what is called the "economic rent" of the house he occupies; secondly, that it is higher than the quality of the accommodation offered would justify; and, thirdly, that it is higher than is charged by some other local authorities for similar or comparable accommodation. An attempt was made at the trial to extend this comparison by reference to houses in private ownership, but this was abandoned, and it seems to me wisely, for privately owned houses of this type are subject to the Rent Restrictions Acts and no true comparison is possible. C

The defendants' case is that the words "reasonable charges" in their ordinary connotation mean charges reasonable by the test of the open market, whether looked at from the landlord and tenant point of view or tested by the price which such a house would fetch freehold and the rent which would be charged in order to obtain a fair return on the money invested. The plaintiff quarrels with this view on the ground that there is virtually no free market in small houses nowadays, and moreover that considerations valid between buyer and seller are not the proper criterion when considering the obligations of a local authority to the tenants of its council houses. D

There seems no doubt that, if the defendants' test be the right one, £2 a week is a reasonable rent for this house. If it were put on the market, as it is within the powers of the defendants to do under s. 79 (1) (d) of the Act of 1936, it would fetch, according to the evidence, not less than £1,700; and the plaintiff's own expert witness, a Mr. Curtis, who objected to the defendants' suggestion that £130 a year was a fair rent, himself put the rent at £112 a year. E

The plaintiff called officials from other boroughs, Willesden, St. Pancras and Hendon, who showed that council houses whose rents are fixed by those boroughs are lower than those charged for comparable houses by the defendants; but these rents in each case had brought about very large deficiencies in the housing revenue accounts of the authorities concerned. No notice was taken, in those boroughs, of what was called the economic rent, and in my judgment testimony of this sort is of no value whatever. Moreover, the obligation to have regard to rents ordinarily payable in the locality contained in s. 85 (5) of the Act of 1936 as originally enacted has been repealed. It must be the duty of a local authority to try to hold the balance evenly between the council house tenants and the general body of ratepayers in the borough, and in this I respectfully concur with the decision of ROMER, J., in *Belcher v. Reading Corpn.* (2) ([1949] 2 All E.R. 969) in which it was held that the question whether or not the increased rents contravened s. 83 of the Act of 1936 did not depend on whether certain items were wrongly debited to the housing revenue account, but on whether they were "reasonable"; that the authority had to consider the welfare of the tenants on the one hand and the interests of the ratepayers as a whole on the other, and that it was their duty to maintain a balance between those two sections of the community so far as possible, having regard to the specific requirements of the Act. F G H I

A Most council houses already enjoy both an Exchequer and a rate subsidy and thus are already a burden on the taxpayers and the ratepayers, and it seems to me that it should be the object of a local authority at least not to produce a deficiency exceeding the amounts which Parliament has thought fit to allow by way of subsidy. Accordingly I put aside comparisons of this sort. The only financial limitation of the charges which a local authority may impose
B in the management of its housing estate is as before mentioned, that the charges must be reasonable.

As to the class of accommodation afforded by this house, the evidence was that it was well up to the standard usual in 1934 when the house was built, but lacked certain amenities which more modern houses incorporate. The cupboard room is deficient; the house is said to be rather damp because there
C is no heating running up the stairs; and there was a complaint about the hot water system, but this admittedly is in course of being remedied by the defendants. It was also said that the house had suffered twenty years' wear and tear, but I have no doubt that the plaintiff, who has been the only occupier, has not allowed it to be much the worse for that. The complaint that the pattern of the power plug is obsolete was really a trivial matter. On the whole it does not
D seem to me that these complaints add up to much.

The plaintiff, by his statement of claim, seeks to extend the ambit of the action so as to include all the houses on the estate, but they are by no means uniform and no evidence was offered about the rest. In any event, this is in no sense a representative action and my judgment is confined to this house alone.

The main argument turned on what was called the "economic rent". The
E sense in which this phrase was used is to be found in a document issued by the Minister of Housing in 1953 called "Transfers, Exchanges and Rents", on p. 14 of which I find the following definition:

"Economic rent—The rent at which a house must be let in order to cover loan interest and sinking fund contribution and the cost of maintenance and management."

F The plaintiff argued that no rent which substantially exceeded this figure could be a reasonable rent, and for this house it was argued on his behalf that the figure was in the neighbourhood of £1 a week. The defendants pointed out that to keep to this figure would mean: first, that each house must be kept separate; secondly, that the only variable figure would be cost of maintenance so that in
G fact you would be tying council houses to the system of the Rent Restrictions Acts, which does not apply to local authorities; thirdly, that when the loan was amortized and loan charges disappeared the only charge which could be made would be maintenance; and, fourthly, that there was nothing in the Housing Acts to tie rents to building costs of individual houses or, for that matter, of housing estates.

H The defendants have been at great pains to explain the method by which they arrived at their figure. It was not reached capriciously, but was in fact related to the economic rent not by taking any house or estate separately but by grouping the defendants' housing estates and then ascertaining the highest economic rent chargeable for houses in that group. Exchequer housing subsidies were also pooled for the purpose of this calculation. The lowest priced
I group included the Westcroft estate, the Garnett House estate and others offering comparable accommodation. In this calculation the economic rent for a four-roomed house on the Westcroft estate worked out, according to the defendants, at £1 9s. 6d., yet that for a smaller house on the Garnett House estate, built at a later date and more expensively, amounted to £1 19s. 6d. Using this yardstick it was considered fair to put the maximum rent of four-roomed houses in the group at a figure of £2. The objection taken to this was that if the Westcroft estate were taken by itself the figure would be substantially lower, even assuming that the defendants' figure of £1 9s. 6d. were

right and not the plaintiff's figure of 20s. or less. The plaintiff's advisers in their calculation did not attempt to arrive at a figure applicable house by house, but took costs based on the entire estate. A

The question for me is whether a charge was arrived at which can be said to be unreasonable. In my opinion it clearly cannot, especially when accompanied by rebates designed to help the less wealthy members of the community. It is true that thus the richer contribute to some extent towards the rents of the poorer, but this is an inescapable feature of any rebate scheme, for if the maximum rents are based on the economic rent and rebates are given off that figure it must follow that every rebate scheme will produce a deficiency which has to be supplied by the general body of ratepayers. It is also true that tenants on the older estates will pay more because newer estates are built at greater cost, but I can see no reason why a local authority may not spread its costs over all its properties at any rate to the extent within a figure which is not unreasonable from a market point of view. The notion that a council house or estate must necessarily be run at a loss seems to me to find no justification in the Housing Acts, which do contemplate losses but also contemplate profits (see s. 130 of the Act of 1936) and do not provide that if a surplus is produced by some estate or other that surplus must necessarily go to reduce the rents on that or other council estates. Money may, in fact, in certain circumstances, be repaid to the Exchequer so as to recoup at least to some extent the state subsidies. B C D

There is, to my mind, a more fundamental flaw in the argument thus advanced on the plaintiff's behalf. I demur to the whole theory that there is, as the law now stands, some duty placed on local authorities to limit the rent they charge by reference to the prime cost of their houses when built. No other house-owner does so, and I can see no reason why local authorities alone should be so constrained. The value of money changes, wealth shifts from one part of the community to another, and in my judgment the tenant of a council house is not entitled to insist on being favoured above his neighbours who live outside the charmed circle. The needy must be succoured, wants must be supplied, charges must not be unreasonable; but for the tenant who can afford it a rent is not unreasonable if it be no higher than his neighbour will pay who has to rely on the open market. E F

Therefore I dismiss the action.

Action dismissed. Judgment for the defendants.

Solicitors: *Pearce & Sons* (for the plaintiff); *Town clerk*, Hampstead (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

R. v. PATENTS APPEAL TRIBUNAL, *Ex parte* CHAMPION PAPER AND FIBRE CO.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hallett and Ashworth, JJ.), October 24, 1956.]

Patent—Appeal tribunal—Certiorari—Patents Act, 1949 (12, 13 & 14 Geo. 6 c. 87), s. 85 (1).

Certiorari—Patents—Certiorari will lie to Patents Appeal Tribunal—Patents Act, 1949 (12, 13 & 14 Geo. 6 c. 87), s. 85 (2), (10).

Certiorari will lie to the Patents Appeal Tribunal.

[As to certiorari to quash decisions of bodies exercising judicial or quasi-judicial functions, see 11 HALSBURY'S LAWS (3rd Edn.) 128, para. 239, note (c); and for cases on the subject, see 16 DIGEST 387-389, 2282-2312.

As to appeals to the Patents Appeal Tribunal, see 24 HALSBURY'S LAWS (2nd Edn.) 573, para. 1090, note (k).

For the Patents Act, 1949, s. 24 (1), s. 85, see 17 HALSBURY'S STATUTES (2nd Edn.) 656, 708.]

Motion.

The patentees, Champion Paper and Fibre Co. (a U.S.A. company) applied for an order of certiorari to bring up and quash an order of the appeal tribunal under the Patents Act, 1949, dated Mar. 27, 1956.

The patentees had a patent for the manufacture of machine coated paper. Their sale of this paper was curtailed by the war and they applied to the Comptroller-General of Patents, Designs and Trade Marks under the Patents Act, 1949, s. 24, for an extension of the term of their patent*. Five licences had been granted and two of the licensees, the Westfield Paper Co., Ltd. and Donside Paper Co., Ltd., opposed the application. The superintending examiner, acting for the Comptroller-General, extended the patent for five years. On appeal by the opponents to the appeal tribunal under s. 24 (9) and s. 85 (1) of the Act of 1949, the tribunal (LLOYD-JACOB, J.) reduced the extension from five to two years. The patentees now sought an order of certiorari† to bring up and quash the decision of the appeal tribunal. The opposing companies took the preliminary point before the Divisional Court that certiorari did not lie in respect of a decision of the appeal tribunal. The case is reported solely on this preliminary point‡.

Charles Russell, Q.C., J. P. Graham, Q.C., and S. Gratwick for the patentees, the Champion Paper and Fibre Co.

G. T. Aldous, Q.C., and D. W. Falconer for the opposing companies, Westfield Paper Co., Ltd. and Donside Paper Co., Ltd.

Rodger Winn for the Attorney-General.

P. J. S. Bevan for the Comptroller-General of Patents, Designs and Trade Marks.

LORD GODDARD, C.J.: Counsel for the opposing companies took a preliminary point that certiorari cannot lie to the appeal tribunal. The appeal tribunal under the Patents Act, 1949, s. 85, consists (by sub-s. (2)) of one person only, a judge of the High Court, and (by sub-s. (10)) an appeal to the tribunal must not be deemed to be a proceeding in the High Court. In the opinion of

* The term of a patent is, in general, sixteen years from the date of the patent: Patents Act, 1949, s. 22 (3) (see 17 HALSBURY'S STATUTES (2nd Edn.) 654).

† The Patents Act, 1949, makes no provision for an appeal from decisions of the appeal tribunal under s. 24 (cf., s. 87 (2) of the Act).

‡ The case is fully reported on the question of the period of the extension in [1956] R.P.C. 323.

this court it is clear that certiorari will lie to the tribunal if the tribunal exceeds its jurisdiction, and equally if the tribunal gives a decision which the court conceives to be bad on the face of the decision. The tribunal is an inferior tribunal. It deals with a variety of matters under the Patents Act, 1949. In regard to at any rate two of them, where the effect of the tribunal's decision is the revocation of a patent, appeal from the tribunal lies direct to the Court of Appeal*. It would be certainly a strange tribunal if at one time it is exercising judicial functions so that there is a right of appeal to the Court of Appeal, and at another time is not exercising judicial functions, although it may be that no right of appeal is given. An appeal is always a matter of statute. The decision of a tribunal which deals with particular matters stands unless a right of appeal is given by statute. In the present case no right of appeal is given by statute, but it is contended that there shall be a right to apply for an order of certiorari.

I will not go into the question whether certiorari will not lie because, so it is said, that would be an infringement of royal prerogative, except to say that this is all now a matter of statute law and no question of infringement of the Queen's prerogative arises, because both the comptroller and the appeal tribunal are given certain duties to perform which they must perform in a judicial manner, and if they exceed their jurisdiction or give decisions which are bad on their face, it follows that certiorari must lie. Therefore, the court has no hesitation in saying that an order of certiorari can be issued to this tribunal.

[His LORDSHIP then held that the proper length of time for extension of the patent under s. 24 was a question of fact not law and that as no error of law was shown on the face of the decision of the tribunal the application for an order of certiorari would be dismissed.]

Application dismissed.

Solicitors: *Bristows, Cooke & Carmael* (for the patentees, Champion Paper and Fibre Co.); *Slaughter & May* (for the opposing companies, Westfield Paper Co., Ltd., and Donside Paper Co., Ltd.); *Treasury Solicitor*; *Solicitor, Board of Trade*.

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

* See Patents Act, 1949, s. 87 (1) (a) (17 HALSBURY'S STATUTES (2nd Edn.) 709).

ADLER v. UPPER GROSVENOR STREET INVESTMENT, LTD.

[QUEEN'S BENCH DIVISION (Hilbery, J.), December 20, 1956.]

Landlord and Tenant—Lease—Assignment—Covenant not to assign without consent—Express provision in lease for consent not to be unreasonably withheld—Proviso that tenant, if wishing to assign, should first offer to surrender lease—Validity of proviso—Landlord and Tenant Act, 1927 (17 & 18 Geo. 5 c. 36), s. 19 (1) (a).

By a lease dated Jan. 17, 1955, the landlords demised a flat and premises to the tenant for a term of seven years. The lease contained in cl. 2 (15) a covenant by the tenant "not to assign underlet or part with possession of the . . . flat . . . without the previous consent in writing of the landlords such consent (subject as hereinafter provided) not to be unreasonably withheld . . . Provided that should the tenant desire to assign or underlet the flat he shall before doing so offer in writing to the landlords to surrender the lease . . . without any consideration and the landlords may accept such offer at any time within twenty-one days from the receipt thereof . . . but shall otherwise be deemed to have rejected it". The tenant, wishing to assign the flat to a particular assignee, applied for the landlords' consent to the proposed assignment. The landlords refused their consent, giving as one of the reasons for their refusal the fact that the tenant had failed to comply with the proviso at the end of the covenant against assigning without consent, in that he had not offered to surrender the lease to the landlords before applying for their consent to the assignment. In an action against the landlords the tenant claimed that the proviso was void, as being contrary to s. 19 (1) (a)* of the Landlord and Tenant Act, 1927, by which a covenant against assigning without consent was made subject to a proviso that the consent should not be unreasonably withheld.

Held: the surrender proviso to cl. 2 (15), viz., the proviso requiring the tenant first to offer to surrender the lease, was not void as being contrary to s. 19 (1) (a) of the Landlord and Tenant Act, 1927, because (i) on the true construction of the lease, the surrender proviso imposed a condition precedent to, or was a covenant operating on matter anterior to, the coming into operation of the covenant against assigning the lease without consent, and (ii) the proviso to the covenant against assignment, which it would have been the full effect of s. 19 (1) (a) to imply (viz., a proviso that consent should not be unreasonably withheld), was expressly stipulated in cl. 2 (15).

Dictum of GREENE, L.J., in *F. W. Woolworth & Co., Ltd. v. Lambert* ([1936] 2 All E.R. at p. 1542) applied; *Re Smith's Lease* ([1951] 1 All E.R. 346) distinguished.

[As to the unreasonable withholding of a landlord's consent to assignment, and grounds of refusal of consent, see 20 HALSBURY'S LAWS (2nd Edn.) 349, para. 421; and for cases on the subject, see 31 DIGEST (Repl.) 424-427, 5515-5535.]

For the Landlord and Tenant Act, 1927, s. 19, see 13 HALSBURY'S STATUTES (2nd Edn.) 904.]

Cases referred to:

- (1) *Re Smith's Lease, Smith v. Richards*, [1951] 1 All E.R. 346; 2nd Digest Supp.
- (2) *Balfour v. Kensington Gardens Mansions, Ltd.*, (1932), 49 T.L.R. 20; 31 Digest (Repl.) 427, 5535.
- (3) *Creery v. Summersell & Flowerdew & Co., Ltd.*, [1949] Ch. 751; [1949] L.J.R. 1166; 31 Digest (Repl.) 422, 5504.

* The relevant terms of s. 19 (1) are printed at p. 231, letters A to C, post.

(4) *Woolworth (F. W.) & Co., Ltd. v. Lambert*, [1936] 2 All E.R. 1523; [1937] A Ch. 37; 106 L.J.Ch. 15; 155 L.T. 236; 31 Digest (Repl.) 179, 3122.

Action.

The plaintiff, Louis Reginald Adler, was the tenant of a flat under a lease granted to him by the defendants, Upper Grosvenor Street Investment, Ltd. (referred to hereinafter as "the landlords"), for a term of seven years from Dec. 25, 1954. The lease contained a covenant by the tenant not to assign without the previous consent of the landlords, such consent (subject as therein-after provided) not to be unreasonably withheld, and, at the end of the clause containing this covenant (cl. 2 (15)), was a proviso that, should the tenant desire to assign, he should, before doing so, offer in writing to surrender the lease to the landlords. The tenant now claimed (i) a declaration that the proviso was void and of no effect, and (ii) a declaration that, in the event of the tenant applying to the landlords for a licence to assign or underlet the flat to a responsible and respectable person, the landlords were not entitled to refuse such licence by reason only that the tenant had not offered to surrender the lease to the landlords as required by the proviso. In support of his claim the tenant relied on s. 19 (1) (a) of the Landlord and Tenant Act, 1927.

G. Avgherinos for the plaintiff, the tenant.

D. A. M. Kemp for the defendants, the landlords.

HILBERY, J.: By a lease dated Jan. 17, 1955, made between the defendants, the landlords, and the plaintiff, the tenant, a residential flat known as Flat No. 4 on the first floor of the building known as No. 46, Upper Grosvenor Street and 46 and 46a, Reeves Mews, Westminster, London, was demised to the tenant for a term of seven years from Dec. 25, 1954, at a yearly rent of £850 which included rates, except for any increase in the rates which might occur after the date of the lease and the coming into effect of the terms of the lease, and the letting was otherwise subject to the terms and conditions in the lease. Among other terms and conditions, the lease contained, in cl. 2 (15), the usual covenant by the tenant:

"Not to assign underlet or part with possession of the said flat or any part thereof without the previous consent in writing of the landlords such consent (subject as hereinafter provided) not to be unreasonably withheld to an assignment or underletting of the said flat as a whole to a respectable and responsible person . . ."

At the end of cl. 2 (15) there was this proviso:

"... Provided that should the tenant desire to assign or underlet the flat he shall before doing so offer in writing to the landlords to surrender the lease on any subsequent quarter day without any consideration and the landlords may accept such offer at any time within twenty-one days from the receipt thereof (such acceptance to be without prejudice to the rights and remedies of the landlords in respect of any rent in arrear or any breach of the covenants herein contained) but shall otherwise be deemed to have rejected it."

I am told, and I do not think it is disputed, that in March, 1956, something like fifteen months after the lease had come into existence, the tenant expressed a wish to assign and asked for leave to do so. The landlords refused leave to assign to the designated and proposed assignee, giving various grounds and adding, as I understand it, that the tenant had failed to comply with the proviso to cl. 2 (15) in that he had not offered in writing to surrender the lease to the landlords when he desired to assign or underlet the flat. Dissatisfied with that situation, the tenant comes to the court, seeking a declaration that this express provision in the lease, viz., the proviso to cl. 2 (15), to which he subscribed (and by which, in the solemn form of a lease, he undertook to abide), is a proviso which

is void and of no effect. He relies for that contention on an argument based on s. 19 of the Landlord and Tenant Act, 1927. Section 19 (1) is in these terms:

"In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express condition to the contrary, be deemed to be subject—(a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld . . ."

The argument which has been put before me on behalf of the tenant is that the proviso at the end of cl. 2 (15) of the lease is void because it offends against the words "notwithstanding any express provision to the contrary" in s. 19 (1) of the Act of 1927. The first thing to observe is that s. 19 (1) (a) merely purports to add something to every lease which contains

"a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent . . ."

There is such a covenant in the lease of Jan. 17, 1955, namely, in cl. 2 (15), but the covenant in cl. 2 (15) already contains the proviso which s. 19 (1) (a) says must be added and read into such a covenant against assigning or subletting without the previous consent of the landlord. The question which arises is whether, therefore, through the inclusion of the further covenant or proviso at the end of cl. 2 (15), something has been added which offends against s. 19 (1) (a). It is said that the proviso at the end of cl. 2 (15) does offend, because it is an express provision stultifying the effect of that which is required by s. 19 (1) (a).

In my view, that argument fails. I think that s. 19 (1) (a), properly construed, only does that which, in express terms, it sets out to do: it forces into any lease, which contains a covenant against assigning or subletting without the previous consent of the landlord, a further proviso [viz., that such consent shall not be unreasonably withheld], and it expressly prevents the inclusion in the lease of anything which would prevent the inclusion of that proviso. That is the real meaning of the words in s. 19 (1), "notwithstanding any express provision to the contrary".

I, therefore, approach this matter asking myself: Does the proviso at the end of cl. 2 (15) of the lease prevent the operation of the provision in s. 19 (1) (a) that the "consent is not to be unreasonably withheld"? I cannot see that it does. Properly read, it appears to me to be a provision in the lease imposing a condition precedent to the coming into operation of the covenant against assigning or subletting without the previous consent of the landlords, and, in express terms, the tenant agrees with the landlords that, if he wishes to assign, before he may do so, and, therefore, before he asks for the permission of the landlords to do so, he shall offer to the landlords a surrender of the term. The first thing to be observed is that there is no particular hardship in the tenant making such a bargain; it is not particularly hard on him, if he wishes to get rid of the term, that he should afford the landlords an opportunity of accepting a surrender of what remains of the term.

It is said that the effect of the proviso to cl. 2 (15), when operated, must be one of two things, and I agree that it must: either the landlords will accept the surrender or they will refuse it. If the landlords accept, it appears to me that the provision that the tenant may assign never comes into operation. It is clear from previous decisions that s. 19 (1) (a) is not applicable to and is not to be read into a clause which absolutely prohibits assignment. If, in the first place, the landlords refuse the surrender offered, the right of the tenant to offer an assignee who cannot be reasonably objected to by the landlords remains unimpaired. If, on the other hand, the landlords accept the surrender, that does not

amount and cannot amount in law to making the effect of cl. 2 (15) that of a clause which is absolute against assignment.

It was submitted on behalf of the tenant that the decision of ROXBURGH, J., in *Re Smith's Lease, Smith v. Richards* (1) ([1951] 1 All E.R. 346) shows that the proviso must be bad. In that case the lease contained the following proviso attached to a covenant against underletting or parting with possession without the previous consent of the lessor:

"Provided always that any refusal by the lessor to consent to any particular assignment or unfurnished underletting of the said premises or a furnished underletting thereof for a period exceeding six calendar months shall not be deemed to be an unreasonable withholding of consent by reason only that the lessor at the time of intimating any such refusal may offer to accept from the lessee a surrender of the tenancy hereby created and in the event of any such offer being made by the lessor the lessee within three calendar months after receiving such offer shall either withdraw her application for the lessor's consent to assign or (as the case may be) underlet the said premises or shall surrender to the lessor the tenancy hereby created without prejudice to the liability up to the date of such surrender of either party against the other under any of the covenants on their respective parts herein contained."

The ratio decidendi, however, in that case was, as ROXBURGH, J., said ([1951] 1 All E.R. at p. 348):

"Can the parties curtail the operation of that statutory provision [s. 19 (1) of the Act of 1927] by postulating in the lease that certain things shall not be deemed unreasonable? In my judgment, the answer is in the negative."

He then dealt with the decision of MACNAGHTEN, J., in *Balfour v. Kensington Gardens Mansions, Ltd.* (2) ((1932), 49 T.L.R. 29) and the decision of HARMAN, J., in *Creery v. Summersell & Flowerdew & Co., Ltd.* (3) ([1949] Ch. 751), and finally said ([1951] 1 All E.R. at p. 349):

"Therefore, in my judgment, both on principle and on authority, the parties cannot restrict the ambit of s. 19 by stipulating expressly that this or that shall be deemed to be reasonable. The question is objective: Is it reasonable? That question has to be decided without regard to the interpretation which the parties have put on that expression."

In the present case, the parties have not, by this proviso and covenant on the part of the tenant to offer a surrender of the lease, purported to restrict the ambit of s. 19 (1) by any stipulation that a failure to offer that surrender shall be deemed to be a reasonable reason for refusal; they have not, in terms, put any further restriction on the covenant which, as it stands, embodies all that s. 19 (1) (a) requires shall be included in a lease containing a covenant not to assign without consent. As was pointed out in argument, it may well be that, if there were no such express covenant and undertaking by the tenant to offer a surrender, and the landlords were to make such an offer to surrender a condition of giving their consent to an assignment, that would be an unreasonable withholding of the consent; they would then be seeking to impose on the tenant a term that the tenant should afford something, namely, an offer of surrender, as a condition for his getting a consent. It has to be remembered that in the present case there is a clear contract—true, attached in the form of a proviso, but none the less really a separate undertaking. Although it is attached, in one way, as a proviso to the covenant against underletting or assigning without the consent of the landlords, it is a covenant dealing, in express terms, with something which is to be regarded as a step to be taken before the question arises whether or not consent should be given or should be reasonably withheld by the landlords to a proposal to assign or underlet.

Lastly, I want to point out that s. 19 imposes on the parties to a lease terms for which they have not themselves contracted. I see no reason to construe it as intended to effect any more than it expressly says that it shall effect. It was submitted that the result of the proviso to cl. 2 (15) and the covenant was, by implication, contrary to the section. I see no reason to read the section so as to bring about that implication. It is worth noticing that GREENE, L.J., in *F. W. Woolworth & Co., Ltd. v. Lambert* (4) ([1936] 2 All E.R. 1523 at p. 1542), said of this section—

“ . . . I only wish to make two observations. The first one is this. It is, in my judgment, a misconception to treat the relevant sub-section here [s. 19 (2)] as though it were a sub-section conferring upon the court some remedial jurisdiction to relieve the lessee from a covenant or to modify it. It is, in truth, nothing of the kind. It is a statutory addition to the terms of a particular type of covenant, and the proviso which the sub-section mentions is to be read into the covenant. What the legal consequences of that may be in relation to any particular set of facts is a matter which will fall to be determined in the usual way. It is quite wrong to look upon this as something which enables the court to say that a particular set of terms or some particular conditions would be the reasonable thing for the lessor to impose in the circumstances. The practical question which falls to be decided in matters of dispute under this is simply the question: Aye or no, has the covenant been broken? Aye or no, does the covenant, or does it not, apply in the particular circumstances of the case? ”

For my part, I see no reason why this particular proviso should not be construed as a covenant, as, indeed, it is a covenant, and, if so, it is a covenant which the parties have contracted shall be a covenant by way of a condition precedent and it operates on matter which is anterior to the coming into operation of the covenant against underletting or assigning without the previous consent of the landlords. I so construe it. As I have said, if it is put into operation and the landlords refuse the surrender, the tenant has not lost his right under the covenant against assigning or underletting without the landlords' previous consent; if the landlords accept the surrender, then the whole lease goes and the situation of the tenant is no worse than, and no different from, what it would be if he had a covenant against assigning which was absolute. In the circumstances, I refuse to make either of the declarations sought by the tenant. Accordingly, I need not deal with the further point which was argued, namely, whether the second declaration asked for is not one which is too hypothetical for the court, in any event, to grant.

Declarations refused. Judgment for the defendants.

Solicitors: *Malcolm Slowe & Co.* (for the tenant); *Digby & Co.* (for the landlords).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

HUNTLEY v. THORNTON AND OTHERS.

[CHANCERY DIVISION (Harman, J.), November 27, 28, 29, 30, December 3, 4, 5, 6, 7, 11, 12, 13, 20, 1956.]

Trade Union—Conspiracy—Acts of local committee after ineffective resolution for expulsion of member—Local committee preventing member from obtaining employment—Whether dispute between member and committee a “trade dispute”—Whether committee’s acts “in furtherance of a trade dispute”—Trade Disputes Act, 1906 (6 Edw. 7 c. 47), s. 3, s. 5 (3).

The plaintiff was a member of a trade union which, on the employers refusing an increase in wages, instructed all its members not to work for the twenty-four hours of Dec. 2, 1953. The strike was apparently not within the rules of the union, and the plaintiff’s instruction to cease work was given to him on Dec. 1, 1953, though under his contract of employment seven days’ notice of termination was needed. The plaintiff refused to strike, and subsequently was summoned to attend a meeting of the Hartlepool district committee of the union. The letter of summons charged the plaintiff with failing to carry out the direction to strike, and made no other charge. At that meeting ten of the defendants, members of the committee, and the secretary of the committee (also a defendant) were present, and the plaintiff in answer to the charge pointed out that the decision to strike was contrary to the rules of the union and stated that in similar circumstances he would again refuse to strike. When, in consequence of a question put by the secretary whether it was true that the plaintiff had endeavoured to get other members at his firm to ignore the instruction to strike, it was proposed to call one witness to give evidence to this effect, the plaintiff rose, threw his summons on the table, became abusive and left the room. In the plaintiff’s absence the district committee resolved to recommend his expulsion from the union, placing on record their disgust at the arrogant attitude that he had adopted and at his attempt to coerce other members not to comply with the direction to strike. No notice of a charge of such coercion had been given to the plaintiff, and it seemed that there was no evidence in support of such a charge other than, probably, that the plaintiff had endeavoured to persuade one other member to adopt the same attitude as himself. The executive council of the union refused to approve the expulsion, which was, therefore, ineffective under the rules. The executive council having refused a request to reconsider their decision, the district committee met on Dec. 23, 1953, and, in the plaintiff’s absence and without notice to him, purported to expel him for his “disrespectful attitude” towards themselves. This also was not approved by the executive council and was not effective, the general secretary by letter dated Jan. 6, 1954, writing that the council did not favour the plaintiff’s expulsion. The plaintiff gave up his job and left the district for two weeks. On Jan. 15, 1954, the plaintiff being about to return on Jan. 18, 1954, the district committee resolved that the secretary should write to various districts respecting the plaintiff. On Jan. 25, 1954, the district committee held an emergency meeting at which it appeared to have been unanimously agreed that efforts should be made in all factories where they had official shop stewards to ensure that the plaintiff was not allowed to start work under any consideration. The secretary sent letters to all the shop stewards in the district instructing them to inform their employers that, should they employ the plaintiff, it was the committee’s intention to withdraw all labour in protest. The district committee had, in fact, no power to call a strike. In consequence of these acts it was impossible for the plaintiff to obtain employment at his trade in the district. The committee’s secretary also wrote to the defendant T., the union secretary of the neighbouring Tees-Side district,

informing him of the Hartlepool district committee's efforts to prevent the plaintiff's taking up employment in the Hartlepool district and that the plaintiff might attempt to obtain employment in the Tees-Side district. The secretary did not inform T. that the executive council of the union would not countenance the plaintiff's expulsion or that the plaintiff was still a member of the union. The plaintiff obtained employment at a power station in Tees-Side, but was unable to produce his contribution card to the defendant, N.L., the convener of shop stewards at the power station. As result of representations (which did not, however, amount to threats of strike action which action would, in the circumstances, have been illegal) made by N.L., in accordance with instructions given to him by T., the plaintiff was given a week's wages and dismissed on Feb. 9, 1954. These representations were based on the plaintiff's not having his union contribution card rather than on his trouble with the Hartlepool district committee. On Feb. 8, 1954, T., on the instruction of the Tees-Side district committee, wrote to all conveners of shop stewards in Tees-Side district stating that the plaintiff was "not desirable in this district" until he had made peace with his own district committee. On Feb. 11, 1954, the plaintiff tried to obtain an interview with the Hartlepool district committee but this was refused. On Feb. 16, 1954, the secretary of the Hartlepool district committee on behalf of the committee wrote to the plaintiff's branch secretary saying that they had decided to resist the plaintiff's retaining membership of the union. In March, 1954, and subsequently the plaintiff applied to the branch secretary for his contribution card but did not obtain it. In June, 1954, the plaintiff was informed by the branch secretary that he had been expelled from the union for his contributions being in arrear. The plaintiff was unemployed until July 26, 1954. In this action the plaintiff claimed damages for conspiracy and intent to injure him for having refused to comply with the unlawful direction to strike on Dec. 2, 1953. The defendants admitted that the plaintiff was a member of the union until expelled in June, 1954.

Held: (i) the plaintiff was entitled to damages for conspiracy on the part of the defendant members of the Hartlepool district committee and the secretary of that committee because

(a) after the executive council's letter of Jan. 6, 1954, any question of the plaintiff's expulsion was closed, and thereafter the acts of these defendants were without justification and a gross abuse of their powers, being directed to injuring the plaintiff in his trade and not to protecting the defendants' trade, and the acts had caused the plaintiff damage (see p. 249, letter G, to p. 250, letter B, post), and

(b) the dispute between the plaintiff and these defendants was not a trade dispute within the Trade Disputes Act, 1906, s. 5 (3), since the defendants were not asserting a trade right and no interest of the trade was involved (see p. 256, letter B, post), and the defendants' actions were not in furtherance of the trade dispute but of a grudge (see p. 256, letter C, post).

Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch ([1942] 1 All E.R. 142) applied; *Dallimore v. Williams & Jesson* ((1914), 30 T.L.R. 432) distinguished; *Conway v. Wade* ([1909] A.C. 506) considered.

(ii) the defendants T., and N.L., did not participate in the conspiracy of the other defendants to injure the plaintiff because their motive was not proved to be to injure the plaintiff rather than to forward the interests of the union (see p. 251, letter E, post); nor were the actions of T., and N.L., tortious apart from conspiracy, because, although their representations secured the plaintiff's dismissal from the power station, they had merely

informed the employers that his continued employment would have untoward results and had not threatened illegal strike action (see p. 251, letter H, to p. 252, letter B, post).

Hodges v. Webb ([1920] 2 Ch. 70) applied.

[As to acts amounting to conspiracy, see 32 HALSBURY'S LAWS (2nd Edn.) 189, para. 283.

As to tort of conspiracy arising out of the operations of trade unions where there is no trade dispute, see 32 HALSBURY'S LAWS (2nd Edn.) 522-524, paras. 820, 821.

For the Trade Disputes Act, 1906, s. 3, s. 5 (3), see 25 HALSBURY'S STATUTES (2nd Edn.) 1268, 1269.]

Cases referred to:

- (1) *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.
- (2) *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 43 Digest 10, 51.
- (3) *Sorrell v. Smith*, [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 43 Digest 113, 1183.
- (4) *Allen v. Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 43 Digest 111, 1164.
- (5) *Quinn v. Leathem*, [1901] A.C. 495; 70 L.J.P.C. 76; 85 L.T. 289; 65 J.P. 708; 43 Digest 112, 1179.
- (6) *Ware & De Freville, Ltd. v. Motor Trade Assocn.*, [1921] 3 K.B. 40; 90 L.J.K.B. 949; 125 L.T. 265; 43 Digest 124, 1264.
- (7) *Bradford Corpn. v. Pickles*, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 42 Digest 972, 34.
- (8) *Hodges v. Webb*, [1920] 2 Ch. 70; 89 L.J.Ch. 273; 123 L.T. 80; 43 Digest 121, 1240.
- (9) *White v. Riley*, [1921] 1 Ch. 1; 89 L.J.Ch. 628; 124 L.T. 168; 43 Digest 122, 1242.
- (10) *Conway v. Wade*, [1909] A.C. 506; 78 L.J.K.B. 1025; 101 L.T. 248; 43 Digest 120, 1237.
- (11) *Cooper v. Millea*, [1938] I.R. 749.
- (12) *Riordan v. Butler*, [1940] I.R. 347; 2nd Digest Supp.
- (13) *Dallimore v. Williams & Jesson*, (1912), 29 T.L.R. 67; *subsequent proceedings*, (1914), 30 T.L.R. 432; 43 Digest 121, 1238.
- (14) *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 43 Digest 118, 1226.
- (15) *Valentine v. Hyde*, [1919] 2 Ch. 129; 88 L.J.Ch. 326; 120 L.T. 653; 43 Digest 122, 1243.

Action.

The plaintiff, Leslie Clifford Huntley, a fitter and turner by trade, who at the material times was a member of the Amalgamated Engineering Union, and belonged to the Hartlepool No. 5 branch (of which one Wilkinson was secretary), brought an action in which the plaintiff claimed (i) damages for conspiracy and (ii) damages for wrongful interference with his trade or employment. The action was brought against the defendants H. Thornton, secretary of the Tees-Side district committee of the union; John W. Lupton, secretary of Hartlepool district committee; Norman Langford, convener of shop stewards at North Tees power station; and ten members of the Hartlepool district committee of the union, viz., H. Bryson; S. Webster; C. R. Warnes; O. Bradshaw; R. Halcrow; H. Dixon; J. Mitchell; J. McCann; G. Winship; and William Verrill. The plaintiff also claimed injunctions to restrain interference with his

A employment. The defendants by their joint defence denied the conspiracy, and relied on the Trade Disputes Act, 1906, s. 3.

The facts are set out fully in the judgment and summarised in the headnote.

I. J. Lindner, Q.C., and J. L. Arnold for the plaintiff.

F. W. Beney, Q.C., John Thompson, Q.C., and H. O. C. Trenchard for the defendants.

Cur. adv. vult.

Dec. 20. **HARMAN, J.**, read the following judgment: The plaintiff is a fitter and turner by trade and a native of West Hartlepool, where he lives with his wife and children. At the time when the events about to be related begin he was employed at the shipyard of William Gray & Son at Hartlepool and convenient to his home.

C At all times material to this action, i.e., between October, 1953, and March, 1954, and, indeed, since he was apprenticed in 1938, with an interval during and after the war, he was a member of the Amalgamated Engineering Union, a duly registered trade union. That body is governed by rules apparently last revised in 1950. A more confusing document than the rule book it has rarely been my lot to study. [His LORDSHIP referred to the relevant rules, and continued:] In the autumn of 1953 a trade union known as the Federation of Shipbuilding and Engineering Unions, of which the Amalgamated Engineering Union was a constituent, was apparently negotiating with the engineering and shipbuilding employers for a rise in wages. In October a flat rate increase of fifteen per cent. had been claimed and refused by the employers. Following this there was a meeting on Nov. 16 of the national committee of the Amalgamated Engineering Union, when a resolution was passed in the following terms:

E "This national committee instructs executive council to call upon the Confederation of Shipbuilding and Engineering Unions at the Nov. 19 meeting, to recommend to all unions party to the claims to undertake a twenty-four hour token stoppage in support of the fifteen per cent. wage claim."

F On Nov. 19 there was a joint meeting of all the executive councils of the constituent unions, at which the following resolution was put forward:

G "This executive council therefore recommends, at this stage, that all workers in factories and shipyards should confine their activities to leaving their places of employment for twenty-four hours on a date to be fixed by the confederation executive council."

H After an adjournment, at which the executive council of the Amalgamated Engineering Union (hereafter sometimes called the A.E.U.) decided in pursuance of the recommendation of their national committee of Nov. 16 to vote for this resolution, it was put to the vote and carried. Immediately afterwards the federation executive met again and decided that the twenty-four hours "cessation of work" should be on Dec. 2, 1953. Now to call this a cessation of work or a stoppage is a quibble. It is no less a strike if it is only to last twenty-four hours, and if labour is to be withdrawn without such notice as is required by the various contracts of the strikers with their employers it is an illegal strike and none the less illegal because the several unions who approve it are protected from action by s. 4 of the Trade Disputes Act, 1906. Moreover, so far as the A.E.U. was concerned the strike was recommended (not called) by the national committee, and assented to by the executive council, and does not seem to have been within any rule of the union. Indeed, the president of the union, in the witness-box, was fain to appeal in justification to the general powers given by r. 15 (17) for action by the executive council "where the rules do not provide to the contrary . . ."

I On Dec. 1, 1953, one Wallace, the shop steward at Gray's Yard, served on the plaintiff at the shop a printed leaflet issued by the executive council instructing

him to stop work for twenty-four hours from the morning of the next day. It appears that the plaintiff felt doubtful about the justification for this step and, having consulted his rule book in the lunch hour and getting (not surprisingly) scant enlightenment from that, he returned to the shop and announced that he did not intend to abide by the instruction. He also made some attempt to persuade a fellow member, one Hugill, to do likewise, but without success. On Dec. 2 the plaintiff came to work as usual, and his mates, who did not, resented this. They held a meeting in the shipyard next day and sent a deputation to the employers asking for the plaintiff's dismissal. The employers refused, whereupon it seems that the plaintiff's fellow workmen refused to speak to him, but took no further action.

On Dec. 4, at a meeting of the Hartlepool District Committee Wallace reported that the plaintiff had ignored the instructions to strike, and it was resolved that he be summoned to attend the next committee meeting "for having abrogated the executive council's direction". Accordingly on the next day the defendant Lupton wrote to the plaintiff as follows. He started by citing the wrong rule, but that again is not surprising.

"Dear Sir and Brother . . . I am instructed by my district committee to summons you to attend the district committee meeting to be held on Friday, Dec. 11, 1953, in the Engineers' Club at 7.45 p.m. The reason for the summons follows on a report that has been given, to the effect, that you failed to carry out the instructions of executive council to cease work for twenty-four hours on Wednesday, Dec. 2, 1953. Trusting that you will avail yourself of the opportunity to defend yourself on the above charge. Yours fraternally, John W. Lupton, district secretary."

On Dec. 5 there was a normal branch meeting of Hartlepool 5, which was attended by, among others, the plaintiff and the defendant Lupton. The plaintiff desired to ventilate his position, but was prevented from doing so by the chairman at Lupton's request on the ground that this was a matter to be dealt with by the district committee. The plaintiff then left, followed by Lupton, after which the branch meeting passed the following resolution:

"That the branch secretary inform district committee that this branch recommend to district committee that Brother Huntley be expelled."

This resolution was, it is said, prompted by a letter to the press which was read to the meeting and assumed to emanate from the plaintiff: see exhibit D4. It was communicated to Lupton by a letter of Dec. 6. This seems not to have been in accordance with the rules, by which the letter should have been sent to the executive council. It was in these terms:

"Dear Sir and Brother, During the course of the Dec. 5 meeting of this branch the token stoppage was discussed, arising from this a resolution was carried . . . A further resolution was carried, namely, 'That this branch recommend that Brother L. C. Huntley (brass finisher) be expelled from this union'. This arose through Brother Huntley working on Dec. 2, 1953, and his statement at our Dec. 5, meeting made in spite of warnings as to jeopardising his position further. Yours fraternally, J. A. Wilkinson, branch secretary."

It will be observed that this resolution was passed in the plaintiff's absence without any warning and after refusing to hear him. Lupton, when he laid it before his committee, did not disclose this fact, though it must have been well known to him.

The district committee meeting was held on Dec. 11. The plaintiff attended it and there were present, according to the minute book, the defendants Bryson, Webster, Warnes, Verrill, Winship, Halcrow, Mitchell, Dixon, McCann and the

A secretary. In addition Wallace, the shop steward, and Hugill, already mentioned, were present as witnesses. Item 4 of the minutes reads as follows:

B "Bro. L. C. Huntley, turner, employed at the Central Shipyard, attended in answer to D.C. summons of Dec. 5, 1953, to answer a charge of his having refused to carry out E.C.'s instruction to absent himself from work for twenty-four hours on Dec. 2, 1953. The chairman in opening the discussion asked Bro. Huntley if he had received his official summons to attend the meeting, which summons related to r. 13, cl. 19. Bro. Huntley stated that he had received same. Bro. Huntley was then asked as to why he had ignored the instruction of E.C. to carry out the terms of the twenty-four hours stoppage of work, to which he replied that the decision of E.C. was contrary to rule, and that he was not prepared to conform to any such decisions, and that he would adopt the same attitude in the future as he had adopted on Dec. 2, the day of the stoppage. The chairman then called upon the witnesses to give evidence, and Bro. Wallace stated that he had given Bro. Huntley a copy of E.C.'s leaflet at his place of employment. The secretary then asked Bro. Wallace if it was true that Bro. Huntley had endeavoured to get other members at his firm to ignore the instruction of E.C. Bro. Wallace stated that Bro. Huntley had done so, and he named Bro. Hugill as a witness to same. The chairman then called upon Bro. Hugill, who was in attendance, to give his evidence; as Bro. Hugill rose to speak Bro. Huntley jumped to his feet and with arms waving hurled his rule book and his summons letter on to the table and walked out of the room shouting that we were only a 'shower'!

E "The District Committee then considered all the available evidence and arising from same it was unanimously agreed, 'That D.C. condemn the action of Bro. Huntley in refusing to carry out the instructions of E.C. and desire to place on record their disgust at the arrogant attitude adopted by him at the meeting, also his attempt to coerce other brothers at his place of employment to also disregard E.C.'s instructions, and recommend to E.C. that Bro. Huntley be expelled from our union, as in D.C.'s opinion he is not a fit and proper person to hold membership of our union'."

This appears to be a tolerably accurate account, though no doubt much condensed. It seems that the plaintiff did not conduct his defence with discretion or tact, and that the dispute developed into a wrangle. Two points, however, emerge: first, that the plaintiff was claiming to justify his action by asserting that the strike was not called in accordance with the rules. I must say that as at present advised I think he was in the right on this point. If so he was under no obligation to obey the instruction. Secondly, he was confronted with a new charge of which he had had no notice, and which should have been ruled out of order by the chairman. It is not altogether surprising that the plaintiff was angered by this manoeuvre of Lupton's and that he lost his temper, but that, of course, does not excuse the foul language he used. It seems that there was no evidence that the plaintiff ever tried to persuade more than one fellow member to follow his example, nor any justification for the statement that he had tried "to coerce other brothers". Nevertheless this was one of the grounds on which the district committee, in his absence, decided to recommend his expulsion.

I Now it is to be remembered in connection with these two recommendations by the branch and the district respectively to expel the plaintiff that in this district, as it was boasted on behalf of the defendants, ninety-five per cent. of the engineering works are "closed shops." This means that expulsion from the union makes it almost impossible to earn a living at the trade in the district. It is not for English lawyers to dislike or distrust the principle of the closed shop, for they are all members of a society which itself lives and thrives on this principle. No man, unless he has served his time and received his union card

—that is to say, his call to the Bar—may (save in his own cause) address the Supreme Court of England. Such monopolies are only justified if they are so regulated as to promote the public interest. Moreover, the weapon of expulsion from such a society is a step of the most extreme gravity, only to be entered on after very careful inquiry and in the case of the very gravest offence. A

It was admitted by at least some of the defendants that the plaintiff's action had not the slightest effect on the success of the demonstration constituted by the one-day strike. To seek to use such a weapon on such a pretext can only be characterised as a gross abuse. This would appear to have been recognised by the Amalgamated Engineering Union itself, for when the defendant Lupton wrote to the general secretary giving an account of the happenings on Dec. 11 (which repeats the substance of the minute) and urged the executive council to uphold the district committee's decision, he received the following sensible and moderate answer: B

"Dear Sir and Brother, Executive council acknowledge receipt of your letter dated Dec. 12, 1953, wherein you set out in detail a report of your committee's deliberations concerning the case of Brother Huntley, for working on the day of the token stoppage. C

"We are not surprised to learn of a few cases like your particular case in view of the time fixed for the operation of the token stoppage being so close to the date on which the decision was reached and which left insufficient time to adequately cover all points which were likely to arise. D

"Executive council caused circular letters and leaflets to be issued covering what was thought to be the main points and taking into consideration the whole of the different circumstances of the various districts, executive council are satisfied that the demonstration was a huge success. E

"Nevertheless, there is the question of action of the various districts in dealing with the members who failed to give effect to the instruction of executive council and district committee, but executive council feel that apart from a strong censure being passed it would be inadvisable to embark on any other action. Further, executive council do not feel disposed to approve of any such disciplinary action you suggest. Yours fraternally, . . . B. Gardner. General secretary." F

Meanwhile there had been a certain amount of press comment and so-called interviews with the plaintiff. Nothing in this press matter which was drawn to my attention was in any way inaccurate, but evidently public criticism was much resented by the district committee. G

On Dec. 18 a further district committee meeting was held, to which the plaintiff was not summoned, and at which the following resolution was passed:

"E.C. Letter: Re:—Case of Brother Huntley—After very lengthy discussions it was unanimously agreed by D.C. that secretary write E.C. once again with a view to E.C. approving of D.C.'s decision to expel this member"; H

whereupon Lupton wrote the following letter to the general secretary:

"Dear Sir and Brother, I am to acknowledge receipt of your letter of the 15th instant relating to the case of Brother Huntley, to which I am directed to reply as follows. I

"After very careful consideration of executive council's letter, wherein E.C. do not feel disposed to approve of the disciplinary action i.e. expulsion of Brother Huntley as unanimously agreed by the Hartlepool District Committee at the D.C. meeting held Dec. 11, '53, it is felt by all concerned that we should again request executive council to reconsider their decision, in view of the fact that the position of both the district committee and the whole of the shop stewards movement in the Hartlepoons will be placed in jeopardy in view of the fact that Hartlepool 5th Branch, of which Brother

A Huntley is a member, at their last branch meeting unanimously adopted a resolution urging D.C. to recommend this Brother Huntley's expulsion to E.C.

B "Furthermore, D.C. have had the greatest difficulty in keeping our members employed in the same shop as Brother Huntley from taking this matter into their own hands, as it was felt with confidence by D.C. that E.C. would without any doubt agree to his expulsion for having ignored the instructions of E.C. It must also be pointed out that when Brother Huntley attended the D.C. meeting to answer the charge against him he adopted an insulting and arrogant attitude and hurled not only his rule book, but also an abusive expression as 'You are only a shower', at the members of the district committee; as a result, my committee feels that C for the above expression *alone* E.C. should have, without any hesitation agreed to uphold D.C.'s recommendation.

D "I am also asked by D.C. to point out that many shop stewards in the district have stated that in the event of this man being allowed to retain his membership of our union, that they will immediately resign from their office; furthermore, I feel it only right that I should inform E.C. to the effect that the whole of the branch delegates to D.C. have stated that should E.C. refuse to agree to D.C.'s recommendation that they will have no other alternative than to resign, as in their considered opinion the decision of E.C. is nothing other than a vote of no confidence in the district committee.

E "Trusting you will ensure E.C. give consideration to D.C.'s request and that you will let me have a reply as early as possible, as a further special meeting of D.C. has been called for Wednesday, Dec. 23, '53, to consider same."

F This is really a shocking document, suggesting first of all that the plaintiff's outburst of temper alone warranted his expulsion, and secondly using threats about the resignation of the district committee and others which Lupton in the witness-box in effect admitted to be perfectly empty.

The general secretary was quite unmoved by this exhibition and wrote the following letter:

G "Dear Sir and Brother, Executive council have to acknowledge receipt of your letter dated Dec. 19, 1953, wherein you again raise the question of Brother Huntley and the district committee's desire to expel him from the union.

H "In reply, might we make it perfectly clear that executive council have no desire whatsoever to frustrate the efforts of district committees when it comes to a question of disciplining members. We would point out that there are special circumstances surrounding this one-day's token stoppage which executive council had to take into consideration when they issued their general instructions in relation to the expulsion of members who may have worked on that particular day.

I "However, you are now raising the question of this member's behaviour when attending the district committee and, of course, that raises another issue. If the district committee feel so inclined, executive council would not be averse to the district committee dealing with the member in relation to his conduct when summoned before the district committee, but the question of expulsion for that offence, in the opinion of executive council, goes too far.

"Having regard to this explanation, perhaps the district committee will reconsider their approach from a different angle, other than expulsion, based upon his conduct when attending the district committee meeting. Yours fraternally, . . . B. Gardner. General secretary."

It looks from this that the executive council itself had qualms about the legality A
of the one-day strike.

Nothing daunted, on Dec. 23 the district committee met and purported to
expel the plaintiff for his "disrespectful attitude" towards themselves. This
they did in the plaintiff's absence and without any notice to him, and followed
it up through Lupton by another letter to Mr. Gardner:

"... After very careful consideration of the executive council's letter, B
wherein E.C. suggest that D.C. could approach the whole question from a
different angle, it was unanimously agreed that E.C.'s letter be accepted,
but that D.C. observe with very deep regret the fact that E.C. are not
prepared to approve of the unanimous decision to expel this member for
having worked on the day of the token stoppage. However, it is the C
unanimous decision of D.C. that we recommend to E.C. that Brother
Huntley be expelled from our union for having used such disgraceful conduct
towards the members of the district committee when he attended to answer
the charge against him.

"My committee also direct me to forward the enclosed press cutting
for your information, and also to point out that in the event of E.C. refusing
to uphold their decision of expulsion, that the whole of the branch delegates D
to D.C. will resign from the district committee, and I also anticipate that
D.C. will also get a host of resignations from the shop stewards at the
quarterly meeting to be held on Monday, Dec. 28, '53, as many stewards
have *already* informed me that it is their intention to resign should Brother
Huntley be allowed to retain his membership."

This, too, was treated with proper contempt by the general secretary in his E
letter of Jan. 6:

"Dear Sir and Brother, Executive council have given very careful con-
sideration to your letter dated Dec. 26, 1953, with respect to the case of
Brother Huntley.

"As already indicated, executive council do not favour the expulsion of F
this member from the union. Executive council are of the opinion that
there are other steps which you could take, providing a specific charge has
been made against the member, regarding his conduct and that charge
ought to be made in writing.

"If the district committee are prepared to discuss this case further, in G
accordance with the rules of the union executive council will give considera-
tion to your further report thereon and to any decision which may be
reached."

In the meanwhile the plaintiff had given notice to determine his employment
with William Gray & Son in Hartlepool and obtained a job at Bradford, eighty H
miles away, thus being separated from his wife and children and his home,
and taking a wage less than he had been receiving. After a fortnight of this
he determined to return and came back to Hartlepool on Jan. 18, 1954, to seek
work. News of his return seems to have preceded him, for on Jan. 15 the
district committee passed the following resolution: "E.C. Letter: Re:—
L. C. Huntley. Arising from same it was agreed secretary write various districts
respecting same". It was said that the secretary took no step in pursuance of I
this resolution, but I cannot doubt the nature of the letters he was instructed
to write. They were intended to support the ban next to be related.

The plaintiff's return was the occasion of further press interviews and com-
ments which seem, though in no way inaccurate, to have enraged the district
committee further, and that body held a special meeting on Jan. 25. No minute
of this meeting appears in the minute book. This was explained on the ground
that the meeting was an emergency one, but I cannot but feel some doubt
whether there is not a more sinister reason. Be that as it may, the outcome

A is sufficiently disclosed in a letter which the secretary of the district committee wrote the next day (Jan. 26, 1954) and circulated among all shop stewards in the district:

B “To all Shop Stewards. Dear Sir and Brother, As no doubt you are aware, L. C. Huntley, the only member of our union in this district who defied E.C.’s call for a twenty-four hour token stoppage, has now returned to West Hartlepool and has announced through the press that he intends to obtain work once again in West Hartlepool. At a special meeting of my district committee held Jan. 25, 1954, the question of action to be taken against Huntley was fully discussed, and arising from the deliberations it was unanimously agreed, ‘That efforts be made in all factories where we have official shop stewards, to ensure that L. C. Huntley is not allowed to start work under any consideration’.

C “Trusting you will inform your labour office to the effect that should they give L. C. Huntley a job, it is our intention to withdraw all labour in protest, Yours fraternally, John W. Lupton.”

D He followed this up on the next day (Jan. 27, 1954) by a letter to the defendant Thornton, secretary of a neighbouring district, namely, Tees-Side, in these terms:

E “Dear Sir and Brother, As no doubt you are aware we had one member of the Hartlepool district who ignored E.C.’s call for the twenty-four hour token stoppage and as a result of the hostile attitude of our members to L. C. Huntley he left the district but has now returned.

F “At a recent special meeting of my district committee to consider the official action to be taken with respect to this man, it was agreed that every effort should be made to resist him from taking up employment in this district, which we have been able to do to date.

F “The reason for my writing you, to inform you of our action is in the belief that he is endeavouring to obtain employment in your district. Yours fraternally, J. Lupton, District secretary.”

G The plaintiff, on his return, attempted to find work in the district. He applied to the labour exchange and was informed that so long as he was at loggerheads with the union the chances of employment were slender. He was, however, introduced to the South Durham Steel Works on Jan. 23 but failed to obtain employment because it was there known he was in trouble with the union. The plaintiff alleged in his statement of claim that his failure to obtain this engagement was due to threats by the defendant McCann, a shop steward at the South Durham Steel Works, but he failed to prove this. It appears, indeed, that this defendant approached the employers and informed them that if the plaintiff were engaged there would be trouble, but this, on the evidence, was after the decision not to engage him; so that the defendant McCann, though willing to make mischief, in fact effected none at this time. He was no doubt acting on his knowledge of the district committee’s resolution of Jan. 25, for he was a member of that committee and present on that occasion, as also at the previous meeting on Jan. 15.

I Subsequently the plaintiff applied for work at Gray’s Yard and at one or two other places, but he was refused. The plaintiff, having been out of work from the middle of January till the beginning of February, applied for unemployment benefit, which he received during the week ending Feb. 3. On the latter date, or just before it, he was engaged at the power station of the British Electricity Authority at Haverton Hill, Stockton, nine miles from West Hartlepool, thus beginning a new chapter of this story. He was asked by the employer whether he was a member of the union and he said, and truthfully, that he was.

The defendant Langford was convener of shop stewards at this power station, which is within the Tees-Side district of the union; the defendant Thornton,

a full-time official, being secretary of the district committee. On Feb. 3 Langford asked the plaintiff for his union card. The plaintiff produced his admittance card, which showed that he was a member of the union, but could not produce his contribution card because he had left the 1953 card at the branch meeting on Dec. 5 and had not received it back or obtained a new one, though he was entitled to both. He had not paid his subscription since Dec. 5. The plaintiff told Langford that he had no contribution card, but would obtain it and show it next day. He did in fact visit Wilkinson* that evening but failed to obtain a card. This appears to have been a breach by Wilkinson of r. 27 (8). On being asked on Feb. 5 by Langford for his card the plaintiff explained that the 1953 card was lost and, after some fencing, admitted that he was the man about whom there had been trouble at West Hartlepool. This was a Friday. Langford said that the men in the shop were unwilling to work with the plaintiff and were urging him (Langford) to go to the management and demand the plaintiff's dismissal. On the evidence before me this is true not because of the Hartlepool trouble, the reason Langford gave, but because the men in the shop were under the impression that, as the plaintiff could not produce his contribution card, he was not a member of the union; and as this was, according to them, a closed shop they were unwilling that he should stay there unless he was a member. These men—namely, the witnesses Fishburn, Hymer, Collier and Drinkel—all put their objections to the plaintiff on this ground and said that the attitude was that the plaintiff could not start until he produced his contribution card. At least two of them also said that if he had been able to produce it there would have been no trouble.

It appears that on Friday, Feb. 5, Langford communicated with Thornton on the telephone and was told by Thornton that he was not to allow the plaintiff to be employed. This was in accordance with a resolution of the Tees-Side District Committee of the union at a meeting on Feb. 3, when Lupton's letter to Thornton was considered, and the following resolution was passed:

"Letter from the Hartlepool district secretary stating that a member employed in his district who had refused to absent himself from work on Dec. 2, 1953, and who was not allowed to obtain employment in the Hartlepool district was endeavouring to gain employment on Tees-Side. Moved 'That the conveners be circulated'. (Carried)."

On the Friday afternoon, Feb. 5, Langford had an interview with one Henson, assistant superintendent at the power station, and told him that he wanted the plaintiff discharged. This was, of course, in accordance with the instructions he had received from Thornton, and I do not believe Langford's statement that he made this demand merely on pressure from the A.E.U. members in the shop.

On the Saturday morning, Feb. 6, Langford was interviewed by Henson's superior, one Whiteside. Whiteside's evidence, which I accept on this point, was that he asked Langford what the trouble was, and that Langford replied that the plaintiff appeared to be a full member, but that he was under instructions from Thornton to call a meeting of the men the probable result of which would be no work over the week-end. Langford, in his evidence, confirmed this, saying that he told Whiteside that the opinion of the A.E.U. members on the station was that the plaintiff was not a member, and that he, Langford, would be obliged to hold a meeting which he knew would end in a downing of tools.

At this juncture Whiteside got into touch with a Mr. Little, his superior at Newcastle, and the latter in turn communicated over the telephone with Thornton, who told him that there was a question of the plaintiff's membership, that he was not being allowed to work in the Hartlepool district, that the Tees-Side

* Mr. Wilkinson was the branch secretary (see p. 236, letter H, ante).

A members supported that attitude and demanded the plaintiff's immediate dismissal. Little also said that Thornton informed him that the Hartlepool committee had made repeated attempts to get the plaintiff to meet them without success. This, of course, was untrue, but it did not appear that Thornton knew it to be untrue. Little asked Thornton to put his demands in writing and arranged that the matter should stand over the week-end without an
B immediate strike. Thornton complied with his undertaking by writing the following letter:

C "Dear Sir, Mr. L. C. Huntley—Fitter. Further to our telephone conversation of this morning, I confirm that the above-named member of the A.E.U. is in trouble with the Hartlepool district committee, and is not allowed to work in that district. It is for that reason that our members at the North Tees power station refuse to work with him, and the Tees-Side district committee fully support our members in their attitude and ask that you dispense with the services of this man until he has made his peace with his own district committee. Yours faithfully, H. Thornton—District secretary."

D Mr. Thornton also instructed Langford to tell the men not to make trouble over the week-end, which Langford did.

On the Monday morning, Feb. 8, Langford again saw Henson, and there is some conflict of evidence at this point. It is common ground that Langford asked to hold a meeting. Henson said he refused this, but apparently Langford did call such a meeting in the afternoon. Shortly before the time fixed for this meeting Henson and Langford met again, and according to Henson Langford
E then threatened that if the plaintiff were not dismissed at once he would call out all his members. This, according to Henson, would include the maintenance men, without whom the power station could not operate. Langford disagrees to this extent, that his version is that he told Henson the men would come out. Langford also saw Whiteside on Monday and informed him that the men were demanding the dismissal of the plaintiff. Meanwhile Little had been in touch
F with Thornton and suggested that the plaintiff be given a week in which to make his peace with the union. This Thornton would not accept and demanded instant dismissal. He also said that if this were not done the employers might find the men "out". Whiteside eventually got instructions, through Little, that the plaintiff should be paid off and told that if within the week he made his peace with the union he would be re-engaged. The plaintiff attended on
G the Tuesday morning at 9 o'clock and did not go to work, but was given a week's pay in accordance with this arrangement.

On the same Monday, Feb. 8, Thornton, in accordance with the directions of his committee, sent the following circular letter to all conveners of shop stewards in his district:

H "Dear Sir and Brother, A member of Hartlepool district, L. C. Huntley, has not been allowed to obtain employment in his own district, owing to his non-compliance with the instruction from executive council to absent himself from work on Dec. 2, 1953. This member is endeavouring to obtain employment on Tees-Side, and I am instructed by district committee to inform all shop stewards that he is not desirable in this district, at least until he has made peace with his own district committee. Yours fraternally,
I H. Thornton. District secretary."

The plaintiff, thus once more out of work—again, though he did not then know it, owing to the machinations of the Hartlepool district committee—made an effort to make peace with that body by writing on Feb. 11 to Lupton:

"Dear Sir, I would be greatly obliged if you could arrange an early meeting of your district committee with the object of my having an opportunity to discuss my industrial position with them.

"As you are no doubt aware, I am at present being prevented from obtaining employment in this district and for this reason I ask that as little time as possible be lost in the convening of this meeting."

He had previously seen Lupton and been rebuffed, Lupton saying it was a committee matter. The plaintiff's letter was not considered until a meeting of the district committee on Feb. 16, when a special meeting passed the following resolution:

"The chairman explained to the meeting the reason for the calling of this special meeting, which had been brought about through the secretary receiving a letter from L. C. Huntley, wherein he requested an interview with the district committee, to discuss his position industrially, as he has found it impossible to get a job at his trade owing to the hostile attitude that has been shown towards him by our members who are employed in the organised shops in this district, also on the Tees-Side, where he has now been endeavouring to get a job. Arising from the discussion that arose from this matter, it was unanimously agreed that the interview requested by L. C. Huntley, not be granted, as in the opinion of D.C. no useful purpose would be served by same, having in mind the fact that this man stated in an article that appeared in the 'Northern Daily Mail', that he no longer considered himself a member of the A.E.U. and that he was right in refusing to take part in the twenty-four hour token stoppage."

Mr. Lupton wrote a letter to the plaintiff on the same day in these terms:

"Dear Sir, Your letter of Feb. 11, 1954, has been considered by my district committee who direct me to reply as follows. After very careful consideration of your request for an interview with the members of the district committee to discuss your industrial position with them, it was decided by that body that no useful purpose would be served by such an interview as you suggest, having in mind the fact that you yourself announced through the press that you regarded yourself as being no longer a member of the union."

Thus the plaintiff's effort to make his peace was rejected out of hand, and this appears to me inexcusable, the statement attributed to the plaintiff by the newspaper that he no longer considered himself a member of the union being the merest pretext. The plaintiff agreed that he said something of the sort, meaning that the committee were attempting to expel him. He had not been told that the executive council had refused to countenance this plan. The district committee were perfectly well aware that the plaintiff remained a member until expelled in due course according to the rules.

Not content with this, the district committee determined to find some means of circumventing the executive council's refusal to expel the plaintiff, and Lupton, the secretary to the district committee, on the same Feb. 16, wrote this letter to Wilkinson, the branch secretary:

"Dear Sir and Brother . . . I am directed by my district committee to inform you to the effect that it has been decided by that body to resist the above named from retaining his membership of our union. D.C. trust that your branch will support them in their endeavours, and would suggest that your branch committee be called to consider the position."

He received a favourable reply by return of post from Wilkinson:

"I am in receipt of your letter of Feb. 16 concerning your committee's decision for which I thank you. No doubt when my chairman reads your letter to the branch on Feb. 27, the decision of the district committee will be wholly endorsed. Yours fraternally."

On Mar. 17 the writ in this action was issued against Thornton alone, asking for an injunction to restrain him from interfering with the plaintiff's trade and

A preventing his employment at the power station, and the court was moved before me on Mar. 23, when the motion was adjourned. Meanwhile on Mar. 18 the plaintiff applied to Wilkinson for his contribution card, sending 4s. which he claimed to be the amount of his arrears. This 4s. was returned on the next day, but no card was sent nor any intimation as to the amount claimed for arrears. This again was a breach of the rules by the branch secretary, but I cannot doubt that it was prompted by the district committee's request of Feb. 16 which I have read, and was thus indirectly their doing.

B On Mar. 27 the plaintiff's solicitors received from an anonymous source a copy of Lupton's circular of Jan. 26*, and as a result the writ was amended by joining the members of the district committee. The motion came on for hearing on Apr. 14 and I did not feel I could grant any relief on that occasion.

C On Apr. 17 and 23 the plaintiff's solicitors again applied for his card. On May 14 arrears of £3 3s. 6d. were claimed, but no card was sent. These figures were disputed. On June 8 the branch secretary wrote a letter announcing that the plaintiff had been expelled for arrears of contributions under r. 27. Whether this expulsion was lawful is not in question in this action and I express no further opinion on it. The plaintiff was a member of the union at any rate until the beginning of June, 1954.

D The plaintiff was out of work and in receipt either of unemployment benefit or national assistance until July 26, 1954, when he joined the Durham County Constabulary. He left that body in February, 1955, had a temporary job in March, 1955, and in May, 1955, obtained employment at Stockton in the Admiralty Spare Parts Department where there is no closed shop. This employment E he still retains. His place of employment is fifteen miles from his home.

F By his statement of claim the plaintiff alleges, first, that he was unlawfully ordered to strike on Dec. 2, 1953, and secondly that the defendants have since that time conspired to injure him for having refused to comply with that direction. The overt acts of conspiracy on which the plaintiff relies begin with the district committee meeting of Jan. 25, 1954, and continue till the meeting of that committee of Feb. 16. Alternatively the plaintiff alleges that the acts of the defendants were in themselves wrongful and tortious, omitting any element of conspiracy. The plaintiff claims damages for conspiracy or alternatively for the alleged wrongful acts against all the defendants and certain injunctions which I need not explain at this point. The defendants did not sever in their defences. They admit the plaintiff was a member until expelled under r. 27 in June, 1954. They deny the wrongfulness of the call to strike on Dec. 2, and they deny conspiracy or that the acts alleged by the plaintiff amounted to conspiracy in law, justifying their course of conduct from Jan. 25, 1954, first by the plaintiff's refusal to join in the stoppage, secondly by the statements said to have been made by him or on his behalf in the press, and thirdly by his behaviour at the district committee meeting on Dec. 11, 1953. The defence of Thornton and Langford is that they were not partners to the conspiracy and that they did not threaten to call out the men at the power station but merely informed the employers of the attitude of the men there employed. In addition all the defendants rely on s. 3 of the Trade Disputes Act, 1906, alleging that all the acts done were done in contemplation or furtherance of one or other of four trade disputes. In the defence I s. 4 of the Trade Disputes Act, 1906, is also relied on, but this was abandoned at the Bar.

The first question, therefore, on the facts as I find them is whether there was a conspiracy to injure the plaintiff and who were the parties to it. Now the elements of conspiracy in the civil sense of that word have been exhaustively examined in the House of Lords in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (1) ([1942] 1 All E.R. 142), and I think it unnecessary to examine the

* This is the letter printed at p. 243, letter B, ante.

earlier authorities. VISCOUNT SIMON, L.C.'s well-known analysis is as follows A
(*ibid.*, at p. 146):

"... the question to be decided is whether the appellants have proved that the respondents are liable to them for illegal conspiracy. In other words, is it proved that the two respondents combined together 'to injure' the appellants in the way of their trade, and that the appellants have suffered damage from the respondents' illegal action? Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it. (I am omitting consideration of those cases on the borderland of illegality, where the combination was held to amount to a criminal conspiracy because the purpose aimed at, though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct.) The crime consists in the agreement, though in most cases overt acts done in pursuance of the combination are available to prove the fact of agreement. The tort of conspiracy, however, is constituted only if the agreed combination is carried into effect in a greater or less degree and damage to the plaintiff is thereby produced. It must be so, for, regarded as a civil wrong, conspiracy is one of those wrongs (like fraud or negligence) which sounds in damage, and a mere agreement to injure, if it was never acted upon at all and never led to any result affecting the party complaining, could not produce damage to him. The distinction between the essential conditions to be fulfilled by the crime and the tort respectively are conveniently set out by LORD COLERIDGE, L.C.J., in his judgment in *Mogul S.S. Co. v. McGregor, Gow & Co.* (2) ([1892] A.C. 25) . . . The appellants, therefore, in order to make out their case, have to establish (a) agreement between the two respondents (b) to effect an unlawful purpose (c) resulting in damage to the appellants. As regards (c), there can here be no doubt . . . The only difficulty in the case arises under (b). What exactly is meant, in this branch of the law, by a combination to effect an unlawful purpose? LORD CAVE, L.C., in *Sorrell v. Smith* (3) ([1925] A.C. 700) when what he called 'the famous trilogy of cases in Your Lordships' House' *Mogul S.S. Co. v. McGregor, Gow & Co.* (2) ([1892] A.C. 25), *Allen v. Flood* (4) ([1898] A.C. 1), and *Quinn v. Leathem* (5) ([1901] A.C. 495) were submitted to a close examination in order to extract from them the principles involved, formulated as a result two propositions of law which he stated as follows ([1925] A.C. at p. 712): ' (1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues'."

LORD SIMON sums up his conclusions in these words ([1942] 1 All E.R. at p. 150):

"I am content to say that, unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination wilfully to damage a man in his trade is unlawful."

VISCOUNT MAUGHAM, in the same case, based his judgment on LORD CAVE's observations in *Sorrell v. Smith* (3) which I have just read. He points out also (*ibid.*, at p. 152) that the absence of spite or malice does not preclude a finding of conspiracy, and that it is not enough to justify wrongful acts to show that the predominant motive was not the injury of the plaintiff. He formulates the question thus (*ibid.*, at p. 152):

A "We may formulate the question thus: 'was the real or predominant
purpose of the combination to forward or defend the trade or business
interests of the trade union and its members and of the millowners?' If the
answer is in the negative, it will be necessary very carefully to examine
B 'the real purpose' or 'the true motive' (which I think is the same thing)
of the combination, and to consider whether there was, in the eyes of the law,
a just cause or excuse for taking or directing acts in combination which
would destroy the present means of subsistence of the appellants. On this
point, if it arises, there is little authority to guide us, but I will add that, when
the question of the real purpose is being considered, it is impossible to leave
out of consideration the principle that men are in general to be taken as
intending the direct consequences of their acts . . ."

C Was there then a conspiracy on the part of the Hartlepool district committee
to injure the plaintiff? In my judgment there was, because the acts of these
defendants were "without justification", to use LORD CAVE's words. It might
be arguable that in the early days the members of the district committee honestly
took the view that nothing would uphold the prestige of the union in the district
D but the plaintiff's expulsion, though this is a view so wrong-headed that it would
be hard to accept it. The only element in the charges against the plaintiff
relevant here is his disobedience to the instruction to stop work on Dec. 2, and
that is indeed the charge made in the letter summoning him before the district
committee on Dec. 11. The recommendation to expel relies, however, not only
on that but also on the new charge of "coercing" other members, a charge of
E which no notice was given and which was entirely unsupported by evidence.
The third ground is the "arrogant attitude" of the plaintiff. If this refers to the
fact that the plaintiff insisted on questioning the validity of the summons to
strike it is a denial of the right to hold an opinion. It would be no ground even
if the plaintiff were mistaken; it becomes grotesque when, as I have shown,
he was probably right. If it be a reference to the plaintiff's use of bad language,
F it is enough to point out that the rules themselves provide a penalty of a fine of
2s. 6d. for that offence (r. 22 (3)).

The matter does not end there. When the executive council declined to
sanction expulsion for disobedience of the strike summons the district committee
persisted in asking for expulsion for the plaintiff's "disrespectful attitude" to
themselves. This looks very like punishment for personal reasons.

G Be this as it may, all question of expulsion was closed by the general secretary's
letter of Jan. 6, 1954. The district committee then knew that nothing more than
a reprimand and perhaps a fine would be countenanced by the executive council.
Nevertheless by the resolution of Jan. 15, and still more clearly by that of Jan. 25,
they sought to flout the executive council's decision and to produce by other
means, at any rate within their own district, and as the letter to Mr. Thornton
shows also on Tees-Side, all the effects of expulsion. It is an ironic comment that
H while pretending to visit the plaintiff with a penalty for disloyalty to the union
they were themselves guilty of that very offence.

I In my judgment it is true to say that by this time the district committee had
entirely lost sight of what the interests of the union demanded, and thought only
of their own ruffled dignity. Probably the publicity given to the affair in the
press was largely responsible, but in saying this I cast no reflection on that organ
which was reporting fairly enough on a matter of public interest. It had become
a question of the district committee's prestige; they were determined to use any
weapon ready to their hand to vindicate their authority, and grossly abused the
quite frightening powers at their command. The threat to "withdraw all
labour" from any employer daring to engage one of their own members whom
they had been elected to protect was, as events showed, effective enough, even
though they had, as they well knew, no right to take any such step. The
district committee had no power to call a strike. The matter does not end there.

It was none of their business to interfere in another district, and the letter to Thornton was only justifiable if the plaintiff was or was about to be expelled. This is the inference that Thornton drew, and in my judgment was intended to draw. Moreover, when the plaintiff in February attempted to make his peace he was refused a hearing and the aid of his branch was solicited in order to serve the district committee's end, which was by this time to be revenged on the plaintiff for the slight put on the district committee by their superiors, the executive council, and to demonstrate the fact that they were greater than him. As McCann said, "To make the punishment fit the crime". What crime? The crime of standing up to the district committee. That damage was suffered by the plaintiff cannot be questioned, so all the elements of a civil conspiracy are present.

In view of this finding I need not consider whether the actions of any member of this group was in itself a tortious act against the plaintiff. Assuming that what was done might not be a legal wrong if done by an individual, it is clear that the combination may make the act wrongful: see per SCRUTTON, L.J., in *Ware & De Freville, Ltd. v. Motor Trade Assn.* (6) ([1921] 3 K.B. 40 at p. 67), cited by LORD PORTER in the *Crofter* case (1) in these terms ([1942] 1 All E.R. at p. 170):

"The general proposition has been summed up by SCRUTTON, L.J., in *Ware & De Freville, Ltd. v. Motor Trade Assn.* (6) at p. 67: 'I take *Allen v. Flood* (4) and *Bradford Corp'n. v. Pickles* (7) ([1895] A.C. 587) to decide that an act otherwise lawful, though harmful, does not become actionable by being done maliciously in the sense of with a bad motive or with intent to injure another . . . I take the *Mogul* case (2) as deciding that a combination to do acts, the natural consequence of which was to injure another in his business, was not actionable if those acts were not otherwise unlawful, such as assaults, or threats of assaults, and were done in furtherance of the trade interests of those combining. I understand *Quinn v. Leathem* (5) to decide that a combination to injure another in his trade and business, not in furtherance of the trade interests of those combining, but out of spite against the person injured, is actionable'. This is a summing-up of the principles to be deduced from the so-called trilogy of cases upon conspiracy—namely, *Mogul S.S. Co. v. McGregor, Gow & Co.* (2), *Allen v. Flood* (4), *Quinn v. Leathem* (5)—and I think that it is a correct one. It has since received support from the reasoning upon which your Lordships' House decided *Sorrell v. Smith* (3)."

LORD PORTER also said ([1942] 1 All E.R. at p. 171):

"There may, however, be combinations which are criminal, though entered into for purposes which would not be criminal if done by an individual, but, whether this be so or not, it is now established that a conspiracy the object of which is to injure a third person, is an actionable wrong. *Quinn v. Leathem* (5) and *Sorrell v. Smith* (3) in your Lordships' House are sufficient authority for this proposition."

It is true that Lupton was not a voting member of the committee but in my judgment he cannot escape liability on the ground that he was only its servant. No such defence is pleaded, and having observed his demeanour in the witness-box I formed the conclusion not merely that he identified himself with the committee's acts but that he was the instigator and prime mover of them.

When I turn to consider the case against the officials of the Tees-Side district, the defendants Thornton and Langford, the picture is at once seen to be very different. I could have wished that they had delivered a separate defence, though it was perfectly proper that they should be represented by the same counsel as appeared for the members of the Hartlepool district committee. Against these defendants it is said that they lent themselves to the design of the other defendants and so joined the conspiracy to injure him. This must have been after

A Jan. 27, when Lupton appealed to Thornton. No doubt it is not necessary that all the conspirators should join at the same time, but it is, I think, necessary that they should know all the facts and entertain the same object. Now one essential fact was not communicated to them, viz., that the executive council would not countenance the plaintiff's expulsion and that he was a member of the union entitled to be treated as such.

B Thornton is drawn into the controversy by Lupton's letter to him of Jan. 27 and it is true that this letter speaks of the plaintiff as a member at this time of the strike. It says no more on this subject, but refers to "the official action to be taken" as though no disapproval of the Hartlepool district committee's action had been expressed from headquarters. Thornton said in the witness-box that it left a doubt in his mind whether the plaintiff was still a member, and this I accept. C As secretary he brought this letter before his committee on Feb. 3, with the result that this body directed him to inform the shop stewards that the plaintiff was not desirable in the district until he had made his peace with his own district committee. This Thornton did by his letter of Feb. 8. Meanwhile on Feb. 5 he received Langford's message as to the unrest at the Haverton Hill power station caused by the fact that the plaintiff could not produce his contribution card, and he directed D Langford to oppose his employment. On Feb. 6 and 8, he himself pressed the employers to dismiss the plaintiff. Langford, for his part, carried out his instructions. He was no doubt under some pressure from the members; but, as I have said, the evidence is that their views were based on the absence of the plaintiff's card and not on the Hartlepool trouble. No doubt Thornton and Langford lent themselves to their co-defendants' plan, but I have no evidence that their motive was to injure E the plaintiff rather than to forward the interests of the union as they saw them. They had none of their co-defendants' personal reasons for attacking the plaintiff, who was in fact unknown to them. I cannot hold them to be participators in the conspiracy I have found to exist. It was suggested that they might themselves have formed a separate conspiracy. No doubt they acted in concert, but I cannot find that their predominant motive was to injure the plaintiff.

F I must then consider their individual acts apart from conspiracy. It was undoubtedly through the pressure they applied that the plaintiff lost his job at the power station. The law on this point has been admirably stated by PETERSON, J., in *Hodges v. Webb* (8) ([1920] 2 Ch. 70), a judgment which has received the highest approbation. I read from the headnote (*ibid.*, at p. 71):

"In the absence of conspiracy or unlawful combination, a firm or even
Z emphatic statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker will do that which he is lawfully entitled to do, is not a threat for which the speaker can be held liable at law."

I On this subject also see *White v. Riley* (9) ([1921] 1 Ch. 1) hereafter more particularly to be mentioned. If then all that Thornton or Langford did was to inform the employers that the continued employment of the plaintiff would have untoward results they did no more than they were entitled to do. If, however, their actions amounted to threats of illegal strike action—that is to say, action to withdraw labour in breach of contract—then those acts were tortious and illegal.

There is, as I have said, some conflict of evidence on this subject. Mr. White-side was able to confirm his evidence by a report made to his superiors at the time. He dealt only with Langford, whose evidence he confirms to this extent, that what Langford was insisting on, both on Saturday, Feb. 6, and Monday, Feb. 8, was to be allowed to call a meeting the outcome of which he said would probably be an immediate stoppage. This was not a threat. Mr. Henson also dealt with Langford, and he insisted that Langford had threatened to call out his members if the plaintiff were not dismissed. I do not at all accuse Mr. Henson of deliberate overstatement, but his recollection may be at fault:

the line is a narrow one. Langford said that he only repeated what he said to Whiteside. He had no power to call out the members. Nor, indeed, had Thornton. Mr. Little, who dealt with Thornton, did not testify to any threat by him, although no doubt the latter made it plain that the men would come out, and so they probably would, thinking that the plaintiff was not a member. On the whole I must acquit these two of tortious acts, though Thornton is open to grave criticism for accepting Lupton's suggestion without inquiry. Langford merely did what he was told by Thornton, and what he was urged to do by the members at the station.

There remains the plea of the Hartlepool district committee members that they are protected by the Trade Disputes Act, 1906. This I have found the most troublesome part of the inquiry. Under s. 1 of that Act the following paragraph is now inserted in the Conspiracy and Protection of Property Act, 1875, s. 3:

"An act done in pursuance of an agreement or combination by two or more persons shall if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

The Trade Disputes Act, 1906, s. 3, provides:

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Section 5, the definition section, provides by sub-s. (3):

". . . the expression 'trade dispute' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises . . ."

Two questions arise out of this: first, was this a trade dispute; and, secondly, were the actions of the district committee done in furtherance of it?

I need not reconsider here the earlier efforts to have the plaintiff expelled, for they were frustrated by higher authority and came to nothing. This issue was settled by Jan. 6. The facts to be considered begin on Jan. 15, when the first move was made to boycott or blacklist the plaintiff*. It was not argued that these acts were "in contemplation" of a trade dispute, and the plea in the defence that the dispute was as to the fifteen per cent. increase in wages then being demanded by the union was not persisted in. Further, in my judgment the employers were in no way parties to any dispute. Was it, however, a dispute within the meaning of the Act, and, if so, was it one between workmen and workmen? According to the defendants the contestants were the district committee on the one side and the plaintiff on the other, and the subject whether the plaintiff (a member of the union) should be allowed to earn his living as an engineer in a closed shop in the district. It was contended for the plaintiff that the members of the committee did not act in their capacity as workmen. I feel the force of this point, but on the whole feel bound to reject it. The committee consisted of elected representatives of the workmen in the district who were members of the union. There are a number of cases to show that if the plaintiff had not been a member of the union and his right to work had been contested on that ground this would have been considered a trade dispute. A more persuasive argument for the plaintiff is that the committee embarked on a policy of embargo entirely unauthorised by the rules of the union, and that

* See p. 242, letter H, ante.

A they cannot escape the consequences of a wrong which was of their own invention by labelling it a trade dispute. This is to say that there was no "dispute" at all. It was argued none the less for the defendants that the words of the definition clause cover the case: it was a dispute, say they, "as to the employment of the plaintiff" within the words of the clause.

B The plaintiff's contention derives some support from the speeches in *Conway v. Wade* (10) ([1909] A.C. 506), and in particular the speech of LORD SHAW OF DUNFERMLINE. In that case the defendant Wade had no authority from the union to threaten the employers with a strike unless they dismissed Conway. What Wade was trying to do was punish Conway for not having paid a union fine in the past, as to which apparently no dispute at that time existed. LORD SHAW says (*ibid.*, at p. 520):

C "It is no doubt true that by s. 5 (3) the expression 'trade dispute' receives a very wide interpretation. It 'means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment . . . of any person', etc. But I cannot see my way to hold that 'trade dispute' necessarily includes accordingly every case of personal difference between any one workman and one or more of his fellows. It is true that after a certain stage even such a dispute, although originally grounded, it may be, upon personal animosity, may come to be a subject in which sides are taken, and may develop into a situation of a general aspect containing the characteristics of a trade dispute; but until it reaches that stage I cannot hold that a trade dispute necessarily exists. My Lords,

D I cannot better illustrate my meaning than by simply taking the facts of the present case in the light of the rules of the trade union to which the appellant belonged. It is said that eight years ago he had been fined by his union and had not paid. In the interval he had rejoined the membership and was apparently a full paying member. Wade, the respondent, was an official delegate of the union. By the rules of the union, district committees were appointed to decide all complaints and disputes between members or branches in their district . . . The conduct of Wade was contrary not only to the terms but to the spirit of the rules, and I am not surprised to observe that the trade union accepts no responsibility whatever for such conduct. Suppose, however, these rules instead of being violated, had been followed in the present case."

E

F

G His Lordship considers that, and continues (*ibid.*, at p. 522):

H "In this view, what is meant by the words 'in contemplation or furtherance of a trade dispute'? My Lords, I think the argument was well founded that the contemplation of such a dispute must be the contemplation of something impending or likely to occur, and that they do not cover the case of coercive interference in which the intervener may have in his own mind that if he does not get his own way he will thereupon take ways and means to bring a trade dispute into existence. To 'contemplate a trade dispute' is to have before the mind some objective event or situation, with those elements of fact or probability to which I have adverted, but does not mean a contemplation, mediation, or resolve in regard to something as yet wholly within the mind and of a subjective character. I think that any other construction would be ill-founded and would lead to strange and mischievous results. With regard to the term 'furtherance' of a trade dispute, I think that must apply to a trade dispute in existence, and that the act done must be in the course of it and for the purpose of promoting the interests of either party or both parties to it."

I

The plaintiff also relied on the Irish case of *Cooper v. Millea* (11) ([1938] I.R. 749). It was there held that the action of the defendants was unlawful at common law, the threat being to procure a strike in breach of contract by

the employees with the railway company, and it was held in those circumstances that s. 3 of the Trade Disputes Act, 1906, did not apply, the reason being, I think, that the word "only" in the section excluded the Act. This view has the support of LORD LOREBURN, L.C., in *Conway v. Wade* (10) ([1909] A.C. at p. 511). The Irish decision was followed in *Riordan v. Butler* (12) ([1940] I.R. 347).

Here I have held that the acts were done in pursuance of a conspiracy which is itself unlawful, and therefore this reasoning would seem to apply, but the issue is clouded by the fact that under s. 1 of the Trade Disputes Act, 1906, a combination is not actionable unless the acts done would be actionable if done by a single person. On the whole, therefore, I do not think this line of cases helps me.

It was argued for the defendants that *Dallimore v. Williams & Jesson* (13) ((1912), 29 T.L.R. 67; (1914), 30 T.L.R. 432) shows that it does not matter that an element of spite exists, and that the motives of the defendants are immaterial. That case was twice tried. It was brought by an employer against officials of a trade union for inducing workmen to break their contracts with the plaintiff. The case was ordered to be retried after the first trial because RIDLEY, J., had misdirected the jury. The same thing happened at the second trial, but on the second occasion the Court of Appeal overruled the jury's verdict and entered judgment for the defendants, holding that s. 3 of the Trade Disputes Act, 1906, was a defence. In that case, however, there undoubtedly was a trade dispute in existence, viz., whether the employers should be entitled to employ bandmen on Sundays at a less rate than that advocated by the trade union. The court held that the fact that the motives of the defendants, who were officials of the union, might be bad did not prevent their acts being done in furtherance of this dispute. LORD SUMNER said (30 T.L.R. at p. 433):

"...secondly, was there a trade dispute at the time? In his opinion the plaintiff's own evidence required the jury to answer the question whether there was a trade dispute at the time in the affirmative and not in the negative. Then, were the acts of which the plaintiff complained done in contemplation or furtherance of a trade dispute? Whatever might have been the motives of the defendants—and he would assume that the jury had found that they were sinister and improper—it was apparent on the plaintiff's own case that the defendants did in fact get up a trade dispute. Except by confusing the motive of an act with the act itself, he was unable to see how it could be said that the acts complained of were not done in contemplation or furtherance of a trade dispute. The argument for the plaintiff involved reading the Act as though it spoke of an act 'honestly' or 'solely' done in contemplation or furtherance of a trade dispute. The facts in the case of *Conway v. Wade* (10) were quite different from the facts in this case. In his opinion it was clear that here there was a trade dispute, and that the acts were done in contemplation or furtherance of a trade dispute. A complete defence was therefore made out. In his opinion it was unnecessary to decide any other question."

It seems to me that this case does not cover the present, for the question here is not whether sinister motives disentitle the defendants to rely on the Act but whether a trade dispute existed at all.

Whether a trade dispute exists is a question of fact, as to which LORD STERN-DALE, M.R., in *White v. Riley* (9) says ([1921] 1 Ch. at p. 18):

"Now was there a trade dispute in this case? That, in my opinion, is a question of fact. It has been so treated in several cases, and being a question of fact it is not easy nor indeed possible to lay down any general rule which would apply to all cases. We have to see what is the circumstance to which we have to apply our minds in determining the question of

A fact in this case. It seems to me that there is no doubt that there was a dispute between the two unions, the Curriers' Union objecting to the Workers' Union including in their membership craftsmen such as the plaintiff and to their negotiating with the employers on behalf of such men, and they insisted that all craftsmen should be members of their union. To this the Workers' Union would not agree. There was therefore a dispute
B between the two unions on this point. We have had a good deal of discussion as to whether it was a burning question or not. I rather agree with the learned counsel for the respondents that it did not burn very brightly, but there was the dispute, there is no question about that, and in accordance with and by reason of the attitude of the two unions the plaintiff soon after he went to these works was asked to join the Curriers' Union. It was suggested to him by one of his employers and by Mead and by Wood, and he refused in each case unless he was allowed still to remain a member of his own union. In 1919, as I have said before, the matter was raised in a more acute form, partly in consequence of a question put by Hardwick and partly, I dare say, by the intervention of the defendant Wood, who was one of the executive of the Curriers' Union. The result of it was that the plaintiff was told that the men would not work with him unless he did join and that if he did not either join or leave the employment they would cease work. He was quite willing, as he said, to join if he could remain in his own union, but that they would not allow. In those circumstances, it seems to me that the only fair conclusion of fact is that there was a dispute between workmen and workmen in connection with the employment of a person—namely, the plaintiff, the dispute being that the men in the shop insisted that no skilled man should be employed unless he belonged to the Curriers' Union, and that this dispute arose because of the restrictions which the union thought fit to put upon the employment of persons as buffers, in what they thought was the interest of their union, and its members, and perhaps in the interest of the trade at large.

F "It is said that this conclusion is inconsistent with the case of *Conway v. Wade* (10) and *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland* (14) ([1903] 2 K.B. 600), but I do not think that is so. The facts in those cases were different. The complaint which the other workers had against the plaintiffs in those cases and the cause of their refusing to work with them were not matters in connection with the regulation of employment in the trade, but were matters of complaint against the personal conduct of the plaintiffs as members of their union. It was truly said by the learned counsel for the respondents that it is very difficult to draw a line between what is a trade dispute and what is not. It is always the case in questions of fact, and I do not intend to attempt a general definition. I must, however, say that I prefer the reasoning of PETERSON, J., in *Hodges v. Webb* (8) to that of ASTBURY, J., in *Valentine v. Hyde* (15) ([1919] 2 Ch. 129), and I think it is really almost a *reductio ad absurdum* of this section to say, as the respondents are bound to say, that it does not include any dispute between union and non-union men and that if union and non-union men are working in the same employment and the union men say, 'We will no longer work with the non-union men unless they join our union', that is not a dispute between workmen and workmen connected with the employment or non-employment of any person. It seems to me that that is contrary to the words of the section. I do not think it is necessary to say where the limitation lies which is to be put upon this section. It is a question of fact in each case and I decide the question in the present case as a question of fact. It is quite possible that the extension of this legislation, which was originally passed for the benefit of workmen in their disputes with their employers, to disputes between workmen and workmen, has produced

results which many workmen in some trade unions did not anticipate, but it does not seem to me that that is any reason for not giving to the sub-section its natural meaning."

On the whole I have come to the conclusion that this was not a trade dispute. The defendants were not asserting a trade right, for they knew they could not procure the plaintiff's expulsion from the union. The dispute, if it could be so called, had become an internecine struggle between members of the union and no interests of "the trade" were involved. It was a personal matter.

Behind these considerations lies a more fundamental point, namely, whether the committee's actions were "in furtherance of a trade dispute". In my judgment this raises the same question as the issue of conspiracy. If, as I have held, the paramount object of the committee was to injure the plaintiff, then that was the object in furtherance of which they acted. They did not intend to further the dispute arising out of the plaintiff's refusal to strike—that was settled by higher authority; they intended to injure the plaintiff in his trade by their embargo, and it was to that end that their actions were directed. They were not furthering a trade dispute, but a grudge, and the Act does not protect them.

On these conclusions what should be the plaintiff's remedy? First, damages. These are at large. If this were a case—as I wish it were on this point—where the judge had the help of a jury, he would not, in charging them, direct them to count on golden scales the days during which the plaintiff was unemployed, or to measure exactly the difference between the wage he has been earning and that which he might have earned but for the wrong done to him, or the expense to which he is put by working so far from his home. All these factors are no doubt material, as is the persecution to which the plaintiff has been subjected. I was asked to award "exemplary damages", a vague phrase and one never in my experience heard before in a Chancery court. I do not think I ought to be influenced by phrases. I propose to consider in a general way the injury done to the plaintiff by these defendants' misconduct, but to remember that an exaggerated sum may be thought to be a punishment.

On the whole I think that £500 is an appropriate award.

As to the remedy by way of injunction, it is true that some of the defendants said they would again act in the same way and that the resolution imposing the embargo still stands, but that is now a matter of history. The plaintiff has employment where he need not be a member of the union. He has paid no contribution since December, 1953, and I see great difficulty in framing any injunction that will fit the present circumstances. What the future will bring cannot be foreseen. I can only hope that wiser counsels will prevail. I do not even know who are the present members of the committee. I propose, therefore, to give the plaintiff leave to move for an injunction if further victimisation requires it, but not to grant an injunction at present.

Judgment for the plaintiff for £500 against eleven defendants (i.e., all defendants except Thornton and Langford).

Solicitors: *Elwell & Binford Hole*, agents for *A. N. & S. I. Levinson*, West Hartlepool (for the plaintiff); *W. H. Thompson* (for all the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

NIZAM OF HYDERABAD AND ANOTHER v. JUNG AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.J.J.), November 19, 20, 21, 22, 23, 26, 27, December 20, 1956.]

Conflict of Laws—Impleading foreign sovereign state—Money deposited with bank in London—Transferred, on instructions of agent of beneficial owner, to account of servant of foreign state—Transfer unauthorised by beneficial owner—Demand for re-transfer—Action by beneficial owner against bank and servant of foreign state claiming return of money.

Agent—Liability to person other than principal—Money received on behalf of principal—Payment to agent a mistaken or wrongful act—Agent informed of wrongful nature of payment—Money still in possession of agent—Duty of agent.

In September, 1948, a sum of £1,007,940 9s. (referred to hereinafter as "the debt") was standing to the credit of an account in the name of the government of the Nizam of Hyderabad with a bank in London. The account could be operated only by two persons, one of whom (referred to hereinafter as "Moin") was then the Finance Minister of the Nizam's government. During September, 1948, Moin called on R., who was then High Commissioner for Pakistan in the United Kingdom, at his official residence and asked him to accept a transfer into his name of the moneys standing to the credit of the Nizam's government with the bank. On the instructions of the Foreign Minister of Pakistan, who was present at the interview, R. agreed to accept the transfer in his official capacity. On Sept. 20, pursuant to written instructions from Moin, dated Sept. 16, the bank closed the account of the Nizam's government and transferred the debt to the account of "[R.] High Commissioner for Pakistan in London". Some two days later the bank received cables from Hyderabad asking for the debt to be re-transferred to the Nizam's account, but the bank was unable to act on the cables as the account now stood in the name of R. In 1952 R. ceased to be High Commissioner for Pakistan in the United Kingdom, and in 1953, acting on the instructions of his government, he asked the bank to transfer the debt into the name of the person who was then the High Commissioner, but the bank refused to do so, on account of the conflicting claims. On May 17, 1954, the solicitors acting for the plaintiffs wrote to R. informing him that Moin had had no authority from the Nizam or his government to effect the transfer of the debt in September, 1948, into R.'s name, and requiring that the debt be paid to the Nizam and his government or to their order. In July, 1954, the Nizam and the State of Hyderabad issued a writ in an action against Moin, the bank and R. Against the bank and R., the plaintiffs claimed payment of the amount of the debt as money held in trust for the plaintiffs or due and owing to them, or as money had and received to the use of the plaintiffs. The claim against Moin was in respect of breach of trust, but, even if any breach of trust could be established against Moin, there was no evidence that R. or the bank knew of it at the time of the transfer of the debt in September, 1948. In January, 1955, leave was given to issue and serve a concurrent writ of summons out of the jurisdiction of the court on R., who was then in Pakistan. On an application by R., the court set aside the writ and the concurrent writ as against him, and stayed all further proceedings against the bank, on the ground that the action impleaded the Sovereign State of Pakistan. On an appeal by the plaintiffs, the court admitted evidence of the Nizam that at no time did he give any direction or sanction or authority to Moin or to any other person to transfer the debt or any part of it to R. or to the Pakistan government or to any person representing that government. There was no

evidence that the State of Pakistan had any beneficial interest in the debt, and R. disclaimed any such interest.

Held: R. was not entitled to invoke the doctrine of foreign sovereign immunity for the following reasons—

(i) the transfer of the debt into R.'s name as High Commissioner for Pakistan was not equivalent to a vesting of the debt in the Sovereign State of Pakistan, as R.'s office was not such as to identify its holder with the state and there was no evidence to show that the state was accepting the transfer through R. (see p. 268, letter D, p. 273, letter A, post), and

(ii) on the basis (assumed by LORD EVERSHERD, M.R., and BIRKETT, L.J.; decided by ROMER, L.J.) that the transfer of the debt into R.'s name as High Commissioner was a transfer to him as a servant or agent of the State of Pakistan, R., as an agent to whom the debt had wrongfully been transferred, was bound, after he had received the letter of May 17, 1954, to transfer the debt to the plaintiffs (or, was a trustee of it for the plaintiffs), there being no evidence to support any claim by the state to a beneficial title to the debt; and, therefore, the Sovereign State of Pakistan had not, merely by reason of the debt's standing in the name of R. as the state's High Commissioner (but not in the name of the state), such control of the debt as would render the continuance of the action an assertion by the court of jurisdiction over the Sovereign State of Pakistan (see p. 269, letters E to H, p. 275, letters E and F, p. 276, letters B to D, post).

Buller v. Harrison (1777), 2 Cowp. 565 applied; *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England* ([1952] 1 All E.R. 572) distinguished.

Decision of UPJOHN, J. ([1956] 3 All E.R. 311) reversed on additional evidence.

Semle (per LORD EVERSHERD, M.R., and BIRKETT, L.J.): the court will not be prepared to exercise its equitable jurisdiction to administer trust property held by a foreign sovereign who is unwilling to submit to the jurisdiction, since the making of such orders as orders for account and the penal consequences which ordinarily attach to their neglect conflict with the court's duty to respect the status and dignity of the foreign sovereign (see p. 271, letter C, post).

[**Editorial Note.** The subject-matter of the action, viz., the credit balance for moneys deposited with the bank, was a chose in action and, being an intangible right, was not something of which a state could have physical possession only through an agent whilst a banking account might stand in the name of a sovereign state. Thus the issue whether the action would infringe the immunity of a foreign sovereign state turned on whether the state had control over the chose in action, since the state was not sued and had not possession of the subject-matter of the dispute. For this reason the *Dollfus Mieg* case ([1952] 1 All E.R. 572) was distinguished, as there the sovereign state had, through its agents, possessory title to the gold which was there in dispute. The distinction between "possession" and "control" is principally discussed at p. 266, letter H, to p. 267, letter A, and p. 275, letter H, to p. 276, letter A, post.

As to the jurisdiction of the courts to entertain an action in respect of property in which a foreign sovereign or state has an interest, see 7 HALSBURY'S LAWS (3rd Edn.) 266, para. 569.

As to liability of agent to repay to third person, see 1 HALSBURY'S LAWS (3rd Edn.) 233, para. 522; and for cases on the subject, see 1 DIGEST 669-673, 2818-2841.]

Cases referred to:

- (1) *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England*, [1952] 1 All E.R. 572; [1952] A.C. 582; 3rd Digest Supp.

- A (2) *Compania Naviera Vascongado v. Cristina S.S., The Cristina*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp.
- (3) *The Jupiter*, [1924] P. 236; 93 L.J.P. 156; 132 L.T. 624; Digest Supp.
- (4) *The Parlement Belge*, (1880), 5 P.D. 197; 42 L.T. 273; 11 Digest (Repl.) 628, 516.
- B (5) *The Gagara*, [1919] P. 95; 88 L.J.P. 101; 122 L.T. 498; 11 Digest (Repl.) 615, 436.
- (6) *The Broadmayne*, [1916] P. 64; 85 L.J.P. 153; 114 L.T. 891; 1 Digest 109, 131.
- (7) *Haile Selassie v. Cable & Wireless, Ltd.*, [1938] 3 All E.R. 384; [1938] Ch. 839; 107 L.J.Ch. 380; 159 L.T. 385; Digest Supp.
- C (8) *Bradford v. Chase National Bank of City of New York*, (1938), 24 Federal Supplement 28.
- (9) *Juan Ysmael & Co. Incorporated v. Government of the Republic of Indonesia*, [1954] 3 All E.R. 236; [1955] A.C. 72; 3rd Digest Supp.
- (10) *Buller v. Harrison*, (1777), 2 Cowp. 565; 98 E.R. 1243; 1 Digest 670, 2828.
- (11) *Cox v. Prentice*, (1815), 3 M. & S. 344, 348; 105 E.R. 641; 1 Digest 669, 2819.
- D (12) *Gowers v. Lloyds & National Provincial Foreign Bank, Ltd.*, [1938] 1 All E.R. 766; 158 L.T. 467; Digest Supp.
- (13) *Kleinwort, Sons & Co. v. Dunlop Rubber Co.*, (1907), 97 L.T. 263; 1 Digest 678, 2888.
- (14) *Holland v. Russell*, (1861), 1 B. & S. 424; 121 E.R. 773; *on appeal*, (1863), 4 B. & S. 14; 32 L.J.Q.B. 297; 8 L.T. 468; 122 E.R. 365; 1 Digest 672, 2834.
- E (15) *Re Bourne, Ex p. Bird*, (1851), 4 De G.M. & Sm. 273; 20 L.J.Bey. 16; 17 L.T.O.S. 303; 64 E.R. 829; 1 Digest 671, 2833.
- (16) *Brunswick (Duke) v. Hanover (King)*, (1844), 6 Beav. 1; 6 State Tr. N.S. 33; 13 L.J.Ch. 107; 2 L.T.O.S. 306; 49 E.R. 724; *affd.* H.L., (1848), 2 H.L. Cas. 1; 9 E.R. 993; 38 Digest 12, 62.
- F (17) *Gladstone v. Musurus Bey*, (1862), 1 Hem. & M. 495; 32 L.J.Ch. 155; 7 L.T. 477; 71 E.R. 216; 11 Digest (Repl.) 628, 514.
- (18) *Strousberg v. Costa Rica Republic*, (1880), 44 L.T. 199; 1 Digest 48, 389.
- (19) *L'Affaire Vestwig*, Cass. req. Feb. 5, 1946, S. 1947. 1. 137.
- (20) *The Jupiter (No. 3)*, [1927] P. 122; *affd.* C.A., [1927] P. 250; 97 L.J.P. 33; 137 L.T. 333; 11 Digest (Repl.) 613, 423.
- G (21) *Torkington v. Magee*, [1902] 2 K.B. 427; 71 L.J.K.B. 712; 87 L.T. 304; *revsd. on appeal on the merits*, [1903] 1 K.B. 644; 1 Digest 78, 635.
- (22) *Colonial Bank v. Whinney*, (1886), 11 App. Cas. 426; 56 L.J.Ch. 43; 55 L.T. 362; *revsg.* C.A., (1885), 30 Ch.D. 261; 5 Digest 751, 6483.
- (23) *Re V.G.M. Holdings, Ltd.*, [1942] 1 All E.R. 224; [1942] Ch. 235; 111 L.J.Ch. 145; 2nd Digest Supp.
- H

Appeal.

Appeal by the plaintiffs from a decision of UPJOHN, J., dated July 30, 1956, and reported [1956] 3 All E.R. 311.

On a motion by the third defendant, Habib Ibrahim Rahimtoola, UPJOHN, J., set aside the writ of summons issued on July 8, 1954, the concurrent writ of summons issued pursuant to an order of WYNN-PARRY, J., dated Jan. 11, 1955, and all subsequent proceedings against the third defendant, and stayed the action against the second defendant, Westminster Bank, Ltd., on the ground that the fund in dispute being vested in the third defendant as a servant of the government of Pakistan, it must be treated as a fund which was due at law to that government and to which that government had a title which was not illusory or manifestly defective, although the government showed no equitable title to the fund. In the Court of Appeal an affidavit of the first plaintiff, the Nizam of

Hyderabad, was admitted, showing that he was the beneficial owner of the fund A
and that his agents had no authority to dispose of his beneficial interest and that
a transfer made by them or one of them in September, 1948, to the third
defendant was made in breach of duty.

Sir Andrew Clark, Q.C., and *S. B. R. Cooke* for the plaintiffs, the Nizam of
Hyderabad and the State of Hyderabad.

B. J. M. MacKenna, Q.C., *R. O. Wilberforce, Q.C.*, and *O. R. Smith* for the third B
defendant, *Habib Ibrahim Rahimtoola*.

Geoffrey Cross, Q.C., *Eustace Roskill, Q.C.*, and *Peter Foster* for the second
defendant, *Westminster Bank, Ltd.*

The first defendant, *Nawab Moin Nawaz Jung*, did not appear and was not
represented.

Cur. adv. vult. C

Dec. 20. The following judgments were read.

LORD EVERSHERD, M.R.: The judgment I am about to read is the judg-
ment of *BIRKETT, L.J.*, and myself.

The facts of this difficult case have been fully stated by *UPJOHN, J.*, and we
find it necessary only to relate such of them as are essential for the purposes of
this judgment. Immediately before the events of September, 1948, presently D
related, the fund of £1,007,940 9s. (which is the subject-matter of the present
action) was standing at the Westminster Bank, Ltd., to an account in the name
of the government of Hyderabad. The persons entitled to draw on the account
were the first defendant (and we shall follow the learned judge in calling him
“Moin”) and the Agent-General for Hyderabad in London, *Mr. Mir Jung* (whom E
we will call, as did the judge “Mir”). The first defendant at that time was the
Finance Minister in the government of the Nizam of Hyderabad. The Nizam
was then an absolute monarch in Hyderabad. There was no distinction, there-
fore, between moneys which were part of his private fortune and moneys which
were, or represented, what we should regard as state funds. It does not, in fact,
appear whether the fund in question belonged to one category or the other, nor F
is the distinction at all relevant to the present case. The Nizam had, in fact,
as between himself on the one hand *Moin* and *Mir* on the other, placed limitations
on their right to draw on the fund. By a decree or firman which he had issued
in the previous January the money was to be applied exclusively for the purchase
of machinery. These limitations had, however, never been communicated to the
bank, and they also, therefore, are irrelevant for present purposes.

On or about Sept. 16, 1948, a meeting took place in London on which a great
deal of the argument in the present case has turned, and to which, therefore, we
must later refer in detail. The effect of the meeting was that instructions were
given in due form by *Moin* to the bank to transfer the fund in question into the
name of the third defendant, *Mr. Habib Ibrahim Rahimtoola*, who then held the
office of High Commissioner in London for the State of Pakistan. The transfer H
was effected by the bank on Sept. 20, 1948, *Mr. Rahimtoola* supplying to the
bank specimens of his signature. Thenceforward the position of the fund at the
bank was, and it still is, that it stood and stands in the name of “*Mr. Habib
Ibrahim Rahimtoola* (High Commissioner for Pakistan in London)”. Within a
matter of a few days after the transfer of the fund the Nizam sent a cable (later
repeated) to the first defendant, *Moin*, requesting him to re-transfer the fund I
into the name of himself or of the government of Hyderabad: and a like request
was also on Sept. 28, 1948, communicated by the Nizam to the bank. To the
cables which he received *Moin* returned soft answers, assuring the Nizam that
the fund was in safe hands, but also asking for specific written instructions
which, in fact, were never despatched. It was stated in the course of his judgment
by the learned judge (and, it may be, correctly, though there was no direct
evidence to this effect in the papers before us) that at this time the armed forces
of India were in process of invading the State of Hyderabad.

A In the month of February, 1952, the third defendant, Mr. Rahimtoola, ceased to be the High Commissioner in London for the State of Pakistan. The fund, however, remained in his name and no dealings with it have at any time taken place. On May 17, 1954, Messrs. Stanley Johnson & Allen wrote to Mr. Rahimtoola on the instructions of the Nizam and on behalf of the government and of the State of Hyderabad informing him that Moin had, in fact, had no authority from the Nizam or his government to effect the transfer in September, 1948, into Mr. Rahimtoola's name. The letter continued:

"As Your Excellency is of course aware, the funds transferred to the account in Your Excellency's name . . . have at all times been and still are the property of H.E.H. The Nizam and his government."

C The letter continued by informing Mr. Rahimtoola that the Nizam and his government required the fund to be paid to them or to their order. Messrs. Stanley Johnson & Allen addressed on the following day a similar communication to the bank. When the case was before the learned judge, there was no direct evidence in support of the contention, referred to in the letter which we have quoted, that the transfer by Moin to Mr. Rahimtoola had been without proper authority. UPJOHN, J., in his judgment said ([1956] 3 All E.R. at p. 315):

"Nor, in my judgment, is it proved that Moin or Mir acted in breach of his duty in ordering transfer of the debt to Rahimtoola . . . No one has sworn that the transfer was against the personal orders of the Nizam; it was only sworn that no trace of any such order could be found."

E When counsel for the plaintiffs was opening the appeal before us he asked leave to read an affidavit since sworn by the Nizam in order to fill the gap in the evidence which the judge had noted. As this was an interlocutory matter we thought it right to give leave to read the Nizam's affidavit sworn on Nov. 6, 1956. In it the Nizam had stated without any equivocation that the transfer of the fund was without his knowledge or authority.

F "I say that at no time did I give any direction or sanction or authority . . . to the said Moin . . . or to any other person to transfer the said sum of £1,007,940 9s. or any part thereof to the defendant Rahimtoola or to the Pakistan government or to any person representing the government of Pakistan."

G The Nizam then alluded to the cables later sent to Moin to which we have earlier referred. On the face of the evidence as it now stands, it must in our judgment be taken as clear that the transfer was effected in breach of the duty of Mir and Moin to the Nizam and without any authority from the Nizam in fact.

H We return to the important events which occurred on or about Sept. 16, 1948. The first account was given by Mr. Rahimtoola in the affidavit which he swore on July 15, 1955, in support of his application to stay the present action. Paragraph 3 of that affidavit was in the following terms:

I "On or about Sept. 16, 1948, it was agreed between the said Nawab [that is, Moin] and myself that the said funds should be transferred to me as the agent of the government of Pakistan and by a letter dated the said Sept. 16 the said Nawab instructed the said bank to transfer the funds standing to the credit of the said account to an account in my name. On receipt of such letter on Sept. 20, 1948 the said bank in accordance with the instructions therein contained transferred the said funds then amounting to £1,007,940 9s. to a new account in my name. I accepted such transfer in accordance with the instructions of and as agent for my government and have never claimed any personal interest in the funds so transferred."

It will be seen that Mr. Rahimtoola stated in clear terms that he accepted the transfer "with the instructions of and as agent for my government": and that such was the intention in making the transfer. In answer to that evidence an

affidavit was sworn by a Mr. Gupta, secretary to the Public Works Department of the State of Hyderabad. Mr. Gupta (see para. 7) stated that, as a result of his inquiries, the transfer had been, to the best of his knowledge and belief, without any authority on the part of the Nizam. He also referred to the cabled instructions to the bank of Sept. 28, 1948, asking that the fund should be re-transferred to an account in the name of the Nizam's government. Finally, he expressed his belief that the fund had been transferred to Mr. Rahimtoola and had been received by him as agent and trustee for the Nizam rather than for the government of Pakistan, and submitted that he (Mr. Rahimtoola) should amplify his first affidavit. This last request on Mr. Gupta's part met with a response by Mr. Rahimtoola, who swore on June 19, 1956, a further affidavit expanding the account given in para. 3 of the affidavit which we have already quoted. Thus he said:

"The then Foreign Minister of Pakistan Sir Mohammed Zafrullah Kahn was present at the interview between such representative* and myself and he instructed me to accept the transfer of the said funds. I objected on the ground that the government of Pakistan should not become involved, but my objections were overruled by the said Zafrullah Kahn who directed me to agree to the transfer of the said funds to an account in my name, but to be described as the High Commissioner for Pakistan and also directed me to sign the necessary specimen signature forms and I thereupon agreed to the transfer of the said funds to the account which was subsequently opened in my name and signed the forms. I would never have agreed to the said transfer unless I had been expressly instructed to do so as the High Commissioner of Pakistan and on behalf of my government by the said Zafrullah Kahn under whose instructions I was as High Commissioner bound to act."

Paragraph 5 of this second affidavit and the first part of para. 6 were as follows:

"5. It was never suggested to me that I should accept the said funds on my own account as a private individual as an agent or trustee for the Nizam, but if it had I should have refused to do so as I would have considered it improper to act in such a way while holding the position of High Commissioner since if I had not been acting on behalf of my government it would undoubtedly have been generally supposed that I was. 6. At the time when the said transfer of the said funds took place I knew nothing about them except that Moin and the said Mir Nawaz Jung had the power to give orders to the defendant bank in respect of such funds. I did not know whether they were personal moneys of the Nizam or state moneys or what if any orders Moin or the said Mir Nawaz Jung had been given in relation thereto by the Nizam or what if any formality was required for the transfer thereof to me."

Mr. Rahimtoola went on to state that he had no knowledge at all, and that it did not occur to him to inquire, as to the extent of the authority of Moin or Mir, and finally he said:

"After accepting the said transfer I regarded myself as bound to deal with the account in accordance with the instructions of my government and would have refused to deal with it in accordance with any directions given by the Nizam."

On this material it has been strongly contended by counsel on Mr. Rahimtoola's behalf that the fund was transferred to Mr. Rahimtoola and held by him in no true sense as a third party but as the agent and servant for the purpose of the State of Pakistan—in other words, that the transfer was not made to him because he was the High Commissioner for his country in England, but in his capacity as such. It may be stated that this view of the matter was consistently maintained by Mr. Rahimtoola himself. In July, 1953, pursuant to

* I.e., Moin, as representative of the Nizam of Hyderabad.

A instructions given to him earlier in the same month by the secretary of his government, he requested the bank in writing to transfer the account into the name of his successor, Mr. Ispahani, observing that he held the fund "not in my personal capacity but as agent of my government." In the same sense was the letter written a year later by Mr. Rahimtoola's solicitors to the bank objecting to the latter's compliance with the plaintiffs' request (contained in the letter of B May 17 already mentioned) for a re-transfer of the fund. Mr. Rahimtoola "was concerned", said the letter, "solely as agent for the government of Pakistan" of which he was High Commissioner in the United Kingdom at the relevant time and on whose behalf the moneys were originally transferred to him. To the same effect again was the letter addressed by Mr. Ikramullah, the present High Commissioner in London for Pakistan, to Mr. Rahimtoola's solicitors dated C July 8, 1955, instructing them to "bring to the attention of the court the fact that my government claims to be entitled to the said sum."

It will be convenient at this point to refer briefly to the remaining chronology in the case. The writ in the action was issued in July, 1954, and the statement of claim is dated in the following November. The nature of the plaintiffs' alleged cause of action against Mr. Rahimtoola is for a return of the money as held by D him on trust for the plaintiffs, or alternatively as money due and owing to the plaintiffs, or alternatively, again, as money had and received to the use of the plaintiffs. The bank put in its defence in December, 1954. Leave was given in the following January to serve out of the jurisdiction the first and third defendants, namely, Moin and Mr. Rahimtoola. The first defendant has entered no appearance to the action. Mr. Rahimtoola's motion to stay the proceedings on E the ground that they impleaded the Sovereign State of Pakistan is dated July 19, 1955, and that application was decided favourably to Mr. Rahimtoola by UPJOHN, J., on July 30, 1956.

When the matter was before UPJOHN, J., it was alleged on the part of Mr. Rahimtoola that the plaintiffs had failed to make proper disclosure of the material facts when seeking leave to serve out of the jurisdiction. UPJOHN, J., F expressed himself as satisfied that the failure in this regard on the plaintiffs' part was in no sense due to any intention to mislead the court. The matter is only now relevant on the question of costs if we take a different view from that of the learned judge on the main question in the appeal.

It appears that since the matter was before UPJOHN, J., the State of Hyderabad has altogether ceased to exist. Before its demise, the state duly assigned to the G first plaintiff, the Nizam, all its rights and title to the fund and in the present action.

In this state of facts counsel for the plaintiffs in opening his case before us for the appellant, the Nizam, said two things. First, he submitted that for the purposes of the present application and the attempt by Mr. Rahimtoola to invoke the rule of sovereign immunity, Mr. Rahimtoola must be regarded as a third H party, altogether distinct from the State of Pakistan, whose High Commissioner in London he happened to be in 1948. Under this head of his argument counsel for the plaintiffs emphasised: (i) that Mr. Rahimtoola was not as High Commissioner at the relevant date entitled to personal immunity; (ii) that the office of High Commissioner was for the purpose in hand quite different from that of one of the principal ministers of the State of Pakistan, which might well have so identified its holder with the state itself as to have made a vesting of the fund in I such a holder equivalent in all relevant respects to a vesting in the state itself or in its whole government as such; (iii) that the State of Pakistan must be taken never to have had any beneficial interest whatever in the fund which belonged at all times in equity wholly to the Nizam; and (iv) that the present case, being concerned with a chose-in-action, in regard to which title only could be relevant, was essentially distinct from that of *United States of America & Republic of France v. Dollfus Mieg et Compagnie S.A. & Bank of England* (1) ([1952] 1 All

E.R. 572), where the subject-matter was chattels, namely, gold bars, deposited with the Bank of England by the foreign sovereign states who were held by the House of Lords to be entitled as bailors to an immediate right to their possession and who were not, accordingly, required to prove or even allege any title to them. A

Counsel for the plaintiffs submitted, secondly, that even if the State of Pakistan could be shown to have any right or interest in the chose-in-action, they held such right or interest in the capacity of a trustee only; and that the rule of sovereign immunity would not be recognised by the English court exercising its equitable jurisdiction in regard to trust property, even where the foreign sovereign was the trustee and declined to submit to the court's jurisdiction. B

The answer to these contentions of counsel on behalf of Mr. Rahimtoola—and they informed us that they were also instructed by the State of Pakistan—may be shortly stated. They submitted that since on the evidence it must be taken as proved for present purposes (as the learned judge held) that Mr. Rahimtoola took the transfer of the fund as the agent of the government (or State) of Pakistan, the latter were therefore entitled, according to the ordinary law of principal and agent, to call on Mr. Rahimtoola at any time to deal with the fund as they should direct and (particularly) to transfer it to themselves. On this view the question of beneficial interest was wholly irrelevant. 'On the other hand there was (they said) a true analogy with the *Dollfus Mieg* case (1) since the Sovereign State of Pakistan had at all times the complete control, or the right to complete control, at law of the fund itself as distinct from any beneficial or proprietary interests therein. They said further that the independence of the Chancery Courts in regard to trust property as shown by the decisions has never extended to a case in which the trustee was a foreign sovereign and should not be so extended—nor could it be, without impinging on the status and dignity of the sovereign to a degree wholly inconsistent with the principle of the rule itself. C D

It must be said at once that the situation in this matter of the State of Pakistan has remained somewhat obscure. According to Mr. Ikramullah's letter of July, 1955, from which we have quoted, the state (or its government) claimed to be entitled to the fund, and the same claim was made in his affidavit by Mr. Chambers, a member of the firm of solicitors now acting for Mr. Rahimtoola. In answer to questions which were put to him and which reflected similar inquiries made by UPJOHN, J., counsel for Mr. Rahimtoola informed us that he was instructed not to abate any of those claims. He conceded that there was no evidence at all before the court of any beneficial interest in the fund vested in the State of Pakistan (or its government), and we also understood him to concede that his claim of sovereign immunity was not founded on the subsistence of any beneficial interest in the sovereign; and beyond a peradventure Mr. Rahimtoola has altogether disclaimed such an interest in himself. But it has throughout been the contention of counsel for Mr. Rahimtoola that this question of beneficial interest was irrelevant to the appeal. The right that they have asserted on behalf of the sovereign is a right of control analogous (as they say) to that successfully invoked in the *Dollfus Mieg* case (1); and they drew particular attention to the disavowal by Sir Hartley Shawcross and Mr. Buckley in that case of any proprietary claim on behalf of the foreign sovereign. E F G

It will, therefore, be convenient for us to make at this stage our references to the *Dollfus Mieg* case (1). It may be said that in the *Dollfus Mieg* case (1) all the earlier cases on the subject were cited to, and considered by, the House, particularly the speeches of LORD ATKIN and LORD MAUGHAM in *Compania Naviera Vascongado v. Cristina S.S., The Cristina* (2) ([1938] 1 All E.R. 719). We shall content ourselves with one substantial citation from the opinion of LORD RADCLIFFE ([1952] 1 All E.R. at p. 587): H I

"For myself, I think that the range and purpose of our rule is expressed as well as may be in DICEY'S CONFLICT OF LAWS (3rd Edn.), p. 215: 'The court has . . . no jurisdiction to entertain an action or other proceeding against

(1) any foreign sovereign . . . An action or proceeding against the property of [a foreign sovereign] is . . . an action or proceeding against such person.' This is the rule which SCRUTTON, L.J., quoted with approval in *The Jupiter* (3) ([1924] P. 236 at p. 243). The rule, so expressed, leaves open the question what is an action 'against the property of a foreign sovereign' in any particular case. But I am afraid that the abundant argument that we had in this case as to the application of the words 'of which he is in possession or control', as used by LORD ATKIN ([1938] 1 All E.R. at p. 721) in the *Cristina* case (2), shows that even his summary leaves open as many questions as it settles. In fact, this is not a field in which the law can be set at rest by any neat combination of words. But the rule as expressed in DICEY'S CONFLICT OF LAWS has this advantage. It does make clear that the property of a sovereign enjoys no immunity in legal proceedings except so far as those proceedings amount in one way or another to a suit against the sovereign. If the sovereign is actually named as a party to a suit, the proceedings identify themselves. Even then, I think that it is going too far to say that such a suit must necessarily be arrested. It may depend on the purpose for which the sovereign is made a party. But certainly a special difficulty begins when he is not actually named, but the suit is one which may result in a judgment or order that will affect his interest in some piece of property. Even to say that much begs one important question, for it assumes that he has a valid interest in that property, whereas a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and, indeed, to require him to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do. *The Parlement Belge* (4) ((1880), 5 P.D. 197) is a leading case on this branch of the law, but it does not offer much help on the particular aspect of it with which your Lordships are now concerned because it was common ground throughout the case that the ship was the public property of the Kingdom of Belgium. What the plaintiffs objected to in that case was the staying of an action in rem about the ship, having regard to the uses to which she was put by her sovereign owner. Once it was settled that those uses did not disqualify the owner from taking advantage of the general rule, it was easy to show that the court's order for the arrest of the ship, if made, would be in substance an order against the sovereign.

"But the principle recognised in *The Parlement Belge* (4) has been carried much further since then. It has been applied even when the sovereign had not claimed, let alone proved, that he was the owner of the property which was the subject of the action. It has been regarded as sufficient to stay the proceedings (i) that he had de facto possession of the property (*The Gagara* (5) ([1919] P. 95), *The Jupiter* (3), *The Cristina* (2)) or such rights of direction and control, without possession, as arise from requisitioning (*The Broadmayne* (6) ([1916] P. 64)), and (ii) that the nature of the proceedings is such that, if successful, they would result in an order of the court affecting that possession or those other rights. *The Cristina* (2) is, of course, a decision of this House. In it the other decisions that I have referred to, all unanimous decisions of Courts of Appeal, were reviewed and, as I think, approved. In my opinion, they constitute a principle wide enough in application to be conclusive of the present appeal."

From this passage it sufficiently appears, in our judgment, that the prohibition which is of the essence of the rule, is a prohibition against the assertion by the English court of jurisdiction to entertain proceedings against a sovereign who (or a sovereign state which) is unwilling to submit to such jurisdiction. Whenever, therefore, the rule is invoked in a proceeding to which the sovereign is not

made or sought to be made a party but in which the subject-matter is some property in regard to which the sovereign has or claims some kind of right or interest, the applicability of the rule depends on the extent to which the prosecution of the claim so affects the right or interest of the sovereign "as to amount in one way or another to a suit against the sovereign". The proposition is imprecise, no doubt; but as LORD RADCLIFFE observed, the law cannot be set at rest "by any neat combination of words".

In the *Dollfus Mieg* case (1) the rule was held to be applicable because, notwithstanding the admitted absence of title in the sovereigns and its admitted presence in *Dollfus Mieg et Compagnie*, the sovereigns as bailors of the bars with the bank had vis-à-vis the bank an immediate right to recover their possession with which, inevitably, the continuance of the action would interfere; so that if the sovereigns desired to recover the possession which they formerly had they would be compelled to come to the English court for the purpose (see per VISCOUNT JOWITT, [1952] 1 All E.R. at pp. 580, 581, 582, per LORD PORTER, *ibid.*, at pp. 585, 586; per LORD RADCLIFFE, *ibid.*, at p. 589).

The present proceeding relates not to chattels but to a chose-in-action. It is, therefore, on matters of essential fact distinct from the *Dollfus Mieg* case (1). For where the subject-matter of the proceedings is a chose in action there can be no question, strictly, of possession. *Prima facie* any rights or interests in respect of it must be matters of title. So much has been laid down for us by this court in *Haile Selassie v. Cable & Wireless, Ltd.* (7) ([1938] 3 All E.R. 384). The judgment of the court in that case must clearly be preferred, in our view, to the suggestion that there might be "possession" (in the true significance of that term) of a chose-in-action in the judgment at first instance in the American case of *Bradford v. Chase National Bank of City of New York* (8) ((1938), 24 Federal Supplement 28). If the question depends on some claim of title on the part of the sovereign, then it cannot, in our judgment, suffice that the sovereign has at some time asserted a title to the fund if, when the rule is invoked, there appears no evidence at all in support of such claim—more particularly if it is conceded on behalf of the sovereign's representative that the claim to immunity is not founded on any title or proprietary interest (see, e.g., *Juan Ysmal & Co., Incorporated v. Government of the Republic of Indonesia* (9), [1954] 3 All E.R. 236).

So far, then, counsel for the plaintiffs' first submission would appear to have persuasive force. For if it be said by A that a chose in action is vested in B as agent for and on behalf of himself, A, then it would ordinarily be understood that A claimed to be the beneficial owner. But for the purpose of considering the application of the rule of sovereign immunity as we have tried to express it by reference to LORD RADCLIFFE's opinion, we are not satisfied that the dichotomy between possession and title is necessarily exhaustive, or that it may not be relevant to consider the conception of "control" (a word appearing in LORD ATKIN's well-known statement in *The Cristina* (2) to which LORD JOWITT referred in the *Dollfus Mieg* case (1) ([1952] 1 All E.R. at p. 580) in relation to a chose in action. For if the sovereign be shown in some sense to have "control" of the debt, then the question arises whether, if continuance of the proceedings interfere with that "control", the court will not in substance be asserting jurisdiction over the sovereign himself. It is true that SIR WILFRID GREENE, M.R., in the *Haile Selassie* case (7) used this phrase ([1938] 3 All E.R. at p. 388):

"In the case of a debt such as that with which we are concerned, there can be no question of possession or control . . ."

The circumstances of the debt with which the court was there concerned, however, did not raise at all the point that is raised here, viz., that the State of Pakistan had an unfettered right to require Mr. Rahimtoola, in whom the debt was vested as their agent, to deal with it in all respects as they required. In that sense (if such right existed at the relevant date) the state may sensibly be

A said to have a "control", interference with which would at least compel the state (if they decided to exercise it) to come to the English court. However the "control" is defined, in terms of the law it might certainly qualify as one of those interests "less than a proprietary interest or even than a possessory interest" which VISCOUNT JOWITT thought were not to be confined to ships ([1952] 1 All E.R. at p. 580).

B It was on this point that UPJOHN, J., rejected counsel for the plaintiffs' first argument, being of opinion that the State of Pakistan was "in effect clothed with the legal title to the debt." The conclusion depended on the learned judge's view of the facts in evidence before him, viz., that the transfer of the debt to Mr. Rahimtoola was a transfer to him in his capacity as High Commissioner and as a mere servant or agent of the sovereign state. It is for this reason that the argument before us turned so much on the proper inference to be drawn from the affidavits of Mr. Rahimtoola relating to the meeting on or about Sept. 16, 1948.

C Before we leave the *Dolfus Mieg* case (1) in order to return to that evidence, there was one other point made by counsel for Mr. Rahimtoola on the speeches of VISCOUNT JOWITT and LORD PORTER, on which we should like to make one observation. We refer to the passage where VISCOUNT JOWITT cites and approves language used by JENKINS, J., when the case came before him at first instance (ibid., at p. 581) and to the language of LORD PORTER (ibid., at p. 585): "... it has always to be remembered that governments must act through servants or agents . . . " These passages were invoked in support of the view that the vesting of the fund in an officer or representative of the State of Pakistan should, prima facie at least, be assumed to be necessarily equivalent to a vesting in the state itself. We cannot accept this argument. No doubt in a case of chattels a sovereign state, as distinct from a personal sovereign, must act through individual agents; but in the case of a chose in action, it is not so. Of course individual persons must execute any direction for dealing with the fund; but there would be or have been no difficulty (if such had been the wish of those concerned) in vesting the chose in action itself in the State (or government) of Pakistan, eo nomine, giving to Mr. Rahimtoola the necessary authority to operate the fund on behalf of the state (or government). After all, prior to the transfer, the fund stood in the name of "the government of Hyderabad", Mir and Moin having the right of operation on that government's behalf. None the less the evidence in favour of the conclusion of agency, which we have set forth at length earlier in this judgment, is of a formidable character. In his first affidavit Mr. Rahimtoola stated in terms that he took the transfer as his government's agent. In his expanded account of the meeting Mr. Rahimtoola explained his original objection to taking the transfer on the ground that he thought it wrong that Pakistan should be involved in the matter; but that his objection was overruled by his foreign minister under whose express and compelling directions he took the transfer not (as he said) having any real knowledge of the beneficial ownership of the fund and regarding himself as being bound accordingly to deal with it as ordered from time to time by his government. Mr. Rahimtoola was, after all, the High Commissioner for Pakistan in London and was so described in the bank's books. Moreover, no attempt was made to cross-examine him. Formidable though the effect of the evidence be, we still think that there is force in counsel for the plaintiffs' argument the other way. It is a truism that men may make a bargain, clear enough in terms, without any proper appreciation of its inevitable legal consequences. For our part, however, we find it not easy to suppose that those who took part in the meeting in September, 1948, could have contemplated that on the very next day the State (or government) of Pakistan could have required a transfer of the fund into their own name and thenceforward have arranged, without further reference to the Nizam or any of his representatives, that the fund should be operated by persons of their own choice and nomination. No doubt Mr. Rahimtoola was chosen because as High Commissioner for his

country he was regarded as a person in whom complete trust could be placed. It may well be, also, that the Nizam's representative felt able to rely on the government of Pakistan and their relations with their own High Commissioner as providing additional security for the fund. It appears that Mr. Rahimtoola was regarded as personally well disposed to the Nizam. We note that, according to a letter dated as early as Apr. 4 exhibited to Mr. Gupta's affidavit, it was even at that time suggested that the name of Mr. Rahimtoola should be added to those of Moin and Mir as the persons authorised to operate the account when it stood in the name of the government of Hyderabad.

In all the circumstances it seems to us that there is at least much to be said for the view that the real purpose and intention of the transaction of September, 1948, were that the fund should stand in the name of Mr. Rahimtoola because he was High Commissioner for Pakistan and so long at least as he held that office; but without his being, in the eye of the law, the mere agent of his government or state: and that such might on a full investigation of the facts turn out to be the proper conclusion without thereby involving any real inconsistency with Mr. Rahimtoola's testimony or impeaching in any way his acknowledged good faith or veracity. But whether or not Mr. Rahimtoola took, and was intended to take, the transfer as agent for the State (or government) of Pakistan, the transfer to him in, or by virtue of, his office as High Commissioner cannot be treated, in our judgment, as a transfer to one of the principal officers of the state which would so identify its holder with the state itself as to have made the vesting equivalent for all relevant purposes to a vesting in the state.

Having regard to the view which we have formed on a further point taken by counsel for the plaintiffs in his reply, it is not necessary for us to express a final conclusion on the question whether Mr. Rahimtoola should be regarded as a mere agent, and we prefer for ourselves not to do so. Counsel's further point is a statement of an exception to the general rule that one who holds money or funds as agent for another is accountable only to his principal. The exception arises when, before the agent has in fact accounted to his principal or otherwise altered his position to the same effect, it appears that the payment or transfer was made to the agent under a mistake of fact or in consequence of some wrongful act. It is expressed, substantially in the form which we have used, in *BOWSTEAD'S LAW OF AGENCY* (11th Edn.) at p. 266 and in *1 HALSBURY'S LAWS OF ENGLAND* (3rd Edn.) at p. 233. Its first appearance in the reports seems to have been in *Buller v. Harrison* (10) ((1777), 2 Cowp. 565). In that case insurers had paid insurance moneys to the agent of the assured believing that the loss had been "fair". When they discovered, before the agent had remitted the moneys to his principals, that the loss had in fact been "foul", they claimed to recover from the agent. LORD MANSFIELD said (*ibid.*, at p. 568):

"... the law is clear that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal... Is it conscientious then, that the defendant should keep money which he has got by [his principal's] misrepresentation, and should say, though there is no alteration in my account with my principal, this is a hit, I have got the money and I will keep it?"

LORD MANSFIELD had no difficulty in answering his question in the negative. His decision was followed by LORD ELLENBOROUGH, C.J., in *Cox v. Prentice* (11) ((1815), 3 M. & S. 344), to which counsel for the plaintiffs referred us, and its principle has since been approved in this court by SIR WILFRID GREENE, M.R., in *Gowers v. Lloyds & National Provincial Foreign Bank, Ltd.* (12) ([1938] 1 All E.R. 766 at p. 773), and in the House of Lords in *Kleinwort, Sons & Co. v. Dunlop Rubber Co.* (13), by LORD ATKINSON ((1907), 97 L.T. at p. 265). LORD MANSFIELD in terms referred to mistake; but the principle, at any rate, applies, in our judgment, as it is stated to do in the text-books to which we have referred, whenever the circumstances are such that he who has paid the money might have recovered

it from the agent's principal whether on the ground of mistake of fact, or on the ground stated in the text-books "on account of some wrongful act"—or, indeed, for any other valid reason. Thus, in *Buller v. Harrison* (10) itself the payment by the insurers had been obtained by the principals' misrepresentation. In the case of *Holland v. Russell* (14) ((1861), 1 B. & S. 424), underwriters had paid a shipowner's agent, himself innocent, under a policy which they could have repudiated on the ground of failure by the agent's principals to disclose that the ship insured was already damaged; and in *Re Bourne, Ex p. Bird* (15) ((1851), 4 De G.M. & Sm. 273) (in which case *Buller v. Harrison* (10) was referred to in the course of argument) payment had been made by bankers in respect of forged acceptances, their claim against the acceptor's innocent agent failing because, on the evidence, the agent appeared already to have accounted to his principal. Let it be assumed in the present case that the effect of the transfer of the fund into Mr. Rahimtoola's name in September, 1948, was not indeed equivalent to a transfer to the government (or State) of Pakistan but, nevertheless, was, in the light of his evidence (i.e., that the transfer was made to him as agent for his government; and that he had no knowledge of the true beneficial ownership of the fund and no reason to suppose the existence of any limits on Moin's or Mir's authority to deal with the fund) to make him accountable only to his principal, the government (or State) of Pakistan. In May, 1954, he received the plainest intimation from the Nizam's solicitors that the fund had belonged in equity to the Nizam personally and that the transfer in September, 1948, had been without the Nizam's authority and in breach of his agent's duty—and, if it be necessary, it is not suggested that the intimation was not received also by the government or State of Pakistan. The allegations in Messrs. Stanley Johnson & Allen's letter have since been incorporated into the sworn evidence of the Nizam himself. In the light of these circumstances, counsel for the plaintiffs, in our judgment, makes good his point that, whatever was the earlier situation, at any rate from the date of the receipt of Messrs. Stanley Johnson & Allen's letter, the State of Pakistan could no longer—and certainly cannot at the present time—claim to have the "control", the right to command future dealings with the fund, as against the Nizam, in the absence of any claim of title on their part. On the evidence now before the court the transfer to Mr. Rahimtoola is shown to have been a wrongful act on the part of the Nizam's agents. Alternatively, and even if Moin and Mir supposed that they were acting within their authority (as Mr. Rahimtoola also supposed), this is now shown to have been a mistake. The same result is also, in our view, reached by another route. As a result of the letter of May, 1954, Mr. Rahimtoola (and his alleged principal) received clear notice, since confirmed by the Nizam's sworn testimony, that the fund belonged in equity wholly to the Nizam and that his agents had no power to give that interest away; so that the person in whose name the legal interest stood held it on a resulting trust for the beneficial owner who has intervened, by assertion of his equitable right, before the agent has accounted to his principal. In any case, as it seems to us, the alleged principals not having established in themselves, in UPJOHN, J.'s words, "a scintilla of title", Mr. Rahimtoola now stands in truth as a third party wholly distinct from the government or State of Pakistan.

The point on which, in our view, the Nizam is entitled to succeed before us was not put to, or considered by, the learned judge, who did not have before him the Nizam's affidavit. Had he had the benefit of that argument and had he had that evidence, we think that he might well have decided the case otherwise than he did. For he observed that the result at which he arrived seemed to involve a wrong against the equitable owner. It is relevant to add that LORD MAUGHAM's warning in *The Cristina* (2) that the doctrine of sovereign immunity should be carefully watched was in no way dissented from in the *Dollfus Mieg* case (1). (See, for example, per VISCOUNT JOWITT, [1952] 1 All E.R. at p. 582, and per LORD PORTER at p. 585.)

Counsel for Mr. Rahimtoola's answer to the point was that the question whether or no there had been any mistake, any wrongful act on the part of the Nizam's agents, was one that would ordinarily have to be determined at the trial; and that it was the trial to which the sovereign state declined to submit. He referred again to Mr. Chambers' affidavit and his assertion there of the claim made by the State of Pakistan; he alleged further that the state still retained de facto the control of the fund and pointed to the fact that, notwithstanding what had been said by the Nizam and on his behalf, Mr. Rahimtoola had refused to comply with the Nizam's requests. In our judgment these answers do not suffice. If there were in truth a question of title to be determined the matter might be otherwise; but on the evidence as it stands the statements of the Nizam and those made on his behalf in regard to beneficial ownership and breach of duty by his agents are uncontradicted, and the State and government of Pakistan have shown no "scintilla of title" of any kind. If Mr. Rahimtoola declined to comply with the Nizam's demands, it seems, as matters now stand, that he was not entitled so to do. On the other hand, he would now appear certainly not bound or entitled to obey the orders in regard to the fund of the State or government of Pakistan: and we observe that the bank felt itself, after the correspondence of May, 1954, unable to accept the direction for transfer of the fund into the name of Mr. Rahimtoola's successor, as it had indeed felt after the Nizam's communication of September, 1948.

Having reached this conclusion on the point taken by counsel for the plaintiffs in reply, it is in strictness unnecessary for us to express our view on his second point in opening the appeal, viz., that whatever the right or interest of the State of Pakistan, they hold it as bare trustees merely and that the court will not be deterred from exercising its equitable jurisdiction to administer trust property even though the trustee is a foreign sovereign unwilling to submit to the jurisdiction. But since the question was fully argued and since the present case may go further, we think it right to say that on it our conclusion coincides with that of the learned judge. As LORD RADCLIFFE observed, the practice of the Chancery Courts, as shown by the decided cases, stands somewhat by itself. The only judicial authority, however, for the view that the court will exercise its equitable jurisdiction against a foreign sovereign who is a trustee appears to be that contained in the judgment of LORD LANGDALE, M.R., in *Duke of Brunswick v. King of Hanover* (16) ((1844), 6 Beav. 1), where he said (*ibid.*, at p. 39):

"So where a defendant in this country is called upon to account for some matter in respect of which he has acted as agent for a foreign sovereign, the suit would not be perfect as to parties, unless the foreign sovereign were formally a defendant, and by making him a party, an opportunity is afforded him of defending himself, instead of leaving the defence to his agent, and he may come in if he pleases; in such a case, if he refuses to come in, he may perhaps be held bound by the decision against his agent."

LORD LANGDALE, M.R.'s statement, qualified as it is in any case by the word "perhaps", was, at best, obiter: for in the case before him he allowed the general demurrer to the Duke of Brunswick's bill on the part of the King of Hanover, who was also and for some purpose a British subject. Nor, in our judgment, can counsel for the plaintiffs obtain support for his proposition from *Gladstone v. Musurus Bey* (17) ((1862), 1 Hem. & M. 495), in which an interim injunction was granted against the Bank of England. The language of JAMES, L.J., on the other hand, which UPJOHN, J., cited (see [1956] 3 All E.R. at p. 318)—and which we do not repeat—from *Strousberg v. Costa Rica Republic* (18) ((1880), 44 L.T. 199 at p. 201), seems to us to be against counsel's proposition. The statement of the lord justice assumes that the trust property is "in the hands of a third person or trustee over whom this court has jurisdiction".

We were referred to PROFESSOR HAMSON's note in the *BRITISH YEAR BOOK OF INTERNATIONAL LAW* (1950), Vol. 27, p. 319, of the case before the French Cour

A de Cassation of *L'Affaire Vestwig* (19) (Cass. req. Feb. 5, 1946, S. 1947. 1. 137). In that case, the Supreme French Court appears to have rejected a claim to immunity on the part of the Norwegian State on the ground that the Norwegian government, in whose name the relevant account had stood, was clearly shown to be in the position of a "mandataire" only; and the learned commentator suggested that the decision would be in accordance with the law as adopted by the English courts. We are not satisfied that, assuming the position of a "mandataire" to be equivalent to that of bare trustee under our law, our courts would follow the view of the French courts, at least as a general proposition: and *The Jupiter* (No. 3) (20) ([1927] P. 122), cited by PROFESSOR HAMSON, may fairly be said not to support in fact the contrary view.

C by a foreign sovereign, then it would appear to follow that the court would be prepared to make orders for an account and the like against the sovereign in order to make the jurisdiction effective. We cannot think that this is so. The making of such orders and the penal consequences which ordinarily attach to their neglect would appear to be in direct conflict with the English courts' duty to respect the status and dignity of the foreign sovereign which, as we understand it, is at the root of the rule itself.

E We add in conclusion a word as to the position of the bank. Counsel, on the bank's behalf, supported on the main question the argument of the plaintiffs; but he further submitted that (as the learned judge decided) if the case for a stay were made good by Mr. Rahimtoola, then the bank also should be entitled to the benefit of the stay. The bank is, after all, in the position of a debtor and, as such, desires (naturally enough) that it should be determined to whom the money properly belongs, and should, if demanded, be paid. If the proceedings were stayed against Mr. Rahimtoola but allowed to proceed against the bank alone, then the latter would be exposed to a real risk of being twice vexed in respect of the same claim. Having regard to the view which we have formed, it is unnecessary for us to express any view on this point; and we do not do so. We think, for the reasons which we have given, that on the facts now before the court Mr. Rahimtoola fails to make good a case for a stay of proceedings at this stage. In our judgment, the appeal should be allowed.

G ROMER, L.J.: The point which I propose first to consider, is one which was much canvassed in argument before us, viz., as to the capacity in which the defendant Mr. Rahimtoola was acting when he agreed on Sept. 16, 1948, to accept a transfer of the funds which were then standing to the credit of the government of the Nizam of Hyderabad at the Westminster Bank, Ltd. The question is of obvious importance in relation to the case as a whole. Three different views of the matter seem to be possible: (i) that he was acting as a private individual; (ii) that he was acting as agent for Pakistan; and (iii) that he was acting as the organ or alter ego of Pakistan.

I There were only three persons present at the interview at which the transfer was agreed on, namely, the defendant Jung (who is here referred to as "Moin"), Mr. Rahimtoola, and Sir Zafrullah Kahn, who was at that time the foreign minister of Pakistan. Of these three gentlemen, only Mr. Rahimtoola has given evidence on this application. In his first affidavit, sworn on July 15, 1955, Mr. Rahimtoola stated:

I "On or about Sept. 16, 1948, it was agreed between the defendant (Nawab Moin Nawaz Jung) and myself that the said funds should be transferred to me as the agent of the government of Pakistan and by a letter dated the said Sept. 16, the said Nawab instructed the said bank to transfer the funds standing to the credit of the said account to an account in my name. On receipt of such letter on Sept. 20, 1948 the said bank in accordance with the instructions therein contained transferred the said funds then amounting to £1,007,940 9s. to a new account in my name. I accepted

such transfer in accordance with the instructions of and as agent for my government and have never claimed any personal interest in the funds so transferred."

In a further affidavit, which Mr. Rahimtoola swore on June 19, 1956, he said that Sir Zafrullah Kahn was present at the interview on Sept. 16, and that Sir Zafrullah instructed him to accept the transfer of the said funds. The affidavit proceeds:

"I objected on the ground that the government of Pakistan should not become involved but my objections were overruled by the said Zafrullah Kahn who directed me to agree to the transfer of the said funds to an account in my name but to be described as the High Commissioner for Pakistan and also directed me to sign the necessary specimen signature forms and I thereupon agreed to the transfer of the said funds to the account which was subsequently opened in my name and signed the forms. I would never have agreed to the said transfer unless I had been expressly instructed to do so as the High Commissioner of Pakistan and on behalf of my government by the said Zafrullah Kahn, under whose instructions I was as High Commissioner bound to act . . . It was never suggested to me that I should accept the said funds on my own account as a private individual as an agent or trustee for the Nizam but if it had I should have refused to do so as I would have considered it improper to act in such a way while holding the position of High Commissioner since if I had not been acting on behalf of my government it would undoubtedly have been generally supposed that I was . . . After accepting the said transfer I regarded myself as bound to deal with the account in accordance with the instructions of my government and would have refused to deal with it in accordance with any directions given by the Nizam."

Mr. Gupta, who was secretary to the Public Works Department of Hyderabad State, swore an affidavit in which he expressed a certain scepticism with regard to Mr. Rahimtoola's evidence, but as Mr. Rahimtoola was not cross-examined on his affidavits, and there is no contrary evidence, his account of the events of Sept. 16, 1948, must be accepted on this application as true. That being so, the plaintiffs contend that the proper inference to be drawn is that Moin approached Mr. Rahimtoola as a private individual and that the only relevance of his office of High Commissioner for Pakistan was that it showed him to be a man of position and integrity and therefore, in the eyes of Moin, a fit custodian of the fund which was to be committed to his control. I cannot, for myself, accept this view of the matter for it is quite inconsistent with Mr. Rahimtoola's statement, unequivocally sworn to more than once in his affidavits, that he accepted the transfer by the direction of his superior, Sir Zafrullah Kahn. It is obvious that he wished to have nothing to do with the matter, and had he been acting in his private capacity he could, and would have, rejected Moin's suggestion; and the fact that he regarded himself as subject to Sir Zafrullah's orders in the matter demonstrates, as I think, beyond any real doubt that he accepted the transfer in an official capacity and as the servant or agent of Pakistan. It is to be noted, further, that in July, 1953, Mr. Rahimtoola received from the Pakistan government instructions with regard to the fund which he endeavoured, though unsuccessfully, to carry into effect; and this confirms that his nomination to the account was not private but official. I, therefore, cannot accept the contention of the plaintiffs that Mr. Rahimtoola took control of the fund in 1948 as a private individual. On the other hand there is, in my opinion, no sufficient evidence that he took it, or purported to take it, as the representative of Pakistan in the sense that he ought properly to be regarded as the alter ego of the state. It is obvious that it is not every servant or agent of a sovereign state that can be regarded as the equivalent of the state itself. It appears to me that the question

A must in general be one of evidence, and no evidence was adduced by the defendants or by Pakistan to show that it was the state itself which was accepting the transfer of the fund through the person of its High Commissioner; nor, in my opinion, does the fact that Mr. Rahimtoola held that office give rise to any prima facie presumption that such was the case.

In my judgment, accordingly, such interest as became vested in Mr. Rahimtoola in relation to the fund was taken by him as the servant or agent of Pakistan and not in his personal capacity or as a manifestation of the state. Of what, then, did that interest consist? It is quite clear on the evidence that Moin had no beneficial interest in the money and could not therefore transmit one. Mr. Rahimtoola says in his second affidavit that he did not know whether the fund was the personal money of the Nizam or state money, from which the inference is that he knew it to be either the one or the other. In any case Mr. Rahimtoola claims no beneficial interest in the fund and never has done. Suggestions were put forward in July, 1954, and again in July, 1955 (see exhibits "E.M.C.2" and "E.M.C.1.") on behalf of the government of Pakistan to the effect that they claimed to be beneficially entitled to the fund, but as no attempt has been made to substantiate the claim, and as it forms no part of the defendants' case on this motion, it should, in my judgment, be disregarded for present purposes; on the material now before us the claim seems, in any case, to be a somewhat improbable one. On the footing, then, that no beneficial interest in the fund passed to Mr. Rahimtoola or to Pakistan when it was transferred to Mr. Rahimtoola's control such interest, as a matter of legal consequence, remained after Sept. 16, 1948, where it had been before, namely, in the plaintiffs; and there is nothing to suggest that this legal result was contrary to the intention of any of the parties concerned.

The position, therefore, after the new account was opened in Mr. Rahimtoola's name would appear to be as follows: (a) the legal title to the credit balance on the account was vested in Mr. Rahimtoola; (b) as he took such title as the servant or agent of Pakistan that state had the right to control Mr. Rahimtoola in the disposition of the legal title and to call on him to transfer it to the state or as it should direct; and (c) the entire beneficial interest in the fund remained in the plaintiffs under and by virtue of a resulting trust.

It is convenient at this point briefly to consider the scope of the doctrine of sovereign immunity on which the defendants rely in answer to these proceedings. It is stated as follows in DICEY'S CONFLICT OF LAWS (6th Edn.), at p. 131:

G "The court has . . . no jurisdiction to entertain an action or other proceeding against (1) any foreign sovereign . . . An action or proceeding against the property of [a foreign sovereign] is . . . an action or proceeding against such person . . ."

H The rule as so stated was approved by LORD RADCLIFFE in *United States of America v. Dollfus Mieg et Compagnie* (1) ([1952] 1 All E.R. 572 at p. 587). If it applies to the present action at all it can only be on the footing that the action is one against the property of Pakistan for, as the learned judge correctly pointed out, the sovereign is not directly impleaded. In *Compania Naviera Vascongado v. Cristina S.S., The Cristina* (2) ([1938] 1 All E.R. 719) LORD MAUGHAM said (at p. 739) that if a foreign state

I ". . . is, rightly or wrongly, in possession of property in this country, no action can be brought against it by persons claiming title to, or any interest in, such property."

The doctrine is not, however, limited to cases where the state has possession of property; for, as LORD WRIGHT observed in the same case (*ibid.*, at p. 732), the interest which it claims may be "not merely not proprietary but also not even possessory". A good example of the accepted range of the principle may

be found in certain of the requisitioning cases, in which the state which requisitioned a ship acquired direction and control over it without being in possession of it and without acquiring any proprietary interest in it. An example of such a case was *The Broadmayne* (6) ([1916] P. 64). The question is, then, whether the interest which Pakistan took in the fund, through its agent Mr. Rahimtoola, as I have attempted earlier to define that interest, can be regarded as "property" within DICEY's formula. It was the right of a principal to control the legal title of its agent to a debt; and a debt in which neither principal nor agent had any beneficial interest. True it is that Pakistan had the legal right to compel Mr. Rahimtoola to withdraw the money from the bank and to hold it to the order of the state; or to transfer the legal title to the state or in accordance with its directions. As, however, these vicarious rights of Pakistan in relation to the fund were unaccompanied by any scintilla of beneficial interest, it seems to me that to regard them as constituting "property" in the relevant sense of that term would be to extend the principle of sovereign immunity into an entirely novel field; for even in the cases of requisitioned ships to which I have referred the state which requisitioned them acquired a control which operated to its own advantage and benefit. In the present case the indirect control over the fund which Pakistan acquired in 1948 was not attended by any such advantage or benefit to itself. In addition to these considerations I would add that if Pakistan had been forced to resort to litigation in this country for the purpose of compelling Mr. Rahimtoola to transfer the legal title to the state, I am far from satisfied that the court would have made an order on him so to do without notice to, and against the wishes of, the apparent beneficial owners of the fund. Whatever dominion and control Pakistan had over Mr. Rahimtoola as being the agent of the state he was, in relation to the plaintiffs, a bare trustee for them of the legal title; and it is not the practice of our courts, in such a case, to direct a transfer of the legal estate in the absence of the beneficiaries and without regard to their wishes. In these circumstances, and in view of LORD MAUGHAM's disinclination (as appears from his speech in *The Cristina* case (2)) to extend the doctrine of sovereign immunity, a disinclination which was shared by VISCOUNT JOWITT and by LORD TUCKER in the *Dollfus Mieg* case (1), I should, for myself, hesitate to hold that the somewhat remote and detached interest which Pakistan had in relation to the fund ought properly to be regarded as "property" within the rule as stated in DICEY. It is not, however, necessary to express any concluded view as to this because, in my judgment, the claim which the defendants found on the principle of sovereign immunity fails for a different reason.

It was sufficiently established by the evidence which was before the learned judge that the control which Moin had over the deposit account at the Westminster Bank, on and before Sept. 16, 1948, was in the nature of a fiduciary power which had been vested in him by the plaintiffs. Whether he could, on his own authority, have exercised that power by withdrawing money from the bank for the purpose of purchasing machinery for the Nizam or his government I am not altogether sure; but, if he could have done so, that was the limit of his independent initiative in relation to the account. Certain it is that he could not, without the plaintiffs' authority, apply the fund to any other purpose, nor could he properly transfer the control of the account to anybody else. When the matter was before the learned judge there was no evidence that the plaintiffs had not authorised the transfer of the account to Mr. Rahimtoola, and UPJOHN, J., quite rightly declined to act on the assumption that this transfer was effected without the plaintiffs' authority. Before us, however, an affidavit by the Nizam was, by leave, put in, and this established that the transfer was carried out wholly without the plaintiffs' consent and even without their knowledge. It accordingly follows that the action of Moin in passing the control of the fund over to Mr. Rahimtoola, as Pakistan's agent was, vis-à-vis the plaintiffs, unauthorised and wrongful. In these circumstances counsel for the plaintiffs

A relied on a principle which is stated in 1 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), at p. 233, para. 522, in the following terms:

B "The receipt of money from a third person by an agent on his principal's behalf, does not in itself render the agent personally liable to repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not. But if a third person pays money to an agent under a mistake of fact, or in consequence of some wrongful act, the agent is personally liable to repay it, unless, before the claim for repayment was made upon him, he has paid it to the principal or done something equivalent to payment to his principal."

C The latter part of this proposition has been recognised or applied in a number of cases ranging from *Buller v. Harrison* (10) ((1777), 2 Cowp. 565) to *Gowers v. Lloyds & National Provincial Foreign Bank, Ltd.* (12) ([1938] 1 All E.R. 766). The relevant authorities have been fully reviewed in the judgment of LORD EVERSHED, M.R., and BIRKETT, L.J., which I have had the advantage of reading in advance. It appears to me that all the essential features of the principle existed in the present case. Moin wrongfully transferred the credit balance of the plaintiffs' deposit account to Mr. Rahimtoola as Pakistan's agent. By letter dated May 17, 1954, Messrs. Stanley Johnson & Allen, the solicitors acting for the plaintiffs, wrote to Mr. Rahimtoola informing him that the fund which had been transferred to his account had at all material times been, and still was, the property of the plaintiffs, and that they now required the sums in question to be paid to them or to their order. By this date Mr. Rahimtoola had not paid the money to his principals, Pakistan, nor had he done, or been required by them to do, anything equivalent thereto. In accordance with the principle in question, it would seem, therefore, to follow that on receipt of the letter of May 17, 1954, Mr. Rahimtoola became personally liable to repay the money to the plaintiffs. From that time onwards, therefore, the right of Pakistan, as principals, to call for a transfer by their agent Mr. Rahimtoola of the legal title had been superseded F by the exercise of the plaintiffs' right to call for it themselves.

The only way, as it seems to me, that the defendants could successfully escape from this position would be by identifying Mr. Rahimtoola with the State of Pakistan. If the state itself had had the legal title to the fund, it is true that the plaintiffs could not have sued here for the transfer of the title to themselves without directly impleading the state. The defendants contend that as Mr. G Rahimtoola was the organ of Pakistan the same result must follow. As I have already said, however, the defendants have not proved this, nor is the contention sufficiently supported by any presumption. Reliance was also sought to be placed by the defendants on the decision and reasoning of the *Dollfus Mieg* case (1), and it was said that even if Mr. Rahimtoola was no more than the servant or agent of Pakistan, nevertheless the state had vicarious possession of the fund, through him, that this possession continued down to the date of the writ, and that Messrs. Stanley Johnson & Allen's letter of May 17, 1954, was ineffective to disturb it. In my judgment, however, there are differences of H fundamental importance between the *Dollfus Mieg* case (1) and the present. The subject-matter of the former case was gold bars, namely, chattels, and it is clear that a sovereign state can have possession of chattels through any agent I appointed for the purpose. A credit balance on an account with a bank, however, is a chose in action and cannot, as such, be the subject of a possessory, as distinct from a legal or equitable, title (*Torkington v. Magee* (21) ([1902] 2 K.B. 427 at p. 430); *Colonial Bank v. Whinney* (22) ((1885), 30 Ch.D. 261; *Re V.G.M. Holdings, Ltd.* (23) ([1942] 1 All E.R. 224 at p. 226)). The *Dollfus Mieg* case (1) accordingly provides the defendants, in my opinion, with no sufficient substitute for showing, which they have failed to do, that Mr. Rahimtoola was the alter ego of the state. It is to be observed further, with reference to *Dollfus Mieg* (1), that

a state can have possession of chattels only through an agent. On the other hand it can certainly have a bank account in its own name, as the Nizam's government of Hyderabad formerly had with the Westminster Bank; and the fact that Pakistan at no time took steps to have the fund now in question put into an account in its name or under its direct control is perhaps in itself indicative of the view that Mr. Rahimtoola was not its organ but its agent. A

In my judgment, accordingly, the principle of *Buller v. Harrison* (10) applies and is a sufficient answer to the third defendant's motion. It appears to me, however, that an equivalent result may be achieved by proceeding along a somewhat different route. The effect of the transfer of the fund by Moin to Mr. Rahimtoola was, in my judgment, as I have already said, to give rise to a resulting trust in favour of the plaintiffs. It is elementary law that a trustee is bound to deal with trust property in accordance with the directions of the sole party beneficially interested therein or of the parties collectively if there are more than one of them. Applying that principle, then, to the facts of the present case Mr. Rahimtoola was bound, at all times after Sept. 16, 1948, so long as the fund remained under his control and he had received no contrary instructions from his principals, to comply with such directions as he might receive from the beneficial owners of the fund—whom he knew to be the plaintiffs or one of them. From this it follows that he came under an immediate obligation, enforceable by our courts in the exercise of their equitable jurisdiction, to comply with the requirements of the letter of May 17, 1954, which he received from the plaintiffs' solicitors. This obligation overrode and superseded, in my opinion, any duty arising from his agency to obey directions given to him subsequently by his principals; for his agency had become subordinated to his trusteeship. B C D E

Either, then, on this ground, or on the principle of *Buller v. Harrison* (10), the defendants are, in my judgment, precluded from successfully resting on the doctrine of sovereign immunity as an answer, per se, to these proceedings. In these circumstances it becomes unnecessary to form any definite conclusion whether that doctrine is in any event displaced, as counsel for the plaintiffs contended, by reason of an exception which our law has engrafted on it. That exception, stated in the briefest way, is that our courts will not be deterred from administering a British trust by reason only that a beneficial interest in the trust fund is claimed by a sovereign state. Counsel for the plaintiffs submitted that that exception applies to the present case in that the credit balance on Mr. Rahimtoola's account is a trust fund, that it is within the jurisdiction, and that the court has the right and duty to administer the trusts affecting it notwithstanding the claim which is made in relation to it on behalf of Pakistan. As I say, it is not necessary to express any final opinion on this exception to the doctrine inasmuch as, in my view, the doctrine itself does not apply. My provisional opinion is, however, that the so-called "trust" cases are not relevant to the circumstances of the present litigation. In the first place Mr. Rahimtoola does not seem to me to be sufficiently dissociated from Pakistan for the purposes of the exception. I think those cases are only properly applicable where the court finds a trust fund in the hands of a person who is an independent trustee, and that they should not be extended to cases in which the person who controls the fund combines the character of trustee with that of agent for the foreign state which is setting up an interest in the fund. The contrary view, as it seems to me, would stretch what has hitherto been regarded as an exception to the doctrine to a point at which it ceases to be reconcilable with the doctrine itself. An additional reason why I should hesitate to hold that the exception applies is that Pakistan has not sought to establish any beneficial interest in the fund; its claim, as urged before the court, is limited to the legal title to the fund and is founded on agency, and not the trusteeship, of Mr. Rahimtoola. Such a position, as I am inclined to think, is outside the scope and ratio alike of the relevant authorities which were brought to our attention. F G H I

A Evidence was before us which was not before UPJOHN, J., and this additional evidence enabled arguments to be presented to us which were not, and could not have been, presented to him. In the light of this further material I have reached the conclusion that the principle of sovereign immunity affords the defendants no answer in itself to the plaintiffs' action, from which it follows that I agree that the appeal should be allowed.

B *Appeal allowed. Leave to appeal to the House of Lords granted.*

Solicitors: *Stanley Johnson & Allen* (for the plaintiffs); *Freshfields* (for the second defendant); *Sanderson, Lee, Morgan, Price & Co.* (for the third defendant).

C [*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

D
E
LONDON INVESTMENT AND MORTGAGE CO., LTD. v.
INLAND REVENUE COMMISSIONERS.
LONDON INVESTMENT AND MORTGAGE CO., LTD. v.
WORTHINGTON (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.JJ.), December 4, 5, 6, 1956.]

F *Income Tax—Profits—War damage value payments—Property dealing company—Damage to properties comprising stock-in-trade—Whether value payments part of trading receipts—War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 66 (1)—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Case I—War Damage (Public Utility Undertakings, etc.) Act, 1949 (12, 13 & 14 Geo. 6 c. 36), s. 28. Profits Tax—Computation of profits—War damage value payments—Whether to be included in computing profits of property dealing company.*

G Having paid the compulsory war damage contributions during the war, the taxpayers, a property dealing company, received value payments under the War Damage Act, 1943, in respect of their properties damaged by enemy action. They disposed of some of the properties but retained others as part of their stock-in-trade and either were having them rebuilt or would have them rebuilt. Under the War Damage Act, 1943, contributions made and indemnities given under Part I were to be treated for all purposes as outgoings of a capital nature (s. 66 (1)) and expenditure on making good war damage was not deductible in computing profits for income tax purposes (s. 113 (1) as superseded by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949). On the question whether the value payments should be included in the receipts of the taxpayers' trade for the purposes of their assessments to income tax under Case I of Sch. D, and to profits tax,

I **Held:** the value payments should properly be treated as part of the taxpayers' trading receipts, since they were money into which their stock-in-trade had been converted.

J. Gliksten & Son, Ltd. v. Green ([1929] A.C. 381) and *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* ((1927), 96 L.J.K.B. 735) applied.

Decision of UPJOHN, J. ([1956] 2 All E.R. 613) reversed.

[As to compensation received being a trade receipt for tax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 126-128, paras. 237, 238; and for cases on the subject, see DIGEST Supp.]

For Case I of Sch. D, s. 123 of the Income Tax Act, 1952, replacing Case I of Sch. D to the Income Tax Act, 1918, see 31 HALSBURY'S STATUTES (2nd Edn.) 116.

For the War Damage Act, 1943, s. 66 (1), and the War Damage (Public Utility Undertakings, etc.) Act, 1949, s. 28, see 26 HALSBURY'S STATUTES (2nd Edn.) 543, 662.]

Cases referred to:

- (1) *Gliksten (J.) & Son, Ltd. v. Green*, [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 14 Tax Cas. 364; Digest Supp.
- (2) *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.*, (1927), 96 L.J.K.B. 735; 137 L.T. 426; 12 Tax Cas. 927; Digest Supp.
- (3) *Inland Revenue Comrs. v. Scottish Central Electric Power Co.*, (1931), 15 Tax Cas. 761.
- (4) *Fry v. Salisbury House Estate, Ltd.*, *Jones v. City of London Real Property Co., Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.
- (5) *Seaham Harbour Dock Co. v. Crook*, (1931), 16 Tax Cas. 333; sub nom. *Crook v. Seaham Harbour Dock Co.*, 96 J.P. 13; Digest Supp.
- (6) *Kirkness v. Hudson (John) & Co., Ltd.*, [1955] 2 All E.R. 345; [1955] A.C. 696; 36 Tax Cas. 28, 57; 3rd Digest Supp.

Appeal.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments to income tax under Sch. D to the Income Tax Act, 1918, made on them for each of the years 1948-49 and 1949-50 in the sum of £30,000, and against assessments to profits tax of £7,500 for each of the accounting periods ending on Mar. 31, 1948, and Mar. 31, 1949. The question for determination was whether value payments made to the taxpayers, who carried on the trade of property dealing, under the War Damage Acts, 1941 and 1943, were receipts of their trade required to be brought into account in computing the balance of their profits and gains for taxation purposes, and, if so, to which of their trading years the payments should be assigned.

The taxpayers were a property dealing company and had sustained war damage to certain of their properties. Under the War Damage Acts, 1941 and 1943, they had received value payments from the War Damage Commission in respect of several of these properties. They had subsequently disposed of some of the properties, freehold and leasehold, but had retained the remainder as part of their stock and were either having them rebuilt or to have them rebuilt. In their accounts they placed any value payment received in a suspense account called the value payments account, against which they charged any money spent in making good war damage to the properties.

The taxpayers contended that, by implication from the provisions of s. 66 and s. 113 of the War Damage Act, 1943 (s. 113 subsequently retrospectively replaced by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949), as applied to their company, the value payments were receipts of a capital nature and ought not to be brought into their accounts as trading receipts. The Crown contended that the payments were ordinary trade receipts and that the prohibition of the deduction of war damage contributions in computing profits for income tax purposes in s. 66 (1) of the War Damage Act, 1943, made no difference to their nature, since they represented stock-in-trade of the taxpayers converted into cash. The commissioners held that the payments were *prima facie* to be brought into account as receipts of the taxpayers' trade, since the properties were part of their stock-in-trade, compensation for the loss of which was a trading receipt notwithstanding s. 66 (1) of the Act of 1943. But they

A further found that, where the taxpayers expended money on repairing or rebuilding properties damaged or destroyed, s. 113 of the War Damage Act, 1943, provided in effect that the expenditure was not to be deducted to the extent to which it was recouped by payments received under the Act, with the result that in effect the taxpayers would have to include them twice (if including them in their receipts and deducting the same sum from expenditure) which they held s. 113 clearly implied should not follow. They therefore held that the taxpayers should in general include payments received under the Acts but not where the property had been or was to be repaired or rebuilt, when the payments should not be included but should be deducted from the expenditure on rebuilding. On appeal, UPJOHN, J. ([1956] 2 All E.R. 613) held that the value payments were not part of the taxpayers' trading receipts for taxation purposes, since they were received by the taxpayers in their capacity as owners of the land, and not as a part of the taxpayers' trading operations. The Crown appealed.

J. Senter, Q.C., and D. C. Miller for the taxpayers.

Geoffrey Cross, Q.C., and Sir Reginald Hills for the Crown.

D LORD EVERSHERD, M.R.: These four cases have raised a single point for our consideration, which may be stated as follows: Where a company which carries on the trade or business of property dealing receives from the War Damage Commission a value payment in respect of a property held by the company in the course of its trade, is that value payment to be treated as part of the company's annual profits or gains arising to it from its business within the meaning of Sch. D, now incorporated into s. 122 of the Income Tax Act, 1952? A question as regards profits tax is also raised in each case but we were informed that the answer to the question relating to income tax necessarily involves also the answer to the question relating to profits tax, and I shall therefore follow the learned judge, UPJOHN, J., in delivering a single judgment in all four cases, and I shall confine my observations to the impact of the Income Tax Acts on this value payment.

F The case has been one of great difficulty. One reason is that on either view of it the conclusion inevitably produces, or is capable of producing, anomalies. For example, if the view of the Crown is correct, then the following might be the consequence. Suppose a property of a value of £5,000 owned by a property company is wholly destroyed by enemy action. Suppose that the sum of £5,000 is paid in due course by the War Damage Commission as a value payment in respect of that property. Finally, suppose that the company, though under no obligation to do so in the case of value payments, elects to reconstruct or rebuild the premises and spends £5,000 in doing so. As counsel for the taxpayers demonstrated, on the hypothesis again that the Crown's argument should prevail, the result of the various relevant provisions of the War Damage Acts would be that the company on the one hand could not deduct as a legitimate expense for income tax purposes the £5,000 expended by it on reconstruction, but yet it would have to pay income tax in respect of the £5,000 which it received from the commission. Thus, assuming for simplicity that income tax be taken as 10s. in the £, the entire sum received from the War Damage Commission would have to be repaid, in effect, by way of tax. Not unnaturally, counsel stressed the obvious injustice of such a result (for I think it might be so described), which he characterised as being really a matter of double taxation, though, with all respect to him, I am not sure that it ought strictly to be so described.

I On the other side, if in the same example there were no rebuilding or reconstruction, but the company were to sell the vacant site, the £5,000 would remain perpetually franked, so far as can be seen, from any possible impost in the way of income tax. Although it could not be suggested, I think, that that £5,000 became part of the company's fixed capital, yet it would not be liable

ever to be brought into account for tax purposes. That again would appear to be anomalous. A

One other matter of fact has an important bearing on the proper result to be reached in this case. We are dealing with a company, the taxpayers, whose trade or business is that of property dealing, so that property, whether freehold or leasehold, will be the circulating capital or the stock-in-trade in common parlance of the taxpayers' trading operations. According to ordinary accounting practice, if I correctly apprehend it, the value of the stock-in-trade on hand would be brought into account at the beginning of each year. After items giving sales and purchases there would be a corresponding item on the other side of the account showing what remained in hand at the end of the accounting period. If that is right, it would appear to follow that, if the value of a property were reduced from £5,000 to £500 through destruction by enemy action, then for accounting and therefore for tax purposes the value of the property would be reduced in the accounts from £5,000 to £500, and there would have been a loss in value of the stock-in-trade which would be reflected in the final liability for income tax. B C

Though the matter is not directly before us, it may be relevant to mention cost of works payments. The scheme of the war damage legislation, particularly to be found in s. 6 and s. 7 of the War Damage Act, 1943, provides that value payments are appropriate in cases of total loss; they do not proceed on the footing that the payee will rebuild or reconstruct the damaged property. Cost of works payments are made in cases other than those of total loss, and are paid in practice, and are contemplated plainly by the language of the statute as being payable, only when work of reconstructing is done and by way of recoupment of cost so far the payments will recoup it. D E

Counsel for the taxpayers made the point that, if the Crown were right in its contention, it would appear also to follow that cost of works payments would be liable to tax. I am inclined to think that the answer to that criticism is to be found in the illustrative figures given by counsel for the Crown, showing what in practice would happen in such a case. Those figures indicate that the cost of repair, which cannot be deducted as such for the purposes of income tax liability, would be offset by the cost of works payment received and so in effect would be eliminated by it, and no question on either side of the account would arise in such a case. F

However that may be, I propose to confine myself strictly to the problem of a value payment with which we are concerned. The Special Commissioners, in an attempt to mitigate the hardship of the type of instance which I have described, made a qualification on their determination in favour of the Crown. The qualification is expressed in these words: G

"We hold that the [taxpayers] should in general include payments received under the War Damage Act, but that where a property has been, is being, or is intended to be repaired or rebuilt sums received in respect of it should not be included as receipts, but should be deducted from the amount expended on rebuilding." H

If I correctly follow it, that form of words supposes that in an account the war damage value payment would be treated in the way described in the case of a cost of works payment. Counsel for the Crown has observed that the laudable attempt of the Special Commissioners to achieve a just conclusion unfortunately involves certain grave administrative difficulties. Not thereby discouraged, counsel for the Crown at an earlier stage suggested what I might call a means of gilding the philosophic pill, the adoption of which would inevitably involve judicial legislation no less than the method adopted by the Special Commissioners. The court cannot properly indulge in those exercises, however much they may be tempted to do so. We must decide, for better or worse, wholly in I

A favour of the Crown or wholly in favour of the taxpayers. Legislation to gild the pill is a matter for Parliament.

In his very full and careful judgment, UPJOHN, J., clearly indicated his own difficulty in the matter. Contrary to the determination of the Special Commissioners, he concluded that, by the necessary implication of the war damage legislation, these value payments ought to be treated as exempt in the hands of the recipient in any capacity (as I think it follows) from liability to computation for income tax purposes. I have reached the contrary conclusion, not only with diffidence, because I part company from UPJOHN, J., but also with some reluctance because, although there are undoubtedly anomalies either way, I think the hardship of the decision to which I have felt compelled to come is the greater of the two anomalies. However, that again must be a matter for legislation—subject only to this, that, no doubt the Revenue authorities can properly exercise a certain discretion in assessing the taxpayers and other companies similarly placed.

The arguments put forward proceed from this. There is here a property company, the taxpayers, whose properties are their liquid or circulating capital or their stock-in-trade, and it is urged strongly by counsel for the Crown that prima facie a sum of money received by way of compensation for the loss or destruction of part of the circulating capital or of the stock-in-trade is something which is received by the taxpayers and arises to them from their trade. I think that counsel for the taxpayers in the end was not disposed to quarrel with that as a general proposition. I asked him several questions at the beginning of his argument, and, having regard to the authority of *J. Gliksten & Son, Ltd. v. Green* (1) ([1929] A.C. 381) and *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (2) ((1927), 12 Tax Cas. 927), he was disposed to concede that prima facie that might well be the result, though I do not forget that in some respects he qualified the general implications of those cases. He did say, however, and said rightly, as I think, that the decision in this case must depend on the effect of the war damage legislation. His argument can be posed thus: the war damage legislation properly construed gives, and was intended by Parliament to give, a particular characteristic, relevant for present purposes, to value payments paid to contributors under the Acts. Counsel founds that conclusion on the language of the war damage legislation itself, and it is on that part of his argument that I have felt compelled to take a different view. It may be that the war damage legislation in this respect failed to be exhaustive. Whether it is fair to describe the result as a *casus omissus* is neither here nor there, but I have been forced to the conclusion that the implication of the Acts, as they are expressed, has not been fully apprehended in this respect by Parliament, if Parliament wished to avoid the conclusion for which the Crown is arguing.

In the *Gliksten* case (1) a trader was trading in timber. Certain of his stock-in-trade, timber, was destroyed by fire. Since it had been insured the trader received from the insurers a substantial sum of money as compensation for the loss of the timber, a sum which, having regard to the current increases in timber values, was largely in excess of the book value of the timber destroyed. The House of Lords held that, since the trader's business operations in essence consisted of the purchase and subsequent resale or turning into money of timber with a view to making profits, what had happened must be treated in all relevant respects as any other case in which timber had been replaced by cash, as was the intended result of sales. As counsel for the taxpayers has pointed out, it is observed in several passages in the judgments in the Court of Appeal as well as in the speeches in the House that the insurance of these stocks would be itself a natural business operation; but I do not think that that circumstance is vital to the principle of the conclusion.

That much is shown clearly enough, I think, from the *Newcastle Breweries* case (2). The stock-in-trade there in question consisted of rum, and under war-

time legislation the Admiralty compulsorily acquired stocks of rum for which, after a good deal of protracted battling, a considerable sum of compensation was paid. Again I think that counsel for the taxpayers is justly entitled to say that the sum of money was received as though it had been the proceeds of a sale. The compulsory acquisition was treated for the purposes in hand as analogous to a sale. But the point of my reference to the *Newcastle Breweries* case (2) is to show that the circumstance in the *Gliksten* case (1) that insurance was a natural business operation cannot have been vital, since it could not possibly be suggested that the result of government compulsory acquisition of their stock-in-trade could have been part of the contemplated business transactions of the Newcastle Brewery Co.

It seems to me that these two cases support the view which has been fundamental to the Crown's argument, that, where a trader is dealing in any kind of commodity and where for any reason part of that commodity, his stock-in-trade, disappears or is compulsorily taken or is lost, and is replaced by a sum of cash by way of price or compensation, then *prima facie* that sum of cash must be taken into the account of profits or gains arising to the trader from his trade.

So far I have not departed at all from the conclusion of UPJOHN, J. In his judgment he recited passages from the cases which I have mentioned, and from other cases; and nothing that I have said runs counter to the views which the learned judge expressed. He then said this ([1956] 2 All E.R. at p. 624):

"With all respect to the argument of counsel for the Crown, it seems to me that this broad proposition that whenever trading stock is turned into money it is a trading receipt is too wide. In each case, one must take account of the circumstances. The question to be answered is whether the particular receipt has to be brought into account in computing the profits or gains. There is no doubt that the value payment is in a sense a realisation, and the case no doubt bears a marked resemblance to *J. Gliksten & Son, Ltd. v. Green* (1) and *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (2)."

Although as a general rule, *prima facie* the result is as I have tried to state it, I agree that it would be too wide to say that any money which a trader receives in respect of his business property is necessarily a trading receipt.

In his reply, counsel for the taxpayers referred to what LORD WARRINGTON OF CLYFFE said in the House of Lords in *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (3) ((1931), 15 Tax Cas. 761). He said (at p. 780):

"It is, I think, clear that not every sum expended by an owner of land occupied by him for the purposes of his trade can be regarded as wholly and exclusively laid out for such purposes."

He cited certain authorities and continued:

"Moreover, the recent decision in this House in *Fry v. Salisbury House Estate, Ltd.* (4) ((1930), 15 Tax Cas. 266) throws considerable light on the question. In that case receipts consisting of rents received by a company, owner of a large building of flats, were excluded from the computation of profits and gains of a business carried on in connection with the same premises on the ground that they were received by the company in their capacity as landowners and not as traders."

As I understand it, the material facts in that case were these. The taxpayer company owned the considerable edifice known as Salisbury House. They carried on, on and in respect of those premises, a trade or business of providing services to the people to whom they sub-let parts of the building, and out of the supply of those services they made profits for which they were taxed under Sch. D. As regards the premises themselves they were taxed or had been taxed under Sch. A. Their lettings of the rooms or offices in the building were not part

of their business; they were not carrying on the business of letting and managing flats. The Crown sought to tax them under Sch. D in respect of the profits made from such lettings, deducting what they had paid, or were liable to pay, under Sch. A. The Crown's claim failed on the ground that the business for which they were taxed under Sch. D did not comprehend the business or trade of letting flats so as to justify an assessment in respect of that business under Sch. D. So much appears plainly from the speech, e.g., of LORD TOMLIN. He said (15 Tax Cas. at p. 323):

"The sole question upon which the opinion of the court was desired by the Special Commissioners was whether the rents received by the respondents on letting the offices in Salisbury House were properly to be included in the assessments as trade receipts of the respondents for the purposes of Case I of Sch. D of the Income Tax Act, 1918. ROWLATT, J., apparently took the view that the respondents were carrying on a trade in the nature of a hotel business and that the assessments were rightly made. The Court of Appeal, however, rejected this view of the case and in substance held that a landowner who happens to make taxable profits by rendering certain services to his tenants [i.e., heating, lifts, etc.] cannot for that reason be treated as carrying on a trade in respect of the receipt of rents so as to be chargeable with income tax under Sch. D upon the excess of the actual rents over the annual assessments to tax under Sch. A."

We were referred to *Seaham Harbour Dock Co. v. Crook* (5) ((1931), 16 Tax Cas. 333), and I can well conceive that, if the government were to make all landowners certain payments to be used for some specific purpose, e.g., some particular construction in relief of unemployment, it would by no means necessarily follow that the payments should be brought into account as part of the profits of the payee's trade because his premises were his stock-in-trade. In other words, I accept from counsel for the taxpayers the proposition that it is not a necessary conclusion in every case that a landowner carrying on property dealings with the property he owns is necessarily and inevitably to be required to bring into account for tax purposes under Sch. D every sum of money which he may receive as landowner. It is with the conclusion from that premise that I find myself at variance with the learned judge and the argument of counsel for the taxpayers. UPJOHN, J., in his judgment continued ([1956] 2 All E.R. at p. 624):

"I have to consider the nature of the receipt having regard to the War Damage Act, 1943. We start, then, with this. There is nothing in the nature of a premium here. A capital payment has to be made in five instalments, and it is to be made by the owner of every acre of land in England and Wales. It seems to me quite clear on the construction of s. 28, that, if and when a payment is received, no part of that payment, even if it be expended in restoring the property to its former state, can be brought into account when the property is sold and the net profit is realised as it otherwise admittedly would have been apart from the section. I think those two factors are indications that the legislature was not considering the trading aspect of the matter at all, but was imposing on an owner of land throughout the country the obligation to contribute, with the corresponding benefit, if disaster happened, of receiving a sum of money, a value payment. I think the legislature considered that that would be altogether outside the area of trading operations. It would be very remarkable, as LORD ATKIN pointed out in *Seaham Harbour Dock Co. v. Crook* (5), if half of this money, which was plainly intended to be applied in rehabilitating the property . . . [an observation which with all respect I venture to doubt] . . . should be

instantly taken away in tax. I think that Parliament did not intend that result."

It is apparent from this passage that the learned judge reached his conclusion from the effect which he got from the war damage legislation. So far, as a general matter, I do not at all disagree. Apart from the Acts, the learned judge is saying that the result would no doubt be otherwise; but the import of the Acts gives this stamp to the war damage value payments in the hands of the recipient. I must therefore turn to the war damage legislation itself. As counsel for the taxpayers says, and the argument is echoed by the judge, a company contributed to the war damage scheme qua landowner and received the value payment as landowner; but to say that is not at all to answer the question. The persons to whom the payment is to be made are landowners, but on what terms and in what capacity they hold it is a matter with which *prima facie* the War Damage Commission is in no way concerned.

In argument illustrations were taken of cases where the landowners were trustees. The obligations of trustees receiving value payments would depend not at all on the war damage legislation, but on the terms of the trusts under which the trustees held. Still it is no doubt plainly competent for Parliament to provide that these sums are capital for all purposes, whatever the ordinary implications of the landowners' circumstances might otherwise be.

Our attention was directed to several sections in the War Damage Act, 1943, s. 66 (1) of which provides:

"Contributions made and indemnities given under this Part of this Act shall be treated for all purposes as outgoings of a capital nature";

from which, as the judge said and as I fully agree, it follows that the contributions paid over a period of years were capital outgoings so far as the taxpayers were concerned and had to be treated as such in their accounts.

Section 113 dealt with expenses and other matters, but it has been replaced by s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949*, on which, as will be recalled from the judge's judgment, the real basis of the argument for the taxpayer is founded. Section 28 (1) of the Act of 1949 provides:

"In computing the amount of the profits or gains, or of the income from any source, of any person for any purpose of the Income Tax Acts . . . no sum shall be deducted in respect of any payment or expenditure to which this section applies."

The omitted words contain a reference to profits tax. Sub-section (4) provides:

"Expenditure to which this section applies is—(a) any expenditure on repairing or otherwise making good war damage to land in so far as any person has received or is entitled to a payment in respect of the damage by virtue of any of the provisions of the principal Act (whether alone or as applied or modified by or under any provision of this Act) . . ."

The principal Act is the War Damage Act, 1943. There follows certain language relating to goods damaged by enemy action. Sub-section (5) makes the preceding provisions of the section retrospective*. Sub-section (6) continues:

"Where before the passing of this Act the liability of any person in respect of income tax or excess profits tax or in respect of profits tax . . . has been reduced, or any person has been repaid any amount in respect thereof, by reason of the deduction or inclusion of any sum which under the provisions of sub-s. (1) . . . of this section would not have fallen to be deducted or included, the amount by which his liability has been so reduced . . . shall be recoverable . . ."

* Section 28 (5) provides: "The preceding provisions of this section shall have effect, and shall be deemed always to have had effect, in substitution for the provisions of s. 113 of the [War Damage Act, 1943] . . ."

It is tolerably plain that the compendious terms of the section or of these sub-sections apply, and in terms are intended to apply, not only to private persons whose liability under Sch. A might be affected, but also to traders. I think it is plain that sub-s. (4) is expressly so phrased as to apply, at least among other cases, to property dealers. That has been strongly relied on by counsel for the taxpayers in this way. He says that s. 66 of the Act of 1943 has made what one might call a "premium payment" capital. This section, s. 28 of the Act of 1949, comes in to prevent the recipient, the contributor, including the property dealer, who has received a war damage payment, whether a cost of works or a value payment, from making any deductions for income tax purposes for the expense of restoration to the extent that he receives war damage payments in respect of the property restored. So is produced undoubtedly, on the Crown's view, the anomalous if not unjust result which I mentioned earlier. And, says counsel for the taxpayers, it is impossible sensibly to read this provision save on the assumption that Parliament is treating throughout all the payments made either into or out of the war damage fund as capital payments from whomsoever or into whosoever's hands they come. That is a forcible argument, and it is at the very least tempting to suppose that Parliament, if it gave its mind to this matter at all, was assuming that in every case the sums received would be capital sums in the hands of the recipient, whatever his circumstances, whether he was a private owner, manufacturer whose principal capital asset, a factory, was damaged, or a property dealer. My difficulty is that Parliament has not said so.

What is worse to my mind is that, as junior counsel for the Crown observed and as leading counsel for the Crown emphasised in his reply, this section is in terms directed to a modification of the ordinary fiscal results which would otherwise be applicable to these war damage contributions and payments. As junior counsel for the Crown pointed out, the section is in effect an addition or a modification to the fiscal code. By providing that the expenditure mentioned in sub-s. (4) should not be deducted for income tax purposes, it is accepting the proposition that, were it not for the sub-section, such would be an ordinary fiscal consequence in such a case as that with which we are dealing. Parliament has said that this other result will apply notwithstanding the *prima facie* result. But unhappily it has forborne to go on to say, "and any sums received by a property dealer or by any trader in respect of loss of stock shall in his hands not be brought in as part of his profit or gains but shall be capital." Where Parliament has directed its attention specifically to the fiscal results of legislation, but has made no provision for dealing with the ordinary *prima facie* results in any particular respect, it seems to me that the court cannot say that it intended to do so or that the implication of the Act is such that we must interpret it as though it did.

I said earlier that I felt compelled to this conclusion with some reluctance, but once the proposition is accepted that *prima facie* receipts of this kind (which represent what has been lost by destruction of stock-in-trade) are themselves properly profits or gains arising to the trader from his business, then, unless there is something in the Act which impresses those payments with some other characteristic, the court is unable so to impress them by way of implication. I repeat that, if this were an ordinary insurance case, it could not be doubted that the sums received from the insurers by way of compensation for the loss of the property insured would be annual profits or gains. The general character of the war damage legislation is to provide through the state, and by a scheme for which the War Damage Act, 1943, has provided, the equivalent of insurance money; and although it has in certain respects specifically modified what would otherwise be the fiscal conclusions of the scheme, it has on this matter remained silent. I have felt accordingly unable to extract from s. 28 in particular and from the

legislation in general so extensive an implication as that which appealed to the learned judge. A

For those reasons I think this appeal must be allowed.

BIRKETT, L.J.: I am of the same opinion. This is a case in which someone will be entitled to say that the decision, whatever it may be, causes an injustice. It is not always possible to arrive at a result which wipes out all anomalies, particularly in matters relating to taxation, but my Lord has dealt with them and the arguments thereon. The essential point to be kept in mind is that the taxpayers were dealers in property. The Case stated says: "The [taxpayer] company is a property dealing company", and it relates certain of their trade transactions during the war, and the receipt of the value payments already referred to. It continues: B

"The question for determination in this appeal is whether value payments arising under the provisions of the War Damage Acts, 1941 and 1943, and paid to the [taxpayers], who carry on the trade of property dealing, are receipts of the [taxpayers'] trade to be brought into account in computing the balance of profits and gains of the [taxpayers] for taxation purposes" C

The whole controversy has ranged round that point. UPJOHN, J., after reviewing all the arguments and the cases, put the matter in a single sentence when he said of the value payment ([1956] 2 All E.R. at p. 624): D

"It was a contribution made and a payment received by the taxpayers, not as a part of their trading operations at all, but because they were compelled under the war damage scheme to make payments with the corresponding right of getting the benefit in their capacity, not as traders, but as owners of the land." E

Whilst counsel for the taxpayers did not concentrate wholly on this one point, because he had many points, this point was the most important. He said: "I cannot deny that the taxpayers trade in properties. It is plain on the face of it; but merely because they do that and receive a value payment does not of necessity bring them within the charging sections." F

I quite agree with what my Lord, the Master of the Rolls, said. I can quite conceive of a landowner, who is also a trader, receiving payments which are not to be brought in as trading receipts accruing to the business. The point in this case, as put in the summary of the argument of counsel for the taxpayers with which he supplied us, is this: "Is the value payment a trade receipt arising in the course of carrying on a trade in the ordinary way?" To that he makes the answer, "No". G

The taxpayers did not receive the value payment in their capacity as traders at all; they received it, as everybody else in the country received it, because they were compelled to pay the five instalments under the Act. They were instalments of a capital nature, and, in the case of property damaged, they were entitled to the value payment which the Act prescribed. Indeed, at the conclusion of counsel's argument, when he summarised his points, this point again loomed large. He said: "The source of the payment to the landowner in this case is his statutory right under the Act of Parliament; it is not a source of profit from trading activities. The landowner is not allowed to deduct the premiums paid under the War Damage Act by s. 66 of the Act of 1943, and the whole scheme of that Act and of the Act of 1949 indicates that the payments which he receives because of those capital premiums are not to be regarded at all in the light of trade receipts but are received by him in his capacity as a landowner. All persons were compelled to make the payments, and as UPJOHN, J., H I

recognising the strength of the argument which was put, said ([1956] 2 All E.R. at p. 624):

“ ‘ We start, then, with this. There is nothing in the nature of a premium here. A capital payment has to be made in five instalments, and it is to be made by the owner of every acre of land in England and Wales. It seems to me quite clear on the construction of s. 28 that, if and when a payment is received, no part of that payment, even if it be expended in restoring the property to its former state, can be brought into account when the property is sold and the net profit is realised as it otherwise admittedly would have been apart from the section ’.”

Then he deals with the trading aspect.

Counsel for the taxpayers is there saying: “ This payment is received by the taxpayers not as a trader at all. It is quite wrong to consider a value payment as being received in that capacity, even though it does so happen that the taxpayers admittedly trade in property and in land. That factor must be entirely disregarded, and the taxpayers must be considered exactly as any other land-owner who was not a trader and who was compelled, as the taxpayers were compelled, to pay the five sums and to receive the statutory benefit in case their property was damaged.” As against that it was said: “ One cannot ignore the fact that the taxpayers were trading in property. It makes all the difference. This is a value payment, and one cannot divorce it from the taxpayers’ ordinary trading.”

Reliance was placed on two cases, *J. Gliksten & Son, Ltd. v. Green* (1) ([1929] A.C. 381), the case of the timber, and *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (2) ((1927), 12 Tax Cas. 927), the case of the rum. Counsel for the taxpayers attempted to show that those cases really did not affect the point in this case, and primarily I think for this reason. In the *Gliksten* case (1) both in the court below and in this court it was contended that the money was received because of the payment of the insurance premiums though it was not a trading receipt in the ordinary sense at all. Nevertheless what really happened in that case may be put as simply as this: a stock of timber was transformed into money through no wish or fault of the owners, and the effect was the same as if it had in fact been sold; and, therefore, it must be brought into account.

Similarly in the *Newcastle Breweries* case (2), the point taken was that the rum had not been sold in the ordinary course of trade; it was requisitioned. There again the decision in simple language came to this: The rum was part of the company’s stock-in-trade; if it had been sold and cash had been received for it it would admittedly have had to be brought into the trading accounts. By requisitioning the rum was taken out of the company’s possession, and in its place it had a sum of money; it had to bring that into account.

Despite the valiant efforts of Mr. Senter, I think that those two cases are strong authorities in this case. My Lord has covered every point in the case, and I can find nothing, either in s. 66 of the War Damage Act, 1943, or in s. 28 of the War Damage (Public Utility Undertakings, etc.) Act, 1949, on which reliance was placed, which takes this value payment out of the category of a trading receipt properly falling within the charging section and puts it into some other category. For those reasons I agree that this appeal ought to be allowed.

ROMER, L.J.: I agree, and I only wish to add a few words because we are differing from UPJOHN, J., who has considerable experience of tax matters and to whose judgments one always and naturally attributes considerable weight. There is really only one point on which we do differ from him. Where a trader sells or disposes of part of his circulating capital, it is a well settled principle that, for tax purposes, the proceeds are treated as a trading receipt, and that is not confined to cases where the circulating capital, be it timber or other property,

is actually sold, because, as LORD REID said in *Kirkness v. John Hudson & Co., Ltd.* (5) ([1955] 2 All E.R. 345 at p. 361):

"A sum may well be a trading receipt although it does not come to the trader as the price of goods sold."

J. Gliksten & Son, Ltd. v. Green (1) ([1929] A.C. 381) was a case not of a sale but of a loss of circulating capital, which was timber, by fire; and it was there held that the insurance money which was recovered was to be treated as a trade receipt. Nor is it relevant that the transaction which led to the loss or the disposal of the asset is a compulsory transaction enforced on the owner; that sufficiently appears from *Newcastle Breweries, Ltd. v. Inland Revenue Comrs.* (2) ([1927], 12 Tax Cas. 927).

I feel little doubt that the analogy of those cases is close enough for the application of the principle to a case such as the present, where property forming part of the taxpayers' circulating capital was lost or destroyed as a result of war damage and was compensated for by a payment under the War Damage Act, 1943, of what is called a "value payment". So far I have no reason to suppose that UPJOHN, J., took a different view.

Without going so far as to concede the applicability of the *Gliksten* case (1) principle to the present case, from a prima facie point of view, counsel for the taxpayers said: "In any case, if one looks at the war damage legislation, the whole structure and the scheme of the Act, and in particular at s. 66 of the Act of 1943 and s. 28 of the Act of 1949, it becomes clear that it was the intention of Parliament that 'value payments' should be capital and nothing else". Following from that premise he said that there was a dichotomy of character in which the taxpayers may have received a value payment, and, if in one character the money in their hands would be capital and in the other character it would be income, then in conformity with the intention of the Act they are to be taken as receiving that payment in the character which would enable the payment to preserve its capital nature. In other words, they must be taken to have received the money in the character of property owners and not as traders.

Then, as has already been pointed out by the Master of the Rolls and BIRKETT, L.J., he said that the source of the taxpayers' right to receive these value payments was not to be found in the fact that they were traders; it was to be found solely in the fact that they were owners of property on whom had been imposed an obligation to pay capital instalments, so that, if a certain contingency happened, as it did, they would receive a payment under the Act; and that neither that payment nor the contributions which they paid had anything whatever to do with the fact that they were traders. They were solely referable to their position as property owners, and as such were brought within the provisions of the Act both as to contributions and as to payments. He pointed out that this was quite a different thing from a voluntary insurance, under which the taxpayers would pay premiums out of revenue and would be entitled to bring them in as deductions from their taxable profits. He finally pointed out that the amounts of the instalments they paid as contributions had no reference, apart altogether from being capital payments, to trading receipts or the trading position at all. They were paid simply on the basis of the Sch. A valuation of the property.

That is an attractive way of presenting the case, especially when one bears in mind that hardship falls on the traders in some circumstances if the Crown's contention is right, hardship to which the Master of the Rolls has referred. But, although it commended itself to the learned judge, I do not think that the argument can be really accepted. Of course, generally speaking, it is true that value payments made under the War Damage Act, 1943, would be capital in the hands of the recipients. For example, if they were paid to trustees of a settlement, to trustees who held property under a trust for sale, as between the tenant for life (unless there was some unexpected and unusual provision in the

A settlement) and the remaindermen, the sums in the hands of the trustees would be capital and not income, and more especially having regard to the fact that the contributions had been paid out of corpus.

It seems to me that the answer to counsel's way of putting the case is really that there is no sufficient indication in the Acts that Parliament intended the value payments to be capital in the hands of the recipients, whoever the recipients might be. The truth is that Parliament was not concerned with the fate of the payments after they had been received. If the payments were made to trustees, that was the end of the matter so far as the War Damage Commission was concerned. In such a case one looks at the terms of the trust, and one finds that the capital sums have to be dealt with in accordance with the provisions thereof. So also, in my judgment, if they are paid to a company in respect of the loss of part of the company's circulating capital, they are to be treated as such and dealt with as such in the hands of the recipients. I do not think there is any room or justification to be found in the Act for this suggested dichotomy of which counsel for the taxpayers spoke. As the Master of the Rolls has pointed out, s. 28 of the Act of 1949, which is expressly directed to the fiscal aspect of the matter, makes no mention of this point at all, although it was manifestly directed to the position of people in trade.

That is all I wish to say on the matter, except with regard to the harshness in cases where a company such as the present applies a value payment towards restoring the damaged property. It is in a worse position than a private individual, or a company which has received a payment in respect of a loss of fixed capital as distinct from circulating capital. On the other hand, there is the very important consideration to which the Master of the Rolls has referred, that a trading company such as the present company, which loses a valuable item of circulating capital by war damage in any given year, according to accepted practice, could deduct the value of that property from its taxable profits for that year, which no individual could do, and which no company could do which suffered a loss of some house or property which formed part of its fixed capital. That consideration does, to some extent at all events, mitigate the undoubted harshness of the result for which the Crown is contending.

Finally, although I have every sympathy with the gallant endeavour which the Special Commissioners made to put the matter right from an equitable point of view, there is no justification for introducing words into a taxing statute which are not there, that being a matter for the legislature, and not for this court, which can only take the language as it finds it and put such interpretation as it thinks right on that. For those reasons I agree that the appeal should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *R. C. Barilett & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

PRACTICE NOTE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Lynskey, JJ.),
January 21, 1957.] B

Juror—Oath—Form of oath to be administered at trial of criminal charge.

[As to administering oaths on affirmation to a jury, see 10 HALSBURY'S
LAWS (3rd Edn.) 414, para. 757.]

LORD GODDARD, C.J.: We wish to call the attention of courts of
quarter sessions to a new form of jury oath now in use at the Central Criminal
Court and which will probably soon be used on all the circuits. Experience
at the Central Criminal Court where so many jurors have to be sworn during
the year and indeed at other courts has shown that jurors frequently find a
difficulty in reading aloud the present form of oath, probably mainly due to the
juxtaposition of the words "will well" in the phrase "will well and truly try".
There is no statutory form of oath and any formula may be used which sufficiently
prescribes the obligation imposed. The judges have approved the revised form
which was suggested by the Recorder of London and which has been found to
remove any difficulty. It is: C D

"I swear by Almighty God that I will faithfully try the several issues
joined between Our Sovereign Lady the Queen and the prisoner at the
bar and give a true verdict according to the evidence." E

While we have no power to direct quarter sessions to adopt this form, we commend it to their consideration as uniformity in these matters is desirable.

PRACTICE NOTE.

DIVORCE REGISTRY. G

*Divorce—Petition—Petition within three years of marriage—Leave to present—
Marriage certificate to be lodged.*

A certificate of marriage should be lodged in the Registry on application to
issue an originating summons for leave to present a petition for divorce within
three years of the marriage. H

If leave is given on the originating summons the Registry will transfer the
certificate to the petition. If the application is refused the certificate will be
returned to the applicant or his solicitor.

Jan. 21, 1957.

B. LONG,
Senior Registrar.

ESCOIGNE PROPERTIES, LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.JJ.), December 10, 11, 17, 1956.]

Stamp Duty—Transfer of property from one associated company to another—Contract by original owner to sell freehold and leasehold properties to a company—Purchase price received but no conveyance or transfer executed by owner—Death of owner—Subsequent sale by company to associated company—Conveyance, transfer and assignment executed by deceased's personal representatives—Whether exempt from ad valorem stamp duty—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54, s. 58 (4)—Finance Act, 1930 (20 & 21 Geo. 5 c. 28), s. 42—Finance Act, 1938 (1 & 2 Geo. 6 c. 46), s. 50 (1) (b).

In 1950 the owner of freehold and leasehold properties contracted to sell them to a newly formed limited company for £9,998, which was to be satisfied by an issue of the company's shares to him. The shares were allotted but no conveyance or transfer of the properties was made before the owner's death in 1951. In 1954 the company made arrangements to sell the properties to a second company in which it owned substantially all the shares, and three transfers and one assignment of leasehold properties and the conveyance of freehold properties were executed by the executors of the original owner to the second company. On the question whether stamp duty was chargeable thereon or whether the instruments were within the exemption, enacted by s. 42 (2) of the Finance Act, 1930*, for instruments the effect whereof "is to convey or transfer a beneficial interest in property from one company" to another substantially owned by the former,

Held: the instruments were chargeable with ad valorem stamp duty, since they completed two distinct transactions, the sale by the original owner (an individual) to the first company and the sub-sale by that company to the second company, and the effect of the instruments was not, therefore, solely to transfer the beneficial interests of one limited company to another that the former substantially owned.

Quaere: whether the instruments would in any event have been excluded from the operation of s. 42 by virtue of s. 50 (1) of the Finance Act, 1938, for the reasons next stated.

Semle: the formation of the original company and the transfer to it of many freehold and leasehold properties constituted an arrangement in connection with (though not in pursuance of) which the instruments were executed within s. 50 (1) and (ROMER, L.J., however, differing) the arrangement was one whereunder the beneficial interest in the properties was conveyed or transferred directly or indirectly by the original owner to the original company within that enactment notwithstanding that it passed from him by the operation of equity on his receiving the consideration under the contract of sale in 1950.

Decision of VAISEY, J. ([1956] 3 All E.R. 33) reversed.

[As to relief from stamp duty on transfers between associated companies, see 6 HALSBURY'S LAWS (3rd Edn.) 786, para. 1585.

For the Stamp Act, 1891, s. 54 and s. 58 (4), see 21 HALSBURY'S STATUTES (2nd Edn.) 627, 628.

For the Finance Act, 1930, s. 42, and the Finance Act, 1938, s. 50, see 21 HALSBURY'S STATUTES (2nd Edn.) 959, 1196.]

* The relevant terms of s. 42 (2) are printed at p. 294, letter I, post.

Appeal.

Escoigne Properties, Ltd. appealed against assessments made by the Inland Revenue Commissioners in respect of the stamp duty chargeable on five instruments of conveyance or assignment on sale of properties in land or houses to the company.

Three of the instruments (exhibits A, B and C) were Land Registry transfers to Escoigne Properties, Ltd. of leasehold properties by the personal representatives of Samuel Cohen, deceased, at the request and by the direction of Samuel Cohen (Properties), Ltd. The fourth instrument (exhibit D) was an assignment made between the executors of the will of Samuel Cohen, of the first part, Samuel Cohen (Properties), Ltd., of the second part, and Escoigne Properties, Ltd., of the third part, of certain leasehold property. The fifth instrument (exhibit E) was a conveyance made between the same parties of certain freehold property. Exhibit A was dated Nov. 2, 1954; exhibits B, D and E were dated Nov. 5, 1954; and exhibit C, Nov. 6, 1954. In the case of exhibits B and C, the transfers were subject to certain charges, and there was contained in each deed a new covenant by Escoigne Properties, Ltd. with the respective mortgagees for payment of the mortgage debt. The conveyance of the freehold property (exhibit E) was also subject to a mortgage. The expressed consideration (£24,200 in exhibit A; £30,250 in exhibit B; £35,200 in exhibit C; £3,080 in exhibit D; and £16,170 in exhibit E) was, in each case, stated to have been paid and satisfied by the allotment to Samuel Cohen (Properties), Ltd. of a certain number of shares of £1 each, credited as fully paid, in Escoigne Properties, Ltd.

By an agreement dated June 30, 1950, the late Mr. Samuel Cohen agreed to sell to Samuel Cohen (Properties), Ltd., certain freehold and leasehold properties including those referred to above, subject to the incumbrances then affecting them. The consideration for the sale was stated to be £9,998 to be satisfied by the allotment to Mr. Cohen or his nominees of 9,998 fully paid shares of £1 each of Samuel Cohen (Properties), Ltd. The shares were allotted on or about June 30, 1950. On July 21, 1951, Mr. Cohen died. Before his death he had not executed any conveyance, transfer or assignment of the properties. His will was proved by his executors (parties to the deeds presented for adjudication) on Feb. 29, 1952. Before the execution of the instruments presented for adjudication, the executors had not given any assent or made any conveyance in respect of a legal estate in or affecting the properties conveyed or assigned by the instruments.

Escoigne Properties, Ltd. was incorporated on Aug. 26, 1954, under the Companies Act, 1948, with a capital of £10,000 divided into ten thousand shares of £1 each, of which one hundred were issued for cash. Two of these shares were issued to subscribers on the incorporation of Escoigne Properties, Ltd., and the remaining ninety-eight of the shares issued for cash were allotted to Samuel Cohen (Properties), Ltd., on or about Nov. 1, 1954, as part of an allotment to that company of 2,298 shares of Escoigne Properties, Ltd., the remaining 2,200 of those shares being the consideration for the transfer to Escoigne Properties, Ltd. of the property transferred by exhibit A. Immediately before the execution of the instruments presented for adjudication, Samuel Cohen (Properties), Ltd. was beneficial owner of not less than ninety per cent. of the issued share capital of Escoigne Properties, Ltd. The value of the shares of Escoigne Properties, Ltd. far exceeded their nominal value, and it appeared from the instruments presented for adjudication that the shares were issued at a premium of £10 per £1 share. Escoigne Properties, Ltd. entered into separate bargains with Samuel Cohen (Properties), Ltd., for purchase of the properties for shares of Escoigne Properties, Ltd.

Escoigne Properties, Ltd. claimed that the conveyances and transfers presented for adjudication were not liable to any stamp duty under the heading "Conveyance or transfer on sale", in Sch. I to the Stamp Act, 1891, because the effect

A of the instrument was "to convey or transfer a beneficial interest in property from one company with limited liability [Samuel Cohen (Properties), Ltd.] to another such company [Escoigne Properties, Ltd.]", within s. 42 (2) (a) of the Finance Act, 1930, and the former company was beneficial owner of not less than ninety per cent. of the issued share capital of Escoigne Properties, Ltd., as required by s. 42 (2) (b) of the Act of 1930, and that, therefore, that company was entitled to relief under s. 42.

C The commissioners were of the opinion that the instruments presented for adjudication were not entitled to exemption from stamp duty under s. 42 of the Finance Act, 1930, because (a) each of the instruments was an "instrument . . . whereby . . . property upon the sale thereof" by the late Mr. Cohen to Samuel Cohen (Properties), Ltd. was "transferred to or vested in" Escoigne Properties, Ltd. within the definition of "conveyance on sale" in s. 54 of the Stamp Act, 1891, and was liable to stamp duty under the heading "Conveyance or transfer on sale" in Sch. 1 to the Act of 1891; (b) the commissioners were not satisfied that the effect of any of the instruments was "to convey or transfer a beneficial interest in property from" Samuel Cohen (Properties), Ltd. to Escoigne Properties, Ltd. within the meaning of s. 42 of the Finance Act, 1930; (c) even if the effect of any of the instruments was to convey or transfer a beneficial interest from Samuel Cohen (Properties), Ltd. to Escoigne Properties, Ltd., the beneficial interest could only have become vested in Samuel Cohen (Properties), Ltd., under the agreement on June 30, 1950, and, although at that date Escoigne Properties, Ltd. was not in contemplation as a sub-purchaser, each of the instruments was executed pursuant to the obligation imposed on Mr. Cohen by the agreement of 1950 to execute a conveyance or transfer of the property affected by the agreement when called on to do so, and, therefore, the instruments were excepted by s. 50 of the Finance Act, 1938, from the exemption conferred by s. 42 of the Act of 1930, as they were "executed in pursuance of or in connection with an arrangement whereunder . . . the beneficial interest in the property [there affected] was previously conveyed or transferred directly or indirectly" by the late Mr. Cohen or his executors. The commissioners, accordingly, assessed the duty on the instruments by reference to the heading "Conveyance or transfer on sale" in Sch. 1 to the Stamp Act, 1891, s. 54, s. 55, s. 57 and s. 58 (4) of the Act of 1891, and the other relevant statutory provisions, the total duties assessed being £3,980.

G Vaisey, J., held ([1956] 3 All E.R. 33) that none of the instruments was chargeable with ad valorem stamp duty, since they were exempt under s. 42 of the Finance Act, 1930, as transfers of beneficial interests of one limited company to another in which it owned not less than ninety per cent. of the issued share capital and were not excluded from the exemption by s. 50 (1) of the Finance Act, 1938, since the beneficial interest under the arrangement had not been "previously conveyed or transferred directly or indirectly" by the original owner to Samuel Cohen (Properties), Ltd., within the section. The Crown appealed.

*J. Pennycuik, Q.C., and J. P. F. E. Warner for Escoigne Properties, Ltd.
Geoffrey Cross, Q.C., and E. Blanshard Stamp for the Crown.*

Cur. adv. vult.

I Dec. 17. The following judgments were read.

LORD EVERSLED, M.R.: The question on this appeal is whether duty under the Stamp Act, 1891, as on "conveyances or transfers for sale", is exigible in respect of certain instruments, some transfers of registered land, some conveyances of unregistered land, dated Nov. 2, 5 and 6, 1954.

The parties to all these instruments are: (1) three gentlemen, as executors of Samuel Cohen, deceased; (2) Samuel Cohen (Properties), Ltd., and (3) Escoigne Properties, Ltd., the respondents before us.

By these instruments very numerous properties, some freehold and some leasehold, were conveyed or transferred to Escoigne Properties, Ltd., Samuel Cohen (Properties), Ltd. joining in fact as beneficial owner of the properties and in order to direct the conveying party. My last statement arises from the circumstance, as later appears, that Escoigne Properties, Ltd. were in the position of sub-purchasers from Samuel Cohen (Properties), Ltd., the original contract for the sale of the properties by Mr. Cohen to Samuel Cohen (Properties), Ltd. never having been completed. A
B

It is not in doubt, first, that all the instruments constitute conveyances or transfers on sale, or, secondly, that apart from the Finance Acts, 1930 and 1938, the case would be within s. 58 (4) of the Stamp Act, 1891; i.e., ad valorem duty would have been exigible in respect of all the instruments based on the consideration payable by Escoigne Properties, Ltd. C

Section 58 (4) reads as follows:

“Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with ad valorem duty in respect of the consideration moving from the sub-purchaser.” D

I read also, for reasons which will appear later, sub-s. (6):

“Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with ad valorem duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the ad valorem duty.” E

But the claim of Escoigne Properties, Ltd. is that the instruments are wholly exempted by the effect of s. 42 of the Finance Act, 1930, and that they are not brought again subject to charge by s. 50 of the Finance Act, 1938. The Crown disputes both these propositions. F

I must now state certain dates. The contract for the sale of all these properties between Mr. Cohen and Samuel Cohen (Properties), Ltd., was dated June 30, 1950. Mr. Cohen himself died in 1951. In August, 1954, Escoigne Properties, Ltd. was formed, and, although there appears to have been no written contract between Samuel Cohen (Properties), Ltd. and Escoigne Properties, Ltd., the transfers of the properties direct from Mr. Cohen's executors to Escoigne Properties, Ltd. took place at the beginning of November, 1954. G

The first point, therefore, is whether, as Escoigne Properties, Ltd. submits, the instruments are within the terms of s. 42 of the Finance Act, 1930. So far as relevant, that section is as follows: H

“(1) Stamp duty under the heading ‘Conveyance or transfer on sale’ in Sch. 1 to the Stamp Act, 1891, shall not be chargeable on an instrument to which this section applies . . .

“(2) This section applies to any instrument as respects which it is shown to the satisfaction of the Commissioners of Inland Revenue—(a) that the effect thereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company; and (b) that either—(i) one of the companies is beneficial owner of not less than ninety per cent. of the issued share capital of the other company; or (ii) not less than ninety per cent. of the issued share capital of each of the companies is in the beneficial ownership of a third company with limited liability.” I

A In the present case it is not in doubt that the terms of para. (b) are satisfied. The question is whether the terms of sub-s. (2) (a) are satisfied, and that question turns substantially, if not exclusively, on the use of the three words "the effect thereof."

B There is no doubt that the transactions are within the terms of the sub-section if the words "the effect thereof is", as *Escoigne Properties, Ltd.* submits, are equivalent to "it is effective". The Crown, pointing to the definite article, contend that the words signify that the true and real effect or purpose of the instruments must be the specified result achieved; in other words, that the phrase "the effect thereof" means "the substantial effect thereof".

C It is not in doubt that, in many if not in most cases, a transfer of a beneficial interest will not be the sole and exclusive purpose of the instrument of transfer. For example, the legal estate will commonly also be conveyed or transferred, and there may well be covenants restrictive of user in regard to the instrument; but in such cases these effects are subsidiary or incidental to the main purpose, which is to achieve the transfer from A to B of the beneficial interest in the property the subject of the instrument.

D These last observations, however, are not in my judgment applicable in the present case; for these instruments represented, as I think, the completion or performance of two separate and distinct transactions, viz., (i) the sale by Mr. Cohen to Samuel Cohen (*Properties*), Ltd., and (ii) the sub-sale (and, be it observed, at a slightly different price) from Samuel Cohen (*Properties*), Ltd. to *Escoigne Properties, Ltd.* The effect of the instruments was to achieve both these objects and not the second object which I have stated only; and it is only E the second which is within the terms of s. 42 (2) (a), for it is only the second which constituted a transfer of the beneficial interest from one limited company to another. This conclusion—and the point being a short one, the conclusion can be stated equally shortly—disposes of the appeal in favour of the Crown.

I would add, in deference to the arguments, these further points. First, I am not seeking to dissect the instruments by having recourse to s. 4 of the Stamp F Act, 1891. Such a process is, in my judgment, unnecessary. I am solely concerned with the meaning of the words used in s. 42 (2) of the Finance Act, 1930. Secondly, I am not, I conceive, writing words into the section but stating their effect in the context. On either view, some paraphrase must be stated of the words "the effect thereof". On the other hand, it is right to come to a conclusion as to the meaning of this section against the background of the Stamp G Act legislation. I have already read s. 58 (4) and (6) of the Act of 1891. These seem to me to show that, where an uncompleted sale is followed by a sub-sale and there is a conveyance direct to the sub-purchaser, only one duty is payable; but they also show, to my mind, that the existence of the two distinct transactions is recognised. For example, it is stated in sub-s. (6) that, where, as might happen, H ad valorem duty is payable on the transfer of the beneficial interest as such by the purchaser to the sub-purchaser, then, and only then, a subsequent conveyance is, subject to the limited qualifications stated, exempt from duty.

I Having regard to my answer to the question raised under the Finance Act, 1930, it is not strictly necessary for me to express any view on the second question involved, namely, if the case is covered by s. 42, is it taken out of the exemption of that section by the terms of s. 50 of the Finance Act, 1938? Since, however, the matter was fully argued, I think it right to indicate my views also on that second question.

Section 50 (1) of the Act of 1938, so far as relevant, reads as follows:

"Section 42 of the Finance Act, 1930 . . . shall not apply to any such instrument, unless it is shown to the satisfaction of the Commissioners of Inland Revenue that the instrument was not executed in pursuance of or in connection with an arrangement whereunder: . . . (b) the beneficial

interest in the property was previously conveyed or transferred directly or indirectly by such a person as aforesaid."

"Such a person", as appears from the previous paragraph (para. (a)), is

"a person other than a company which at the time of the execution of the instrument was associated with either the transferor or the transferee."

The problem posed under the section is of a threefold nature: First, was what I have called the original sale from Mr. Cohen to Samuel Cohen (Properties), Ltd., "an arrangement" within the meaning of the sub-section? Secondly, if so, were the instruments sought to be charged entered into in pursuance of or in connection with that arrangement? Thirdly, was the arrangement one whereunder the beneficial interest in the property was directly or indirectly conveyed or transferred by a person such as there stated, namely, as is admitted in this case would be a just description of him, Mr. Cohen?

As to the first part of the problem, counsel for Escoigne Properties, Ltd. says "No". He submits that the word "arrangement" is one of deliberately imprecise import but involving something in the nature of a series of transactions; and he refers to the definition in the OXFORD ENGLISH DICTIONARY: "disposition of measures for a particular purpose". He therefore argues that, whatever the word "arrangement" means, it is not apt in this context to cover a single instrument, a single contract for sale. I shall not attempt any definition of the word "arrangement". I think that it is sufficient to say that what occurred in 1950 was not an isolated contract for sale; for it appears that Samuel Cohen (Properties), Ltd. was formed the day before the contract; and in my opinion the relevant events of 1950 consisted at least of the formation of Escoigne Properties, Ltd. and the agreement to transfer to it the beneficial interest in a very large number of properties, freehold and leasehold, for a purpose which was no doubt good to Mr. Cohen; and all that together at least constitutes "an arrangement".

As to the second question (namely, if it was an arrangement, were the instruments here in suit executed in pursuance of or in connection with it?), I am inclined to think, with all deference to junior counsel for the Crown, that they were not executed in pursuance of that arrangement, since those words import to my mind that the thing done was contemplated by the original arrangement itself, in pursuance of which it was done, and there is no suggestion that the formation of Escoigne Properties, Ltd., was ever contemplated in 1950. On the other hand, I think that they were in connection with the arrangement, because the essence of what was done in 1954 was the completion of the sales made under the 1950 arrangement; they constituted, in other words, a perfecting of that arrangement. As leading counsel for the Crown put it, if the question were asked—"Why did Mr. Cohen's executors join in the transfer?"—the inevitable answer would be—"Because they were bound to do so by reason of the contract in 1950 entered into by Mr. Cohen as part of the arrangement." In truth what I have already said in answer to the first question arising under the Act of 1930 necessarily answers this question also.

Counsel for Escoigne Properties, Ltd. did say that the transfer of the legal estate in the properties was never contemplated at all when the 1950 arrangement was made. In other words, Mr. Cohen never contemplated that these sales would ever be completed. I cannot agree. It seems to me that that view is quite unrealistic, and it is perhaps a sufficient commentary on it if I read paras. 4 and 5 of the contract which Mr. Cohen in fact made. Paragraph 4 reads:

"The purchase shall be completed at the offices of Messrs. Tredgold, Idris & Gernat of 71, Lincoln's Inn Fields, W.C.2."

Paragraph 5 is:

"The company shall be entitled to the receipt of the rents and profits of the said hereditaments as from [a past date], and the consideration shall be

satisfied [as stated] and the vendor and all other necessary parties (if any) shall forthwith at the expense of the company execute and do all such assurances and things for vesting the said respective hereditaments in the company and giving to it the full benefit of this agreement as shall be reasonably required."

I pass, therefore, to the third heading of this question, viz., was the arrangement one whereunder the beneficial interest in the property was conveyed or transferred directly or indirectly by Mr. Cohen? Logically I think this part of the question should have been dealt with second, but I have left it until last because I have found the greatest difficulty in it. Like the other points, however, it is a short one, and the conclusion to which I am inclined, as at present advised, can be shortly stated. There is no doubt that the beneficial interest in the property was transferred and, I think, was transferred under the arrangement, since that was its effect in equity. But it is said that the form of words used, whereunder the beneficial interest was conveyed or transferred "*by*" Mr. Cohen, according to their ordinary significance contemplates an instrument adapted and directed to a transfer, i.e., an instrument of transfer properly so called. The argument is undoubtedly enforced on my mind by the use of the phrase "*by a person*", for the transfer here was in truth, as I have already said, by operation of law. Although I prefer not to express any concluded opinion on this point, I am on the whole inclined to think that the Crown is right on it. In the first place, I place, in support of that view, reliance on the word "*whereunder*". No doubt that word is more appropriate than the word "*whereby*" in connection with the word "*arrangement*". The meaning of the word "*whereunder*" seems to me, however, substantially to be equivalent to "*the effect or consequence of which was that*". Secondly, there is the use of the words "*directly or indirectly*", and I observe that, although the section speaks of the beneficial interest being transferred "*by such person*", it does not go on to say "*to any person or corporation*". If it did, the words "*directly or indirectly*" would naturally cover any intermediate stages if the transfer was not direct from the one to the other. But, in the absence of any added words in reference to the transferee, I think that the word "*indirectly*" when applied to the phrase "*by such person*" may reasonably mean that the transfer, though by operation of law, was the effect of the arrangement which the person made or entered into. Thirdly, I turn again to the last two paragraphs of the contract which I read a moment ago. Although no doubt the transfer did take effect by operation of law, there can equally be no doubt that the result was the result which Mr. Cohen deliberately intended. Therefore, although if the phrase used had been "*from or by such person*" it would have made the meaning to which I am inclined clearer, I still, without expressing any final view, am disposed to think that the Crown is right on this as it was on the other points which arose under s. 50 of the Act of 1938. But I am content to rest my judgment on this appeal on the view which I take on s. 42 of the Act of 1930.

I would add that the case is one in which the common sense and justice of the case seem to favour the Crown. I agree, of course, that the question which we have to determine is the claim of the Crown to duty, and that question must depend on the proper construction of the intention which Parliament has expressed in the Revenue statutes, and not on what one may think to be a fair or just result. The view which I have taken involves no distortion or undue stretching of the parliamentary language but emerges from its fair reading according to its context, and although I regret that I differ from VAISEY, J., my regret is perhaps less because it seems to me that the result which I have reached is one which accords with common sense and fairness. For, if I am wrong, it is plain that, whenever an individual desires to transfer property to a company, the device of the incorporation of two companies will be likely to have the effect of avoiding any *ad valorem* stamp whatever. I would allow the appeal.

BIRKETT, L.J.: I agree and would not desire to add anything to the judgment to which you have just listened. I would like to add that, although this appeal is determined by s. 42 of the Finance Act, 1930, and the point under s. 50 of the Finance Act, 1938, which is a very interesting point that has been argued and has been dealt with by my Lord in his judgment, does not strictly arise, I should like to say that, if it had arisen and had called for a decision, I myself should have been inclined to follow the reasoning of the Master of the Rolls and to have come to the same conclusion. On the whole, I agree with the Master of the Rolls in the decision which he has announced.

ROMER, L.J.: The first point for decision on this appeal is whether the five instruments of conveyance or assignment which are in question qualify for the relief from stamp duty which is conferred by s. 42 of the Finance Act, 1930. At the time when the instruments were effected Samuel Cohen (Properties), Ltd. held not less than ninety per cent. of the issued share capital of Escoigne Properties, Ltd., to whom, by the instruments, freehold and leasehold properties were conveyed and assigned. Accordingly the requirements of s. 42 (2) (b) are satisfied and the only question is whether the instruments were within s. 42 (2) (a). This depends on whether "the effect thereof" was "to convey or transfer a beneficial interest in property" from Samuel Cohen (Properties), Ltd. to Escoigne Properties, Ltd. It is quite clear that one of the effects of the instruments was to convey or transfer a beneficial interest in property to Escoigne Properties, Ltd. The instruments were, however, designed to effect another purpose as well, namely, to obtain the vesting of the legal title to the properties in Escoigne Properties, Ltd. This title was in the executors of Mr. Cohen, because the contract which this gentleman had entered into in 1950 for the sale of the properties to Samuel Cohen (Properties), Ltd. had never been completed. The terms in which s. 42 are drawn show that the attention of the draftsman was concentrated on the passing of beneficial interests in property from one associated company to another; and the immunity from transfer stamp duty was confined to instruments "the effect" whereof was to produce that result. This is not to say that an instrument which conveyed the legal title as well as the beneficial interest from one company to the other would be outside the section; but in such a case the instrument would be exempted, not because of, but in spite of, the passing of the legal title. In such a case the conveyance of the legal title would be no more than incidental to the passing of the beneficial interest; but, subject to this, the words "the effect" seem to me to show that the instruments which were in contemplation were those which were operative to produce only one result, viz., the conveyance or transfer of a beneficial interest. If the intention of Parliament were wider in scope than this, one would have expected to find "an effect" or "which are effective" instead of the language which in fact appears.

If this be the proper interpretation of s. 42 (2) (a) of the Act, it is clear that the instruments in question do not fall within it. The conveyances and assignments were certainly effectual to pass Samuel Cohen (Properties), Ltd.'s beneficial interests in the properties to Escoigne Properties, Ltd. They achieved, however, in addition to this, another and different purpose, viz., to complete the 1950 contract (which would, as an independent transaction, have attracted ad valorem stamp duty) and to introduce Escoigne Properties, Ltd. as sub-purchasers. This involved the joinder of Mr. Cohen's executors as parties to the instruments and the vesting by them in Escoigne Properties, Ltd. of the legal estate in the properties. The instruments accordingly had a dual effect, the conveyance or transfer of a beneficial interest by one associated company to another and the getting in of the legal title, in completion of the earlier contract of sale, which was still outstanding in a third party. By reason of this composite object of the relevant instruments, and their consequent width and scope, it cannot, therefore, be said, in my judgment, that "the effect" thereof was that envisaged by s. 42.

A The view which I have expressed regarding the meaning and effect of s. 42 of the Finance Act, 1930, is sufficient to decide the appeal in favour of the Crown, and it therefore becomes unnecessary to decide the questions which were argued before us on s. 50 of the Finance Act, 1938. I am, however, in agreement with the view which the Master of the Rolls has indicated, that the activities in which Mr. Cohen engaged in 1950 constituted "an arrangement" for the purposes of s. 50 and that the instruments now in question were executed in connection with (though not, I think, in pursuance of) that arrangement. I do not desire to add anything to what the Master of the Rolls has said on these points. I am, however, for myself more than a little doubtful whether the beneficial interest in the properties was, under that arrangement, "conveyed or transferred directly or indirectly by" Mr. Cohen to Samuel Cohen (Properties), Ltd. The beneficial interest certainly passed *from* Mr. Cohen to Samuel Cohen (Properties), Ltd. in 1950 but it passed by operation of law by reason of Mr. Cohen receiving the full consideration payable by Escoigne Properties, Ltd. under the contract of sale. It is difficult to say that a beneficial interest which only passed because of the operation of equity on that position was conveyed or transferred by Mr. Cohen, whether directly or indirectly. The word "by" appears to me to be of significance and D when used in connection with "conveyed or transferred" suggests the execution or signature of some document by the owner of a beneficial interest or by someone who is subject to his control and direction. I would only add that the somewhat looser phraseology "the effect whereof", which is used at the beginning of s. 50 (1) in reciting the general scope of s. 42 of the Act of 1930, is not repeated in the operative part of the section, which is framed in stricter language. I am inclined, E therefore, to the view that there was no conveyance or transfer by Mr. Cohen within the meaning of s. 50 (1); but, with my Lord, I would prefer to express no concluded opinion on a point which is not necessary for the determination of this appeal.

On the ground, however, that the instruments in question are not within the protection afforded by s. 42 of the Finance Act, 1930, I agree that the appeal F should be allowed.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Nicholson, Graham & Jones* (for Escoigne Properties, Ltd.);
Solicitor of Inland Revenue.

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

SUGDEN v. SUGDEN.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), December 17, 1956.]

Divorce—Maintenance of wife—Death of divorced husband—Order made against him in his lifetime to pay maintenance for children—Whether maintenance payable out of his estate after his death—Proper method of securing that maintenance should continue after husband's death—Meaning of "cause of action" in Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5 c. 41), s. 1 (1).

The parties were married in 1927 and there were two children of the marriage. They were divorced in 1945 and in 1946 an order for maintenance was made in the wife's favour whereby the husband was ordered to pay to the wife "during their joint lives until further order" maintenance at the rate of 1s. per annum, and was further ordered to pay to her "until further order until . . . the children" of the marriage should attain the age of twenty-one years maintenance for the children at the rate of £300 per annum, less tax, payable monthly. The husband paid regularly under the order until his death in June, 1955. The wife sought to make the husband's executrix continue the payment of maintenance in respect of the children, on the basis that the obligation continued until they attained twenty-one and survived by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1).

Held: on the true construction of the order the obligation imposed on the husband to make maintenance payments for his children did not extend beyond his lifetime (*Hinde v. Hinde*, [1953] 1 All E.R. 171, applied) nor (per DENNING and MORRIS, L.JJ.), did s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, have any application to the present case.

Per DENNING, L.J.: (i) in relation to maintenance in divorce there is no cause of action within s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, until the order for maintenance has been made (see p. 302, letter F, post), and

(ii) if it is desired to provide for maintenance for children of a marriage after their father's death, the proper way is to order the father during his lifetime to make a secured provision for the children (see p. 302, letter A, post).

Observations of HODSON, L.J., on his decision in *Dipple v. Dipple* ([1942] 1 All E.R. 234).

Decision of KARMINSKI, J. ([1956] 3 All E.R. 874) reversed.

[**Editorial Note.** It seems, also, that the court has no jurisdiction to make such an order on a husband to pay periodical payments to his wife as would endure after his death. All three lords justices doubt the existence of jurisdiction to make such an order; see p. 302, letter B, p. 304, letters B and F, post.]

As to the effect of the husband's death on the wife's claim for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 433, para. 973; and for cases on the subject, see 27 DIGEST (Repl.) 611, 5729 and 674, 6418-6422.

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 792.]

Cases referred to:

- (1) *Hinde v. Hinde*, [1953] 1 All E.R. 171; 3rd Digest Supp.
- (2) *Hyde v. Hyde*, [1948] 1 All E.R. 362; [1948] P. 198; [1948] L.J.R. 641; 27 Digest (Repl.) 629, 5898.
- (3) *Mosey v. Mosey & Barker*, [1955] 2 All E.R. 391; [1956] P. 26; 3rd Digest Supp.

(4) *Dipple v. Dipple*, [1942] 1 All E.R. 234; [1942] P. 65; 111 L.J.P. 18; 166 L.T. 120; 27 Digest (Repl.) 611, 5729.

Appeal.

The husband's executrix appealed against an order of KARMINSKI, J., dated Nov. 15, 1956, reported [1956] 3 All E.R. 874, allowing the wife's appeal against an order of Mr. Registrar KINSLEY dated Sept. 25, 1956. The facts appear in the judgment of DENNING, L.J.

R. J. A. Temple, Q.C., and *P. R. Hollins* for the husband's executrix.

G. H. Crispin for the wife.

DENNING, L.J.: Mr. Thomas Edward Sugden married his first wife in January, 1927. They were divorced on Feb. 12, 1945, having then two children, a boy of eight years and a girl of four. The wife re-married on July 31, 1945. On Apr. 25, 1946, after the wife's re-marriage, an order for maintenance was made, in these terms:

"It is ordered that Thomas Edward Sugden the respondent do pay or cause to be paid to Marjorie Sugden the petitioner during their joint lives until further order, as from May 13, 1946, maintenance for herself at and after the rate of 1s. per annum, the said sum to be payable monthly, and that the said respondent do pay or cause to be paid to the said petitioner until further order until Adam Sugden and Ann Sugden the children issue of the marriage between the parties shall respectively attain the age of twenty-one years as from May 13, 1946, maintenance for the said children at and after the rate of £300 per annum less tax for each child, the said sums to be payable monthly."

The husband paid under that order quite regularly. The husband himself also re-married. He died on June 22, 1955, having paid up to the date of his death every penny payable for the maintenance of the children. The question in the present case is this: Is his estate liable after his death to pay the maintenance of £300 a year less tax for the children until they are twenty-one? KARMINSKI, J., has held that his estate is so liable. There is an appeal to this court.

The husband was a solicitor in practice in the North of England. Presumably he earned money in his work, but in addition he was a man with substantial capital assets. In 1952 he made a will providing some £6,000 for the children, but it appears that before his death he revoked that will and made another will on Mar. 23, 1955, three months before he died. By his last will he cut out the children and gave the whole of his estate absolutely to his second wife. We are told that the children have applied to the Chancery Division under the Inheritance (Family Provision) Act, 1938, asking that provision should be made for them out of the assets; but that matter has not yet been determined. It is standing over pending the decision of this present case, because it is bound to be affected by what we decide today.

Under the order, the maintenance of 1s. a year for the wife is only payable "during their joint lives". It ends, therefore, with the husband's death. The maintenance for the children is not so limited, at any rate not in express terms. The order is "that the said respondent do pay or cause to be paid" to the wife the sum of £300 a year less tax for each child. It is to be noticed that it is only "the respondent" who has to pay, not his personal representatives. It is an obligation which is personal to him and ends with his death. It only subsists during his lifetime. The father is to pay only so long as he is alive to pay. A similar interpretation was put by this court on somewhat similar words in *Hinde v. Hinde* (1) ([1953] 1 All E.R. 171), particularly by BIRKETT, L.J. (ibid., at p. 173). If that is the proper interpretation of the order, it is the end of the present case. The father fulfilled his obligations during his lifetime, and after his death there was no obligation on anyone to pay. The order does not say

that his estate is to pay or that his personal representatives are to pay maintenance for the children. The obligation is at an end. I would like to add that, if it is desired to provide for maintenance for the children after the father's death, the proper way is to order the father during his lifetime to make a secured provision for the children by putting aside a fund on their behalf. That is contemplated by s. 26 (3) of the Matrimonial Causes Act, 1950. In the absence of a secured provision, I doubt whether the Divorce Court has any jurisdiction to order a man's personal representatives to pay maintenance for his children after his death. This is an additional reason for construing this order as I have done, so as to ensure that the court does not go beyond its jurisdiction. A

KARMINSKI, J., was much influenced by s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, which he thought applied so as to make the sums for maintenance continue after the father's death. I do not agree with this view. The sub-section only applies to "causes of action" which subsist against the deceased at the time of his death. The legislature had particularly in mind causes of action in tort which used to fall with the death of either party under the old common law maxim *actio personalis moritur cum persona*. "Causes of action" in the sub-section means, I think, rights which can be enforced, or liabilities which can be redressed, by legal proceedings in the Queen's courts. These now survive against the estate of the deceased person. "Causes of action" are not, however, confined to rights enforceable *by action*, strictly so called—that is, by action at law or in equity. They extend also to rights enforceable by proceedings in the Divorce Court, provided that they really are rights and not mere hopes or contingencies. They include, for instance, a sum payable for costs under an order of the Divorce Court, or a right to a secured provision under an order already made against a man before his death: see *Hyde v. Hyde* (2) ([1948] 1 All E.R. 362) and *Mosey v. Mosey & Barker* (3) ([1955] 2 All E.R. 391). It must be noticed, however, that the sub-section only applies to causes of action "subsisting against" the deceased on his death. This means that the right or liability must have accrued due at the time of his death. There is no difficulty in an ordinary action in determining when the right or liability accrued due; but there is more difficulty in proceedings in the Divorce Court. In that court there is no right to maintenance, or to costs, or to a secured provision, or the like, until the court makes an order directing it. There is therefore no cause of action for such matters until an order is made. In order that the cause of action should subsist at the death, the right under the order must itself have accrued at the time of death. Thus a cause of action subsists against a husband for arrears of maintenance due at his death, but not for later payments. This view of proceedings in the Divorce Court is supported by the decision of HOBSON, J., in *Dipple v. Dipple* (4) ([1942] 1 All E.R. 234) where he pointed out that all that the wife had was the hope that the court would in its discretion order a secured provision. She had no right to it at all until the order was actually made, and hence she had no cause of action at his death. Whilst I entirely agree with that decision, I do not think that the fact that a cause of action is discretionary automatically takes it out of the Act. An injunction is a discretionary remedy, but, if a cause of action for an injunction subsisted at the death, I should have thought that it would survive against the personal representatives. The only thing which takes a case out of the Act is the absence of an enforceable right at the time of death. B C D E F G H I

In the present case, there was no right or liability subsisting against the father at the time of his death. He had paid everything up to that time. If there had been any arrears of maintenance payable by him at that time, then no doubt they would be payable by his estate after his death under s. 1 (1) of the Act of 1934; but there were no arrears. There was nothing, therefore, to come within the Act of 1934 at all. The right to maintenance after his death must come from the terms of the order itself or not at all. As I have said, the order on its true

A interpretation gives no such right. For these reasons, I think that KARMINSKI, J., was in error, and I would allow the appeal.

B HODSON, L.J.: I agree. I think that it is unnecessary to consider the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), but perhaps I may be permitted to give a word of explanation about *Dipple v. Dipple* (4) ([1942] 1 All E.R. 234), a decision of my own which has been subsequently referred to in other cases. I held that the right of a wife, to whom a decree absolute of divorce was granted, to apply for secured maintenance under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925*, was not a cause of action against her husband within the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. As at present advised, I adhere to that view. Some emphasis has been placed on the word "discretionary" which I used in my judgment (*ibid.*, at p. 235), but I fully agree with DENNING, L.J., that that may be a misleading adjective. The question really is whether there is or is not a cause of action, whether the court is asked to exercise powers, but not whether the powers are discretionary. If I have misled anybody by the use of the word "discretionary", which, after all, was apt in that case, I regret having used such a word.

D The present case depends entirely on the construction of the order. I agree with the first contention of counsel for the wife that the words "during their joint lives" appearing in the first part of the order do not control directly the payments to the children which we are now considering and we have to consider the order in favour of the wife for the maintenance of the children without the assistance of the words "during their joint lives" appearing in the third line of the order. I think, however, that the conclusion is the same, and that the observations of BIRKETT, L.J., in the somewhat parallel case of *Hinde v. Hinde* (1) ([1953] 1 All E.R. 171) are relevant. The order in that case directed "that Walter Stanley Hinde the respondent do pay or cause to be paid . . ." That, said BIRKETT, L.J. (*ibid.*, at p. 173) would seem to indicate that the husband is alive to fulfil his obligation. Nothing is said that contemplates his death or what is to happen to the provision for maintenance in that contingency. Similarly, in the present case the order is

F "that Thomas Edward Sugden, the respondent . . . do pay or cause to be paid to the said petitioner until further order until Adam Sugden and Ann Sugden the children issue of the marriage between the parties shall respectively attain the age of twenty-one years as from May 13, 1946, maintenance for the said children at and after the rate of £300 per annum less tax for each child."

G That order connotes periodical payments to be paid by a living man to the wife, and in my view it connotes payments to be made during joint lives. It is quite true, as counsel for the wife pointed out, that nothing is added to or subtracted from the order by the words "attain the age of twenty-one years". Counsel relies on that phrase as showing that the order might extend beyond the lifetime of the payer. In my judgment they do not have that effect. Indeed, the order would have exactly the same effect if those words did not appear, and they do not assist me in the construction of the order at all. The jurisdiction of the court to make maintenance orders for children extends until the children attain the age of twenty-one years, and there is nothing gained by stating in the order what the jurisdiction is, which is already sufficiently precise if it contains the words "until further order". Those words "until further order" assist me to the construction which I have reached because they are put there in order to cover the event of a change of circumstances—which may, of course, include a change of circumstances of the children, but may also include a change of circumstances

I * Now replaced by the Matrimonial Causes Act, 1950, s. 19 (2): 29 HALSBURY'S STATUTES (2nd Edn.) 407.

of the payer, the man out of whose income *prima facie* the payment is to be made. A
They may also include a change of circumstances of the recipient—that is, the
wife. There is no room, in my judgment, for a construction more extensive
than joint lives.

That is sufficient to dispose of the present appeal. I might add, since the
matter has been discussed, that I know of no authority for the proposition that B
an order of this kind could be made by a court on a husband to pay to his wife
periodical payments extending beyond his death. Accordingly, if an order
purported to be made in that form under the provisions of the statute (now
s. 26 of the Matrimonial Causes Act, 1950) such an order would, *prima facie*,
be without jurisdiction; and the observations of MORRIS, L.J., in *Hinde v.*
Hinde (1) ([1953] 1 All E.R. at p. 179) would be directly applicable:

“The possibility of asserting in an action and of seeking to prove and C
establish that there was a contract as alleged by the wife can neither be
excluded nor encouraged.”

It would be perfectly open to a man to covenant to pay to his wife a sum of
money by periodical payments extending beyond his life. Such a covenant
could be binding on his estate, and if he sought to put such a promise in the form D
of a consent order it would not of itself presumably prevent the wife suing on
the contract. That question does not, however, fall to be considered in the
present case.

MORRIS, L.J.: I entirely agree. It seems to me that the present case can
primarily be decided on a construction of the order that was made on Apr. 25,
1946. I read the words in that order as involving an obligation on the husband E
which did not extend beyond the time of his death. The words are:

“and that the said respondent do pay or cause to be paid.”

I think that those words contemplate that the husband would be alive to fulfil
his obligation. The payments were to be made monthly—a fact which is some
further indication—perhaps slight by itself—pointing to the same conclusion, F
namely, that the obligation was one on the husband himself during his lifetime.
Taking that view as a matter of construction, it is perhaps strictly not necessary
to express an opinion on other matters; but I also very much doubt whether there
would be power in the court to make an order which would bind a man's estate
to make periodical payments. It seems to me that there is no room for the
application of the Law Reform (Miscellaneous Provisions) Act, 1934, in the G
present case. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Blundell, Baker & Co.*, agents for *Wright & Wright, Keighley* (for
the husband's executrix); *Haslewood, Hare, Shirley Woolmer & Co.* (for the
wife).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WILLIAMS v. WILLIAMS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.J.J.), December 14, 1956.]

Husband and Wife—Maintenance—Agreement—Enforceability—Wife in desertion—Agreement by wife to maintain herself, to indemnify husband against debts incurred by her, and not to pledge his credit—Consideration—Wife's right to maintenance suspended, not forfeited.

In January, 1952, the wife deserted the husband and in March, 1952, the parties signed an agreement whereby the husband agreed to pay to the wife for her maintenance £1 10s. a week during their joint lives so long as the wife led a chaste life. Clause 2 of the agreement provided that "the wife will out of the weekly sum or otherwise support and maintain herself and will indemnify the husband against all debts to be incurred by her and will not in any way at any time hereafter pledge the husband's credit". By cl. 3 the wife agreed that so long as the husband punctually made the payments she would not bring any matrimonial proceedings other than proceedings for divorce. The wife claimed arrears of maintenance, but the husband contended that there was no consideration for his promise to pay and that the agreement was not enforceable against him.

Held: although cl. 3 was void, the wife's promise in cl. 2 of the agreement was good consideration for the husband's promise to pay her maintenance, since, although she was in desertion at the date of the agreement, yet she might offer to return, and thus her right to maintenance was not forfeited but merely suspended by her desertion (observations of the EARL OF READING, C.J., in *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. at p. 384 applied); accordingly the husband's agreement to pay maintenance was enforceable and he was liable to pay the arrears (*Goodinson v. Goodinson*, [1954] 2 All E.R. 255 applied).

Per DENNING, L.J.: a promise to perform an existing duty is sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest (see p. 307, letter A, post); but cf. per HODSON, L.J. (at p. 309, letter C, post).

Appeal dismissed.

[As to the invalidity of an agreement not to sue for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 439, 440, para. 985.

As to the consideration for separation agreements, see 16 HALSBURY'S LAWS (2nd Edn.) 719, para. 1173; and as to the duty of a husband to maintain his wife, see *ibid.*, 608, para. 951; and for cases on these subjects, see 27 DIGEST (Repl.) 219-222, 1742-1772; 80 *et seq.*, 613 *et seq.*]

Cases referred to:

- (1) *Bennett v. Bennett*, [1952] 1 All E.R. 413; [1952] 1 K.B. 249; 3rd Digest Supp.
- (2) *National Assistance Board v. Parkes*, [1955] 3 All E.R. 1; [1955] 2 Q.B. 507; 3rd Digest Supp.
- (3) *Goodinson v. Goodinson*, [1954] 2 All E.R. 255; [1954] 2 Q.B. 118; 3rd Digest Supp.
- (4) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest (Repl.) 82, 627.

Appeal.

The husband appealed against an order of His Honour JUDGE TREVOR MORGAN at Aberystwyth County Court dated Oct. 3, 1956, whereby the husband was held

liable to pay to the wife arrears of maintenance under an agreement in writing dated Mar. 26, 1952. The facts appear in the judgment of DENNING, L.J. A

S. G. Priestley for the husband.

H. Edmund Davies, Q.C., and R. L. Bayne-Powell for the wife.

DENNING, L.J.: In the present case a wife claims sums due to her under a maintenance agreement. No evidence was called in the court below because the facts are agreed. The parties were married on Apr. 25, 1945. They have no children. On Jan. 24, 1952, the wife deserted the husband. On Mar. 26, 1952, they signed the agreement now sued on, which has three clauses: B

"(1) The husband will pay to the wife for her support and maintenance a weekly sum of £1 10s. to be paid every four weeks during the joint lives of the parties so long as the wife shall lead a chaste life the first payment hereunder to be made on Apr. 15, 1952. (2) The wife will out of the said weekly sum or otherwise support and maintain herself and will indemnify the husband against all debts to be incurred by her and will not in any way at any time hereafter pledge the husband's credit. (3) The wife shall not so long as the husband shall punctually make the payments hereby agreed to be made commence or prosecute against the husband any matrimonial proceedings other than proceedings for dissolution of marriage but upon the failure of the husband to make the said weekly payments as and when the same become due the wife shall be at full liberty on her election to pursue all and every remedy in this regard either by enforcement of the provisions hereof or as if this agreement had not been made." C D E

So far as we know, the parties have remained apart ever since. On June 1, 1955, the husband petitioned for divorce, on the ground of his wife's desertion, and on Oct. 12, 1955, a decree nisi was made against her. On Dec. 2, 1955, the decree was made absolute. In this action the wife claims maintenance at the rate of £1 10s. a week under the agreement for a period from October, 1954, to October, 1955. The sum claimed is £30 5s. 9d., which is the appropriate sum after deduction of tax. The husband disputes the claim, on the ground that there was no consideration for his promise. Clause 2, he says, is worthless and cl. 3 is unenforceable. F

Let me first deal with cl. 3. It is settled law that a wife, despite such a clause as cl. 3, can make application to the magistrates or to the High Court for maintenance. If this wife had made such an application, the husband could have set up the fact of desertion as an answer to the claim, but he could not have set up cl. 3 as a bar to the proceedings. The clause is void, and as such is no consideration to support the agreement: see *Bennett v. Bennett* (1) ([1952] 1 All E.R. 413). Now let me deal with cl. 2. The husband relies on the fact that his wife deserted him. If there had been a separation by consent, he agrees that the agreement would have been enforceable. In that case the husband would still be under a duty to maintain, and the sum of 30s. a week would be assumed to be a quantification of a reasonable sum for her maintenance having regard to her own earning capacity. The ascertainment of a specific sum in place of an unascertained sum has always been held to be good consideration. So long as circumstances remained unchanged, it would be treated by the courts as binding on her and she could not recover more from him: see *National Assistance Board v. Parkes* (2) ([1955] 3 All E.R. 1). In the present case the husband says that, as the wife deserted him, he was under no obligation to maintain her and she was not entitled to pledge his credit in any way. Clause 2 therefore gives him nothing and is valueless to him. The husband says that *Goodinson v. Goodinson* (3) ([1954] 2 All E.R. 255) is distinguishable because there was no finding in that case that the wife was in desertion, and, moreover, the wife promised to maintain the child as well as herself. G H I

A Now I agree that, in promising to maintain herself whilst she was in desertion, the wife was only promising to do that which she was already bound to do. Nevertheless, a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest. Suppose that this agreement had never been made, and the wife had made no promise to maintain herself and did not do so. She might then have sought and received public assistance or have pledged her husband's credit with tradesmen; in which case the National Assistance Board might have summoned him before the magistrates, or the tradesmen might have sued him in the county court. It is true that he would have an answer to those claims because she was in desertion, but nevertheless he would be put to all the trouble, worry and expense of defending himself against them. By paying her 30s. a week and taking this promise from her that she will maintain herself and will not pledge his credit, he has an added safeguard to protect himself from all this worry, trouble and expense. That is a benefit to him which is good consideration for his promise to pay maintenance. That was the view which appealed to the county court judge, and I must say that it appeals to me also.

D There is another ground on which good consideration can be found. Although the wife was in desertion, nevertheless it must be remembered that desertion is never irrevocable. It was open to her to come back at any time. Her right to maintenance was not lost by the desertion. It was only suspended. If she made a genuine offer to return which he rejected, she would have been entitled to maintenance from him. She could apply to the magistrates or the High Court for an order in her favour. If she did so, however, whilst this agreement was in force, the 30s. would be regarded as *prima facie* the correct figure. It is a benefit to the husband for it to be so regarded, and that is sufficient consideration to support his promise.

E I construe this agreement as a promise by the husband to pay his wife 30s. a week in consideration of her promise to maintain herself during the time she is living separate from him, whether due to her own fault or not. The wife cannot throw over the agreement and seek more maintenance from him unless new circumstances arise making it reasonable to allow her to depart from it. The husband cannot throw it over unless they resume married life together (in which case it will by inference be rescinded) or they are divorced (in which case it is a post-nuptial settlement and can be varied accordingly), or perhaps other circumstances arise not envisaged at the time of the agreement. Nothing of that kind has, however, occurred here. The husband must honour his promise. I would dismiss the appeal accordingly.

I HODSON, L.J.: I agree. The facts, so far as they are circumstances surrounding the document that we have to consider, are these. On Apr. 25, 1945, the parties to the agreement were married. There are no children of the marriage. On Jan. 24, 1952, the wife deserted the husband. On Mar. 26, 1952, the agreement was entered into. It is to be inferred, and it was conceded, that the desertion which started on Jan. 24, 1952, was continuing at the date of the agreement. The agreement is what is called a "maintenance" agreement, providing for payments by the husband to the wife of 30s. a week. The wife has sued on the agreement. The husband's answer is that there is no consideration—that, the agreement not being under seal, the contract requires consideration to support it. The agreement describes the parties by their names, followed in the one case by the description "hereinafter called the husband" and in the other case by the description "hereinafter called the wife", giving separate addresses for each party. Clause 1 provides:

"The husband will pay to the wife for her support and maintenance a weekly sum of £1 10s. to be paid every four weeks during the joint lives of the parties so long as the wife shall lead a chaste life . . ."

There is nothing in that agreement to control the duration of the payments except the joint lives of the parties. There is nothing to say that the payments shall only be made while they shall be living apart, or while they shall remain husband and wife, or indeed any other limitation except life and chastity. Then provision is made for the first payment to be made on Apr. 15, 1952.

In view of the terms of that agreement and the vagueness and uncertainty whether this is to cover periods when the parties are living together, or living apart, or both, it might be arguable that this document is not enforceable at all but void. But I think that it is too late now to argue that, as a document in almost exactly the same form was regarded as valid in this court in *Goodinson v. Goodinson* (3) ([1954] 2 All E.R. 255). Clause 2 of the agreement that we are considering provides that:

"The wife will out of the said weekly sum or otherwise support and maintain herself and will indemnify the husband against all debts to be incurred by her and will not in any way at any time hereafter pledge the husband's credit."

That is the clause which is particularly to be noticed, because it has been agreed between the parties that cl. 3 does not provide any consideration. Clause 2 is in the same form as a clause which was considered in *Goodinson v. Goodinson* (3). It was held in that case that such a clause provided good consideration by the wife, moving from the wife to the husband. Clause 2 of this agreement is in three parts—first, that she will out of the weekly sum or otherwise support and maintain herself; secondly, that she will indemnify the husband against all debts to be incurred by her; and thirdly, that she "will not in any way at any time hereafter pledge the husband's credit". It was pointed out in *Goodinson v. Goodinson* (3) that there was nothing to be said against such an agreement. Although it was not an agreement for separation there was a provision for the maintenance of the wife, and although the wife could not be excluded from access to the court by such an agreement yet that did not mean that the agreement of itself was bad.

Without referring in detail to the judgment of the court in *Goodinson v. Goodinson* (3), I think that it is sufficient to say that the reasoning of the judgments in *Goodinson v. Goodinson* (3) applies to the present case, as, indeed, the learned county court judge thought. How, then, is *Goodinson v. Goodinson* (3) to be distinguished here? Counsel for the husband has argued that it can be distinguished in two ways. He says, first of all, that in *Goodinson v. Goodinson* (3) it was not one of the facts that at the time when the agreement was entered into the wife was in desertion, whereas in the present case she was in desertion; therefore, she had forfeited all right to be maintained by her husband and so she was giving no consideration at all when she said she would maintain herself, because that is what she would have to do anyway. The short answer to that is, I think, that she had not forfeited her right to be maintained by her husband by being in desertion. She had only suspended her right and not destroyed it. Authority for that proposition is contained in the judgment of the EARL OF READING, C.J., in *Jones v. Newtown & Llanidloes Guardians* (4) ([1920] 3 K.B. 381 at p. 384):

"There is no doubt that at common law if a wife chooses wilfully and without justification to live away from her husband she cannot, so long as she continues absent, render him liable for necessities supplied to her, or for her maintenance by the union, for the reason that she has of her own free will deprived herself of the opportunity which the husband was affording her of being maintained in the home. But the relief of the husband from the obligation of maintenance continues only so long as she voluntarily remains absent. Her absence, although wrongful, does not affect the relationship of husband and wife."

That passage applies to the present case, looking at it, as we must do, as at the time when the agreement was entered into. The wife had then deserted the husband and was temporarily wrongfully away from home; but she might at any time return. In those circumstances, if she returned or offered to return her husband's liability to maintain her would revive. So that there was good consideration there to meet that contingency, which was a real contingency and not a fanciful one at that time. It is not affected by the fact that (as we now know, as a matter of history) the parties never have come together again but have been divorced.

It was urged by counsel for the wife that, whether the point which I have just put was or was not good, nevertheless it was a valid consideration even if the wife was in desertion, because it was some benefit to the husband to be protected from the embarrassment of invalid claims against him. For my part, I would prefer not to rest my judgment on that, because, once it is conceded that there is no basis for a claim by a wife, no consideration for giving an indemnity by the wife appears to me to emerge. It is unnecessary to express any concluded opinion on that matter, since I am entirely in agreement with DENNING, L.J., on the other point—that this desertion by the wife did not destroy her right to be maintained but only suspended it. An additional point was taken in this court in an attempt to distinguish *Goodinson v. Goodinson* (3), namely, that there was a child and that the wife promised to support not only herself but the child, whereas in the present case there is no child and so different considerations might apply. I am bound to say that I find no substance in that distinction. The judgments in *Goodinson v. Goodinson* (3) proceeded on the footing that the promise by the wife to maintain herself, etc., was sufficient consideration and did not depend on the additional fact (which it is true did appear in that case) that the consideration might be found in the promise to maintain the child.

For these reasons, therefore, I think that the present appeal must be dismissed. I would only add that, as I have already indicated, on the face of the document it is expressed to be between A and B, the two parties, for joint lives, and there is nothing on the face of the contract to say that it shall ever end so long as these two people live and so long as the wife leads a chaste life. But that is not fatal to the husband's future, because it is on the face of it also a post-nuptial settlement, which is under the control of the court after divorce and can be cancelled or varied. I have not forgotten a subsidiary argument put forward by junior counsel for the wife that something is added to the case by the promise that the wife would lead a chaste life and that she was thereby giving the husband something he would otherwise not obtain. I do not think that that adds or subtracts anything in the present case. The husband would not be able to rely on the unchastity of the wife, at common law, if the unchastity were brought about by his own conduct—certainly not if he had connived at it, because no man can take advantage of his own wrong. I have found no assistance, in construing this document, from the limitation (which is additional to the provision that the payment shall remain during the joint lives) that the payment shall only continue so long as the wife shall lead a chaste life.

MORRIS, L.J.: I also agree. I think that the learned county court judge came to a correct conclusion in this matter. I think that he based his decision on *Goodinson v. Goodinson* (3) ([1954] 2 All E.R. 255) in this court. The learned county court judge in his judgment first summarised the submissions made by the husband; then he summarised the submissions made by the wife; and then in coming to his conclusion he based himself on *Goodinson v. Goodinson* (3), and very considerably on the sentence in the judgment of ROMER, L.J. ([1954] 2 All E.R. at p. 260), where the lord justice said:

“But cl. 3 carries here an indemnity from the wife and other promises by her all of which are presumably, and, indeed, manifestly, of value to the

husband; otherwise, they would not have been introduced into the agreement.” A

Counsel for the husband seeks to distinguish *Goodinson v. Goodinson* (3) on two grounds. He said that in *Goodinson v. Goodinson* (3) cl. 3 (which is to be compared with cl. 2 now under consideration) included a reference to a child, and he said that the husband would have been obliged to maintain the child, but that by cl. 3 in that case the wife was undertaking to support and maintain not only herself but the child. In his judgment in *Goodinson v. Goodinson* (3) SOMERVELL, L.J., said ([1954] 2 All E.R. at p. 258): B

“ . . . although I think the point was not taken below, I should have thought the undertaking by the wife to have the custody and control of the child and bring it up until it was sixteen years old in the terms of cl. 4 was also a consideration.” C

I think that from that, and from the whole case, it appears that the judgments proceeded on the basis that, apart from the reference to the child, there was consideration.

The other point on which counsel for the husband relied as a distinction of *Goodinson v. Goodinson* (3) was that in that case the question of desertion was not before the court. There had been a defence, apparently, that the wife was in desertion, but that was presumably not persisted in. At all events, that matter was not before the court. So counsel for the husband submits that *Goodinson v. Goodinson* (3) is to be distinguished. I consider that we must proceed on the basis that at the date this agreement was entered into, Mar. 26, 1952, the wife was then in desertion. It seems to me that the wife might thereafter have offered to return and might have ceased to be in desertion, and that cl. 2 would at that stage and in that event have been in operation. Therefore, it cannot be said that cl. 2 was not of value to the husband. The probability of the happening of such events need not be measured, for the court does not inquire as to the adequacy of consideration. I think that for that reason the learned county court judge came to a correct conclusion. Like HODSON, L.J., I prefer to base my judgment on that ground rather than on the alternative ground—that apart from any question of an offer by the wife to return, while she was still in desertion, there might have been trouble, expense or embarrassment if the wife had incurred debts. I, therefore, agree that the appeal fails. D E F

Appeal dismissed.

Solicitors: *Pennington & Son*, agents for *Barker, Son & Isherwood*, Andover (for the husband); *Haslewood, Hare, Shirley Woolmer & Co.*, agents for *Smith, Davies & Jessop*, Aberystwyth (for the wife).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

**WIGRAM FAMILY SETTLED ESTATES, LTD. (In Liquidation)
v. INLAND REVENUE COMMISSIONERS.**

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.JJ.), December 12, 13, 14, 1956.]

Surtax—Investment company—Apportionment of income—In accordance with the respective interests of members—Apportionment in proportion to dividend rights—Redeemable preference shares—Whether additional interest from contributions to redemption fund—Finance Act, 1922 (12 & 13 Geo. 5 c. 17), s. 21 (1), (8), Sch. 1, para. 8.

The capital of an investment company comprised (a) six per cent. redeemable cumulative preference shares, (b) preference shares and (c) ordinary shares. The company's articles contained provision for maintaining a redemption fund for the redeemable preference shares out of annual profits of the company that would otherwise be available for dividend. This provision of the articles was inserted at the time of the issue of the redeemable preference shares to an assurance society to which they were issued, and the provision gave effect to a term of the agreement by which the society agreed to take up the redeemable preference shares. In the years of assessment 1949-50, 1950-51 and 1951-52, parts of the profits of the company were accordingly transferred to redemption reserve. The Special Commissioners of Income Tax directed, under s. 21 (1) of the Finance Act, 1922, that the income of the company for these years should be treated as the income of the members for the purposes of surtax. The commissioners apportioned the income among the members pursuant to s. 21 (8) and Sch. 1, para. 8, which provided that the apportionment should be made "in accordance with the respective interests of the members". The commissioners apportioned to the society, as holder of the redeemable preference shares, only so much income as was equivalent to the six per cent. interest thereon, disregarding the society's contractual right to restrain the company from distributing such part of its income as it had agreed to carry to redemption reserve. The apportionment to the preference shareholders was similar, and, thus the greater part of the income was apportioned to the ordinary shareholders who were individuals and liable to surtax. On the question whether a greater proportion of the income should be apportioned to the society (which, being a body corporate, was not liable to surtax) because the society had an additional interest in the sums being carried to redemption reserve,

Held: the income had been rightly apportioned by the commissioners because the contractual right of the society as holder of the redeemable preference shares to ensure that income was carried to redemption reserve was not an "interest" within the meaning of that word in para. 8 of Sch. 1 to the Finance Act, 1922, but was a contractual provision directed to ensuring that sufficient of the company's profits were retained as a fund out of which the redeemable preference shares would be redeemed in due course (see particularly p. 318, letters A to C, post).

Decision of VAISEY, J. ([1956] 3 All E.R. 118) affirmed.

[As to the apportionment of a company's income among members, see 17 HALSBURY'S LAWS (2nd Edn.) 297, para. 590.

For the Finance Act, 1922, s. 21 (1) and (8) and Sch. 1, para. 8, see 12 HALSBURY'S STATUTES (2nd Edn.) 237-240, 245; and for the corresponding provisions of the Income Tax Act, 1952, viz., s. 245, s. 246 (1)-(3), s. 248 (1), s. 249 (1), (2) (a), (b), see 31 HALSBURY'S STATUTES (2nd Edn.) 232-236.]

Case referred to:

- (1) *F. P. H. Finance Trust, Ltd. v. Inland Revenue Comrs.*, [1945] 1 All E.R. 492; [1946] A.C. 38; 114 L.J.K.B. 203; 172 L.T. 278; 28 Tax Cas. 209; 2nd Digest Supp.

Appeal.

The appellant company appealed to the Special Commissioners of Income Tax against directions which they had made on it under s. 21 of the Finance Act, 1922, and s. 14 of the Finance Act, 1939, in respect of the years 1949-50, 1950-51 and 1951-52 and against the consequential apportionments of the company's actual income for those years among the members of the company. The commissioners confirmed the directions and apportionments and the company accepted the decision on the directions but objected to the apportionments on the ground that they were not made in accordance with para. 8 of Sch. 1 to the Finance Act, 1922.

The company was incorporated on Dec. 12, 1932, to acquire and deal in real estate, its authorised capital being £5,000, divided into 3,500 preference shares of £1 each and 1,500 ordinary shares of £1 each, all issued for cash. On Apr. 6, 1933, the authorised capital was increased to £7,500 by the creation of 2,500 participating cumulative preference shares of £1 each. Of these two thousand were issued for cash. By a special resolution on Dec. 12, 1934, it was further increased to £57,500 by the creation of fifty thousand six per cent. redeemable preference shares of £1 each, all issued for cash, and by a further special resolution on Apr. 14, 1936, to £107,500 by the creation of an additional fifty thousand six per cent. redeemable preference shares of £1 each, all issued for cash on Apr. 22, 1936, to the holders of the original issue of redeemable preference shares.

The terms of issue of the first issue of redeemable preference shares were, inter alia, that they were to be repaid within five years from Mar. 31, 1935, and that the company was to set aside out of profits available for dividend in each year beginning with the year ended Mar. 31, 1936, a sum of £9,050, to be credited to a redeemable preference shares redemption fund until that fund amounted to £50,000. By the amendments effected by the special resolution of Apr. 14, 1936, provisions were incorporated in art. 14A of the company's articles of association requiring the one hundred thousand six per cent. redeemable preference shares to be redeemed on the expiration of ten years from Mar. 31, 1935, and for the purpose of such redemption the company was to carry to the credit of a redeemable preference shares redemption fund out of the company's profits which would otherwise be available for dividend £9,050 for the year ended Mar. 31, 1936, and £7,797 for every subsequent year. Under art. 14A (c), the profits of the company were to be calculated for the purposes of the article without deduction of any sums payable to the principal shareholders, Mr. Wigram (who was a solicitor of the firm of Messrs. Wigram & Co.) and Mr. Winham (who was the unpaid general manager of the company and proprietor of Messrs. Royds & Co., estate managers), or any firm in which either of them was a partner, in respect of services as directors, solicitors, surveyors or otherwise. Both the first and second issues of redeemable preference shares were made to the Equity and Law Life Assurance Society which imposed the provisions as to redemption as a condition precedent to subscribing for the shares in cash. At all material times the company paid dividends on its preference shares but no ordinary dividends.

By Mar. 31, 1949, the commencement of the first material accounting period of the company, a sum of £77,000 derived from the company's profits in accordance with art. 14A stood to the credit of the redeemable preference shares redemption fund. During the material years transfers to this fund out of taxed profits were made as follows: Year ended Mar. 31, 1950—£4,000; year ended Mar. 31, 1951—£10,000 (covering also some arrears); year ended Mar. 31, 1952—£4,000. On Aug. 30, 1950, eighty thousand redeemable preference shares

were redeemed by applying £80,000 standing to the credit of the preference shares redemption fund, and thereafter the assurance society's holding of redeemable preference shares was twenty thousand only until the company was liquidated on May 31, 1952.

The income of the company for the years in which directions were made was: year ended Mar. 31, 1950—£13,154; year ended Mar. 31, 1951—£21,885; year ended Mar. 31, 1952—£13,527. In apportioning this income, the Special Commissioners apportioned to the assurance society as a member of the company such proportion only of the income as was represented by its right to a six per cent. dividend on the amount of the redeemable preference shares held by it at the relevant time, viz., one hundred thousand up to August, 1950, and twenty thousand thereafter.

The company contended: (i) that the apportionments of the actual income of the company to its members did not fully take into account the interest of the assurance society, because, in addition to its entitlement to a six per cent. dividend on its shareholding, that society had also an interest in the credit to the redemption fund made in each of the relevant years out of the company's profits otherwise available for dividend; (ii) that the sums transferred to the credit of the redemption fund were transferred as a matter of contract with the society constituting an interest of the society as a member within para. 8 of Sch. 1 to the Finance Act, 1922: and (iii) that the Special Commissioners ought to have apportioned to the society the sums of £4,000, £10,000 and £4,000, grossed up at the appropriate standard rate or alternatively not grossed up, for the three years in question, in addition to a dividend for each of the years at six per cent. on the society's shareholding.

The Crown contended that the method of measuring the respective interest of the members by reference to dividend rights was in the circumstances the most equitable and fair, having regard not only to income rights and to voting rights but also to the interests of the ordinary shareholders on a winding-up; and in view of the redemption of the majority of the preference shares in August, 1950.

The commissioners rejected the contention that in the apportionments insufficient account had been taken of the interest of the society as a member, and held that the society's interest was adequately measured by taking six per cent. of the amount of its preference shareholding in the material years and that the guarantee on which the society had insisted as a condition of subscribing for its shares was no more than a security for the eventual repayment of its capital and that it would have been wrong to impute a double interest to the society. They therefore affirmed the principle on which the apportionments had been made. On July 17, 1956, VAISEY, J. ([1956] 3 All E.R. 118) dismissed the company's appeal by Case Stated from this decision, holding that the contributions of the company to the redeemable preference shares redemption fund represented an application of profits as capital to the redemption of the redeemable preference shares and not a bonus or premium constituting an additional interest in the income of the company. The company appealed to the Court of Appeal.

Cyril King, Q.C., and P. J. Sykes for the company.

J. Pennycuik, Q.C., Sir Reginald Hills and M. Temple for the Crown.

LORD EVERSLED, M.R.: As appears from what has been called its preamble, s. 21 of the Finance Act, 1922, was enacted for the purpose of preventing the avoidance of the payment of super-tax (now surtax) through the withholding from distribution of income of certain companies which would otherwise be distributed. The scheme of that section, as later amended, was that the income of such companies was liable to be deemed to be treated as the members'

income notwithstanding that it had not been, or had not been entirely, distributed. The point was this. Whereas individuals are liable to surtax, limited companies are not. So Parliament provided that the income of companies to which the legislation applied should be liable to be assessed for surtax, although it remained the income of the companies. By way of further discouragement, the income is to be assessed for surtax or is to be treated as though it were the highest part of the income of the company's members respectively. B

The Finance Act, 1922, and the later Finance Acts of 1936, 1937 and 1939 provided that that scheme should apply to certain classes of companies, one of which is described as an investment company. The company in the present case, Wigram Family Settled Estates, Ltd. is in that category, and this legislation applies to it.

Two stages operate in the obtaining of the taxation: (i) a direction is given by the commissioners and (ii) as a result of that direction the income is deemed to be the income of the members. The second stage itself may be regarded as sub-divided; for, when it is deemed to be the income of the members, the commissioners must divide it "in accordance with the respective interests of the members." Those last words are taken from para. 8 of Sch. 1 to the Finance Act, 1922; and the problem in this case really turns on the effect of those words —the income shall be apportioned D

"in accordance with the respective interests of the members."

As a result of amending legislation*, this being an investment company, the question whether there should be a direction no longer depended on whether there had been reasonable distribution of the income. The first stage of direction was mandatory, given that the company was one to which the legislation applied as was this company. E

At the opening of the period in 1950 to which the claim of the Crown is directed, the company had a share capital consisting of four different classes of shares. There was an issued number of one hundred thousand £1 redeemable cumulative preference shares. Subject to that issue, there were two classes of cumulative preference shares, each carrying the right to six per cent. cumulative preferential dividend, the first being also participating shares but the second being non-participating. Finally, there was a class of ordinary shares. For the moment, while not forgetting what counsel for the company said in his reply, I leave out of account the two so-called junior classes of preference shares, cumulative preference participating shares and the non-participating preference shares, and confine my attention accordingly to the redeemable preference shares on the one hand and the ordinary shares on the other. F

When the redeemable preference shares were issued, the articles of association were altered to give specific effect to the rights of the holders and to the terms on which the issue was made. Those rights and terms are found in art. 14A of the company's articles of association. That article provided that the redeemable preference shares should be redeemed at the expiration of ten years out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for purposes of the redemption; and then provision was made for the payment of the cumulative preferential dividend up to the date of redemption. So far, the article followed in regard to redeemable preference shares the statutory requirements introduced into company law recently, which now find their place in s. 58 of the Companies Act, 1948. That section requires redeemable preference shares, if not redeemed out of the proceeds of a fresh issue of shares, to be redeemed out of profits otherwise available for dividend. G

Paragraph (b) of art. 14A provided that, for the purposes of such redemption, the company should create and thereafter maintain what was called a redeemable I

* See the Finance Act, 1939, s. 14.

preference share redemption fund out of the profits of the company otherwise available for dividend; and provision was made for putting aside out of such profits for each year certain sums of money, if available. In fact, the actual provisions of the article so far as they specified the sums to be set aside were not exactly followed; but nothing in the present case turns on that variation or on the fact that the dates mentioned in the article were not strictly adhered to. So far as is relevant it is sufficient to say that, for the tax years 1950-51, 1951-52 and 1952-53, with which we are concerned, the following sums were put to the credit of the specially created redemption fund; in the first and the third years £4,000 and in the second £10,000, the sums being taken in each case from the income of the company which would otherwise have been available for distribution by way of dividend to the shareholders. For simplicity, I will confine myself to the first of the three years, when the sum of £4,000 was taken from the profits available for distribution and put to the credit of the specially created redeemable preference shares redemption fund.

There is no question whatever of the company having withheld from distribution unduly large sums, unreasonably or otherwise, or of having been used, at any relevant date or at all, for the purpose against which this legislation was designed, viz., the avoidance of the payment of surtax by individuals by keeping the funds in question in a limited company not liable for surtax. In the result, if the Crown's view is right, it must be conceded that this might fairly be regarded as something of a hard case. All the company did by way of retention of income, otherwise liable to be distributed, was to apply it in accordance with its contractual obligations so to do. But the point has arisen because the sole holder of the redeemable preference shares was a company, the Equity and Law Life Assurance Society, not itself liable to pay surtax at all. On the other hand the ordinary shareholders were individuals themselves liable to pay surtax and it will be remembered that I am leaving deliberately out of account the other preference shareholders, although the same would in effect apply to them. The company being within the scope of the legislation, the necessary direction for the relevant years was given.

When the matter was first before the Special Commissioners, I understand that the company took the point among others that, although an investment company, it was within certain exceptions in the statute so that the direction was wrongly given. That point has now disappeared from the case. There is no doubt now that the direction was properly given, and the consequences of the direction therefore must flow, whatever they may be.

The direction having been given, it thereupon fell to the commissioners to apportion the income of the company among the members, on the footing that it was deemed to be their income in accordance with their respective interests. The way in which it has been apportioned is set out in figures attached to the Case Stated. In para. 12 (ii) of the Case will be found also a table or summary, and the table (speaking generally but I think sufficiently for present purposes) shows this, that the interest of the redeemable preference shareholders was taken to be confined to their right to a six per cent. cumulative preferential dividend. The dividend not, I understand, being in arrear, their interest in the company's income for that year was therefore taken as having been £6,000, viz., six per cent. of £100,000. Similarly, the junior preference shareholders had attributed to their interests sums arrived at by reference to the preferential dividend to which they in turn were entitled; and that left the rest of the income to be apportioned and attributed to the ordinary shareholders. It so works out that the ordinary shareholders in the end are, so to say, saddled with a large portion of the total sum of the company's income; and since they are surtax payers they have therefore to be assessed to a large sum for surtax. Under the scheme of the Act (unless they happen to be willing to pay the surtax which I will assume they are not) the surtax falls to be paid in fact by the company. The net result for practical

purposes is this, that a part (the part with which we are concerned) of the accumulated profits of the company, carried in fact to this redemption fund, brings down on the company a large claim for surtax.

The company says that that method of apportionment wholly neglects an important and certainly a relevant interest of the redeemable preference shareholders, the Equity and Law Life Assurance Society, viz., their right by contract and under the articles to have the £4,000 set aside and put to this redemption fund for their benefit, as creating and building up the fund out of which the shares ultimately would be and were in fact redeemed. Treating the case as one of figures, the company says that, of the company's total income, the £4,000 which has been apportioned to the ordinary shareholders should be transferred from their account (so to speak) and attributed to or apportioned to the Equity and Law Life Assurance Society; the practical effect being that, since the society is not a surtax payer, therefore the company's liability for surtax will be correspondingly reduced.

I said earlier in this judgment that this was admittedly not a case in which the structure and the transactions of the company could be regarded as directed to the avoidance of surtax. The hardship of the case seems therefore to be this; the ordinary shareholders have been treated as having had this income and therefore rendered themselves or the company liable to assessment, though they could not have had a penny piece of it, having regard to the obligations of the company to the Equity and Law Life Assurance Society. So the company is made to pay a sum of surtax in respect of part of its income which it could not deal with in any other way than it did in fact.

The question depends on those few simple words in para. 8 of Sch. 1 to the Finance Act, 1922: the apportionment "shall be made . . . in accordance with the respective interests of the members". It was the view of the Special Commissioners that the right of the Equity and Law Life Assurance Society under this contract and under the articles was in truth, in substance, in reality (whichever phrase you like to use), no more than a right to have the obligations of the company for redemption of the preference shares secured, or better secured. Paragraph 15 of their Case expresses the conclusion in these terms:

"We . . . rejected the contention that in apportioning the actual income of [the company] for the said years among its members insufficient account had been taken by the assessing commissioners of the interest of the society as a member. We held that the society's interest as a member was adequately measured by taking six per cent. on the amount of its preference shareholding in the material years. We further held that the guarantee [i.e., the contract] on which the society had insisted as a condition of subscribing for its shares was no more than a security for the eventual repayment of its capital, and that it would have been wrong for the assessing commissioners to impute a double interest to the society, one measured by the income yield on its shares, the other by the amount credited in any relevant year to the preference shares redemption fund out of profits of [the company] otherwise available for dividend."

That view of the Special Commissioners found favour with VAISEY, J., when the case came before him. He said ([1956] 3 All E.R. at p. 122):

"It seems to me that the contractual guarantee providing for the creation of the redemption fund was, as the Special Commissioners put it, in essence merely a security for the eventual repayment of the capital and in no way and in no sense a double interest attached to the shares . . . It seems to me that the fallacy in the company's argument consists in treating the redemption fund as providing something in the nature of a bonus or premium to the holders of [the society's] shares, whereas in truth all that it did was to provide for their payment off or redemption, which may or may not have been welcome or beneficial to such holders."

The learned judge then referred to *F. P. H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (1) ([1945] 1 All E.R. 492). That was a case in which the company's formation and transactions had been directed to the avoidance of surtax, and the language of LORD RUSSELL OF KILLOWEN, who delivered the only speech in the House of Lords, was primarily at any rate directed to that feature of the case. But his language is also of general application, certainly in some respects, and any opinion of that noble Lord naturally receives the greatest possible attention. To one passage in it to which VAISEY, J., was referred, much argument was directed here. LORD RUSSELL said (*ibid.*, at p. 497):

"In my opinion the commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (i) that they fall within the definition [of being members] and (ii) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions."

Some of the argument turned on the adverb "really". No doubt the word was used with particular reference to the circumstances in *F. P. H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (1) that the real interest of the shareholders had been somewhat disguised by the regulations of the company with a view to avoiding the tax liability which would otherwise have fallen on them. Still I think the speech does lay down the general rule that one should not merely confine oneself to looking at what at first sight may appear to be the income rights of the classes of shareholders in the company concerned; one must see what really is the interest in the fund of those shareholders.

Although this is not a tax avoidance case, as that phrase is commonly understood, yet as Mr. Pennycuik made clear to us in his very cogent argument, it is relevant to bear in mind how the matter would work in such a case as this if the company were right. This is an investment company, and therefore a direction perforce must be given, with the inevitable consequence that the income of the company, available for distribution is to be deemed to be the income of the members. *Prima facie* that income would be deemed to be their income in accordance with their rights to receive it. The structure of the company here is in perfectly normal and ordinary form. The preference shareholders are entitled to preferential dividends and no more (subject again to the limited right of participation by one of the junior classes of preference shareholders). Subject to those rights, everything which is distributed goes to the ordinary shareholders; and they are entitled in a winding-up to the company's distributable assets after the prior classes of shareholders have been repaid the equivalent of their capital. If they received this sum of £4,000, therefore, the ordinary shareholders would have paid a very high proportion of it in surtax. By not distributing it, by keeping it in the company (albeit pursuant to a contractual obligation and for the purpose of providing for the redemption of the redeemable preference shares), no surtax would be paid on it apart from this legislation. If therefore the objective of this legislation is that, quoad companies of this kind, surtax shall be exigible on the footing that the income distributable is deemed to be the income of the members, and if the company is right, the result will be that so much surtax has been lost to the Revenue. Put the other way round, from the point of view of the ordinary shareholders, it may fairly be said that, instead of having received this sum by way of dividend, they will have kept it in the company, and on its liquidation (which has now in fact occurred) they will have received it free of tax. That shows that there is force and cogency in the point made by Mr. Pennycuik, that, if the real interest, the eventual proprietary interest, of the ordinary shareholders is looked at (however it is described), they have indeed that interest in the sum involved. Against that view can undoubtedly be set the fact that by contract, by the articles, the company could not distribute this £4,000. It was conceded by

counsel for the Crown that, if it had threatened to do so, the court would almost certainly have granted an injunction to prevent the distribution. Therefore, the question must be posed and answered: Has the Equity and Law Life Assurance Society, by virtue of that contractual right, which it can call on a court of Chancery to enforce, not got a real interest in the £4,000 such as should have been taken into account by the apportioning commissioners? That is the problem. A

The Special Commissioners answered negatively, and also VAISEY, J., for reasons already stated. I think that conclusion was correct. I agree with VAISEY, J., shutting our eyes to the hardship perhaps in this case, that the interest of the Equity and Law Life Assurance Society in this sum was no more than a concern to see that the company's profits were not dissipated by distribution among the shareholders but were retained to make available at the end of a limited period a sufficient fund of undistributed profits, out of which (and out of which alone in the absence of a re-issue of shares) these preference shares could be redeemed. That is the whole sum of the matter, and I do not think that I should improve it by elaboration. B

Two points should be mentioned. Counsel for the Crown also invoked s. 14 (3) of the Finance Act, 1937, which provides that, in making the apportionment for companies of the kind of which this is one, the apportioning commissioners, if they think it proper to do so, may attribute to the members an interest corresponding to their interest in the assets of the company available for distribution in the event of a winding-up. He said that, in a winding-up, the sensible way of computing the interest of the preference shareholders, during the period when the company was in fact a going concern, was to award them their preferential dividend and give the rest to the ordinary shareholders. With all respect I do not myself think that the argument and the reference to that section materially advance the Crown's case. It seems to me that it is merely stating in another form, and I am not quite sure that it is so accurate a form, what are the true rights to dividend of these classes of shareholders inter se while the company is a going concern. C

Secondly, counsel for the company said in reference to this section that, if regard were to be paid to interests in a winding-up, then it should be paid to the interests of the junior classes of preference shareholders in a distribution, because those shareholders were entitled to have their shares redeemed before the ordinary shareholders got anything. What I have already said about the invocation of this sub-section inferentially answers this point. We have to look at this sum as being part of the distributable income of the company in the year in question. The question then arises—What are the respective rights of the members in that sum of undistributed income? We therefore come back to the single point: Is the contractual right of the Equity and Law Life Assurance Society to have the £4,000 set aside a relevant interest for the purposes of this apportionment? With all respect to the force of the arguments on the other side, in my judgment it is not. D

An illustration which I put in the argument lends emphasis to the view which was taken by VAISEY, J., rightly, as I think. If, for the better securing of the Equity and Law Life Assurance Society's shares, the company were under covenant to apply some portion of its income available in any year for distribution towards the discharge of debts of the company (properly so called), e.g., a debenture debt, could the income so applied or the right to have the income so applied be regarded as an "interest" of the Equity and Law Life Assurance Society in that income for present purposes? In that case it is in my judgment more plainly seen that the answer should be in the negative. It makes clearer that the real object of art. 14A was not to provide something for the Equity and Law Life Assurance Society, what VAISEY, J., called something in the nature of a bonus or premium, but merely to make proper provision by way of security for E

the final obligation for redemption. For those reasons I conclude that VAISEY, J., rightly answered this problem; and I would dismiss the appeal.

BIRKETT, L.J.: I am of the same opinion. I entertain no doubt that the Special Commissioners and VAISEY, J., came to a right conclusion, and that this appeal ought to be dismissed. The problem turns on the word "interest" or "interests." There was never any doubt that the Equity and Law Life Assurance Society did have an interest, in the ordinary use of language in the particular sums with which we are dealing. The argument is, however, that, looking at the wording of s. 21 of the Finance Act, 1922, and of para. 8 of Sch. 1 incorporated therein, there was such an interest that the Special Commissioners ought to have taken it into account when making the apportionments, and they went wrong in not doing so. Thus the argument put before the Special Commissioners was that the apportionment of the actual income did not take into account fully the interest of the Equity and Law Life Assurance Society, because, whilst it is common ground that the society was entitled to the six per cent. dividend on the preference shares, the apportionment did not take account of the credit to the redemption fund set up out of the profits of the company in the relevant years which profits would otherwise have been available for dividend. In support of that it was said that those sums taken out of dividend and so put to the credit of this account to redeem the preference shares were a matter of contract between the Equity and Law Life Assurance Society and the company.

Reference was made to the speech of LORD RUSSELL OF KILLOWEN in *F. P. H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (1) ([1945] 1 All E.R. 492), and his use (at p. 497) of the words "really interested in the income in question". I think there LORD RUSSELL was using the word "really" because of the peculiar and special facts of the case, and it became of some point in the context in which he was using it. The complete sentence reads (*ibid.*):

"In my opinion the commissioners, in apportioning the income among the members, should determine who are the persons of whom it can be said (i) that they fall within the definition, and (ii) that they are the persons who, in view of all their interests in the company, are the persons really interested in the income in question and in what proportions."

When he gets to the end of that paragraph he says (*ibid.*):

"If the same individuals figure in each answer, those are obviously the persons who, according to their interests in the company, own the real and paramount beneficial interest in the fund in question."

That is the sense in which he was using the word there.

Something of the same nature has to be determined in this case. There is no question that the six per cent. dividend ranks as an interest within the meaning of the section. The question is: Is the beneficial interest of the Equity and Law Life Assurance Society in the income of the company set aside for the purpose of redeeming the redeemable preference shares in the same category? The Special Commissioners and VAISEY, J., said "No". I was much impressed by the argument of counsel for the Crown, particularly as to what he submitted was the real distinction between the interests of the Equity and Law Life Assurance Society in this fund and the interest of the ordinary shareholders. He contended that the real interest (or the paramount interest, to use the same word as LORD RUSSELL) lay in the holders of the ordinary shares and not in the Equity and Law Life Assurance Society. As I understood it, the distinction that he made was this:—that the interest of the holders of the ordinary shares was in the accretion of the assets whilst the company was a going concern. But by setting aside out of profits so much to this fund there was an accretion of assets of the company, which on a winding-up would be available for distribution and would

belong to the ordinary shareholders. That is the real interest, the paramount beneficial interest. A

The interest of the Equity and Law Life Assurance Society was to have an additional security for the repayment of their money, and, although they could have restrained by an injunction any attempt by the company to distribute the money instead of fulfilling its contractual obligation, none the less it was not to be considered as a real interest in the sense in which the words are used in the section and in the Schedule. B

I have come to the conclusion that the decision of the Special Commissioners and the judgment of VAISEY, J., were correct, and that this appeal ought to be dismissed.

ROMER, L.J.: I agree. I think this is a very hard case, and not at all the sort of case at which this legislation was aiming. The object of the legislation sufficiently appears from the beginning of s. 21 of the Finance Act, 1922, where it says: C

“ With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed . . . ” D

That was the mischief at which the legislation was directed. Here there is no question of withholding the distribution of income which would otherwise be distributed in order to avoid the payment of surtax, as it now is; the income was withheld from distribution because the company was under a contractual obligation so to withhold it. Nevertheless, so far as an investment company is concerned, the relevant provisions apply automatically whatever the company does with its income, and I cannot avoid the conclusion that the Special Commissioners and the learned judge arrived at a right decision, for the reasons which LORD EVERSHERD, M.R., has given and to which I cannot usefully add anything. E

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Wigram & Co.* (for the company); *Solicitor of Inland Revenue.*

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A

HAYMAN v. ROWLANDS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), December 19, 20, 1956.]

County Court—Appeal—Note of judgment—Incomplete note—Whether affidavit evidence of grounds of judgment admissible on appeal—R.S.C., Ord. 58, r. 18 (5).

B

On an appeal from a county court to the Court of Appeal, if the county court judge's note is not complete, the Court of Appeal may receive an affidavit of what occurred from the solicitor concerned where counsel was not engaged in the case. The affidavit should first be submitted to the county court judge for his comments; but where the affidavit had been in the hands of the opposing party for three weeks before the hearing by the Court of Appeal, the appeal was not adjourned to enable the affidavit to be submitted to the county court judge.

C

Court of Appeal—New trial—Refusal—Grounds that the same conclusion would have been reached on a fresh hearing—County Court Rules, Ord. 37, r. 2.

D

In an action for arrears of rent and for possession of a dwelling-house subject to the Rent Restrictions Acts on the ground of non-payment of rent, the tenant failed to appear at the hearing owing to a mistake as to the date. Evidence was given by the landlord that he was an unsatisfactory tenant and judgment was given against the tenant in his absence. The tenant subsequently paid into court the rent outstanding and applied to the county court judge for a new trial under the County Court Rules, Ord. 37, r. 2. After hearing the tenant, and not disbelieving him, the judge refused a new trial on the ground that he would have come to the same conclusion if the case had been heard afresh, even with the knowledge that the full amount of the rent had been paid into court. On appeal,

E

Held: a new trial must be ordered because the tenant had some defence (viz., that the full amount of rent due having been paid, it was not reasonable to make an order for possession) and ought to have an opportunity of giving evidence and of cross-examining the landlord on his evidence; moreover, where a party failed to appear by mistake, a new trial should be ordered if it could be done without injustice, the other party being compensated in costs.

F

Grimshaw v. Dunbar ([1953] 1 All E.R. 350) and *Dellenty v. Pellow* ([1951] 2 All E.R. 716) applied.

G

Appeal allowed.

[As to a new trial following judgment in the defendant's absence, see 9 HALSBURY'S LAWS (3rd Edn.) 268, para. 630, and 329, para. 795; and for cases on the subject, see 3rd DIGEST Supp.]

For the County Court Rules, Ord. 37, r. 2, see the COUNTY COURT PRACTICE.

H

As to supplying the judge's note on appeal from the county court, see 9 HALSBURY'S LAWS (3rd Edn.) 328, para. 794; and for cases on the subject, see 13 DIGEST 539, 910-924.

For R.S.C., Ord. 58, r. 18 (5), see the ANNUAL PRACTICE, 1957.]

Cases referred to:

(1) *Grimshaw v. Dunbar*, [1953] 1 All E.R. 350; [1953] 1 Q.B. 408; 3rd Digest Supp.

I

(2) *Dellenty v. Pellow*, [1951] 2 All E.R. 716; [1951] 2 K.B. 858; 3rd Digest Supp.

Appeal.

The tenant appealed against an order of His Honour JUDGE RAWLINS, made on Oct. 3, 1956, in Windsor County Court, refusing an application for a new trial of an action for possession of the tenant's dwelling-house for non-payment of rent, at the hearing of which the tenant had not appeared. The grounds of appeal were: (i) that the learned judge had misdirected himself in saying

that he could not grant the application to re-hear unless satisfied that, after taking into account everything that had transpired before the application, he would not have given judgment in the same terms and have made the same orders as were given and made by him on Sept. 12, 1956 (the date of the hearing of the action); (ii) that, in dismissing the application, the learned judge mis-directed himself and erred in law in that on the facts placed before him he could not properly have done otherwise than order that a new trial be had between the parties; (iii) that, in adjudging that the landlord should recover possession of the dwelling-house from the tenant and in dismissing the application, the learned judge failed to give due consideration to the fact that the occupation of the tenant was protected by the Rent Restrictions Acts and that the action had been heard in the absence of the tenant, so that he had had no opportunity of giving evidence in regard thereto or of calling witnesses on his behalf or of cross-examining the landlord and his witness; and had failed to give due consideration to all the facts on matters relevant in deciding whether or not it was reasonable that an order for possession should be made; and (iv) that the judgment and orders resulted in a miscarriage of justice.

J. G. K. Sheldon for the tenant.

C. J. S. French for the landlord.

DENNING, L.J.: An application has been made to us to receive an affidavit from a solicitor as to what happened in the county court. The judge's note contains a statement of the evidence given before him but no note of the reasons for his decision. It has been submitted by counsel for the plaintiff that we ought not to look at this affidavit. He refers to the rule of this court (R.S.C., Ord. 58, r. 18 (5)) which says that the judge's note has to be furnished and in default of production of such a note

"the Court of Appeal may hear and determine the appeal upon any other evidence or statement of what occurred before the judge of the county court which appears to the Court of Appeal to be sufficient."

He says that here there is the judge's note, and that therefore we ought not to look at any other evidence or statement. I think that the rule only applies when there is a complete and full note by the county court judge. If his note is not complete and is only a part of a note, then we habitually allow it to be supplemented by the note of counsel or by any other means which appears to us to be suitable. So in a case where counsel were not engaged, such as the present case, an affidavit from the solicitor concerned can be received. It ought to be submitted to the county court judge beforehand, for his comments, especially if there is any difference. That has not been done in this case; but I do not think we need stand the case over for that to be done. The affidavit has been in the hands of the other side for nearly three weeks now, and if they had anything to query in it they ought to have queried it before now.

I think, therefore, that we should receive this affidavit.

HODSON, L.J.: I agree.

MORRIS, L.J.: I agree.

DENNING, L.J.: Mr. Hayman is the landlord of a house in Windsor. He only bought it three years ago, and he seeks to eject the tenant, Mr. Rowlands, on the ground of non-payment of rent. The tenant has been there for nine and a half years as tenant of the house and is clearly protected under the Rent Restrictions Acts. He withheld the rent for some months at the beginning of this year because the premises were out of repair, as he said. That is not in law a good ground for not paying rent. So the landlord summoned him in the county court. On Sept. 12 the case came on for hearing, but unfortunately the tenant did not appear. We now know from his affidavit that the reason he

A did not appear was that he had misread the notice; he thought the hearing was for October, not September. At all events, he was not there on Sept. 12, and the judge accordingly gave judgment for the landlord for £30 17s. 10d., the arrears of rent, and ordered the tenant out by Oct. 10, only giving him just under a month.

When the tenant got to know of the order which had been made against him, B he promptly went to his solicitor. The solicitor told him that the fact that the premises were not in repair was not a good ground for withholding the rent, and he told him to pay the rent into court. He promptly paid into court on Oct. 1 the full amount of the rent, £30 17s. 10d., and he applied to the judge two days later, on Oct. 3, 1956, for a new trial of the case. He gave evidence as to how he mistook the date. The judge did not disbelieve him, but he refused C his application for a new trial. Counsel for the tenant now appeals to this court, saying that he ought to have a new trial; he has paid all the rent into court and he wants to be heard.

The judge's note did not contain any reasons for his decision. We have under the rules in that behalf admitted an affidavit by the solicitor who appeared in the case. From that affidavit it appears that the judge's reason for refusing a D new trial was: "I would have come to the same conclusion anyway, even if the case was heard afresh today. Even with knowledge that the full amount of rent had been paid into court I would come to the same conclusion and order the tenant out". I cannot agree with this reasoning. It would be very unusual indeed for a tenant to be ordered out on the ground of non-payment of rent when the full amount was already paid into court. If the tenant is in arrear, E in these cases under the Rent Restrictions Acts the everyday practice is to make an order for possession, but to suspend it so long as the current weekly rent and a payment on account of the rent in arrear are paid in. If all the arrears have been paid into court, I should not have thought it right that an order for possession forthwith should be made on the ground of non-payment of rent, unless there was something more in the case of which we do not know.

F What, then, is to be done? I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but, so long as he does so, the strength or G weakness of it does not matter. I think it plain in this case that the tenant had a defence on the merits. He had a defence on the question whether it was reasonable to make an order for possession against him.

It seems to me that, as the tenant has paid the full amount into court and wishes a new trial to be had, he ought to have it. He will probably have to pay the costs thrown away in the court below, but subject thereto I think he H ought to have a new trial. I would allow the appeal accordingly.

HODSON, L.J.: I agree. Order 37, r. 2 (1) of the County Court Rules provides:

I "Where a defendant to an action or a defendant to a counterclaim does not appear at the hearing and a judgment or order is given or made against him in his absence, the judgment or order and any execution thereon may on application be set aside and a new trial may be granted."

That order gives a discretion to the county court judge to grant the defendant a new trial where (as here) he does not appear at the hearing of the case. Naturally, it is said that, the learned county court judge having exercised his discretion, we ought not to interfere; but a situation of this kind was considered by this court in *Grimshaw v. Dunbar* (1) ([1953] 1 All E.R. 350), where a defendant gave an excuse for not having appeared at the hearing, and the excuse was not

contradicted and was accepted. It was pointed out (*ibid.*, at p. 355) that it was essential that a party to an action should have the action heard in his presence, if possible, and, if by some mischance or accident a party was shut out from that right and an order was made in his absence, so far as it could be given effect without injustice to the other parties, justice demanded that the party who was accidentally absent should be allowed to come and present his case. Following what was said in that case, I think that we should take the same course here. On the application being made by the tenant for a re-hearing on the ground that he was not present on the first occasion, the learned county court judge said (in effect) that, having heard what he had heard, he saw no reason to doubt but that he would have made the same order as he made on the previous occasion. He had at that stage heard the evidence of the tenant, who had certain grievances against the landlord, and he also had heard the fact that, on the advice of his solicitor, the tenant had a few days before paid the arrears of rent into court—the action being based on his failure to pay the rent. The county court judge then said: “I have now heard this man: I have heard all he wants to say; and on the facts as I now know them I should have made the same order as I did make.” I confess that I do not think that will do, because, although he had heard some evidence from the tenant, the landlord when giving evidence on the previous occasion had said that the tenant was an unsatisfactory tenant, and his evidence on that point had never been challenged by cross-examination. So it cannot be said that there has been already in substance the new trial for which the tenant asks. I think that the tenant is entitled to a new trial, at which the question should be considered which he wants determined—whether or not it is reasonable to make an order in the circumstances of this case.

In *Dellenty v. Pellow* (2) ([1951] 2 All E.R. 716) in delivering his judgment (with which the other members of the court agreed), JENKINS, L.J., said (at p. 716):

“I would agree that, *prima facie*, where possession is sought on the ground of non-payment of rent . . . and the tenant pays the rent into court or tenders the rent before judgment, it would not be reasonable to make an order for possession . . .”

It is true that here the payment of rent was not made until the judgment had been entered against this tenant because he was absent. But the tenant has paid the rent, and had paid the rent before he made the application to the court, and therefore this case *prima facie* comes into the same class as *Dellenty v. Pellow* (2). It is true that in *Dellenty v. Pellow* (2) this court did not interfere with the order for possession which had been made, the county court judge having found that it was not unreasonable to make an order in the circumstances of that case, in which the defendant had been a bad payer. In this case, however, no final conclusion on evidence given on both sides at the trial has been reached and that matter remains to be determined.

MORRIS, L.J.: I agree with the judgments that my Lords have delivered, and there is nothing that I desire to add.

Appeal allowed. New trial ordered before a judge other than His Honour Judge Rawlins. Tenant to have costs of appeal. Tenant to pay costs thrown away by non-appearance on Sept. 12, 1956, and of application on Oct. 3, 1956. All other costs to be in discretion of judge at new trial. Costs to be set off.

Solicitors: Bower, Cotton & Bower, agents for William J. Wade, Slough (for the tenant); Preston, Lane-Claypon & O’Kelly, agents for Charsley Leonard & Co., Slough (for the landlord).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

OSCAR CHESS, LTD. v. WILLIAMS.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 22, November 13, 1956.]

Warranty—Breach—Sale of motor car—Date of first registration wrongly entered in registration book—Innocent misrepresentation—“Condition” and “warranty” distinguished.

Sale of Goods—Condition—Condition, warranty and misrepresentation distinguished.

In June, 1955, the defendant sold to the plaintiffs, who were motor dealers, a second-hand Morris motor car for £290, this sum being credited to the defendant on the purchase of a new car through the dealers. The car sold to the dealers had been obtained by the defendant's mother in 1954 under a hire-purchase contract, and was shown in the registration book to have been first registered in 1948. There had been five changes of ownership between 1948 and 1954. The defendant, who honestly believed that the car was a 1948 model, described it as such to L., the salesman who acted for the plaintiffs in the matter, and showed L. the registration book. L., who had frequently been given lifts in the car, also believed that it was a 1948 model, and the purchase price of £290 was calculated on this basis. In January, 1956, the plaintiffs sent the chassis and engine numbers of the car to the manufacturers and were informed by them that the car was a 1939 model. If the plaintiffs had known at the time of the purchase that the car was a 1939 model, they would have paid only £175 for it. In an action brought by them against the defendant eight months after the sale the plaintiffs claimed the sum of £115 as damages for breach of warranty, either on the basis that it had been a condition*, i.e., an essential term, of the contract that the car was a 1948 model or that there had been a collateral warranty that it was.

Held (MORRIS, L.J., dissenting): the defendant was not liable to the plaintiffs in damages for breach of warranty because, having regard particularly to the fact that the defendant had no personal knowledge (as the plaintiffs knew) of the date of manufacture of the car and the date was a matter on which the plaintiffs might well also form their own opinion, the true inference from the whole of the facts was that the defendant did not intend to bind himself in contract that the car was a 1948 model, but made an innocent misrepresentation as to the date of its manufacture.

Dicta of VISCOUNT HALDANE, L.C., and LORD MOULTON in *Heilbut, Symons & Co. v. Buckleton* ([1913] A.C. at pp. 38, 49-51) applied; *Routledge v. McKay* ([1954] 1 All E.R. 855) applied.

Appeal allowed.

[Editorial Note.] This case contains a full discussion of the question whether a representation is to be regarded as a warranty or not. The majority of the court held that there was no warranty that the car was a 1948 model. There was only an innocent misrepresentation which gave no right to damages. It was intimated, however, that the purchaser, if he had acted promptly, might have set the contract aside on the ground of mistake, see p. 327, letter H, and p. 330, letter A, post. If the representation had been fraudulent, it would have been actionable. A recent example of this is afforded by the decision of the same court in *Hornal v. Neuberger Products, Ltd.* ([1956] 3 All E.R. 970).

As to the question whether a statement made by a seller with reference to the goods is a warranty, see 29 HALSBURY'S LAWS (2nd Edn.) 52, para. 64; and for cases on the subject, see 39 Digest 419-421, 515-539.]

* Under s. 11 of the Sale of Goods Act, 1893 (22 HALSBURY'S STATUTES (2nd Edn.) 991), the plaintiffs would have been entitled to treat such a condition as a contractual warranty, breach of which would give rise to an action for damages.

Cases referred to:

- (1) *Solle v. Butcher*, [1949] 2 All E.R. 1107; [1950] 1 K.B. 671; 31 Digest (Repl.) 674, 7699.
- (2) *Leaf v. International Galleries*, [1950] 1 All E.R. 693; [1950] 2 K.B. 86; 2nd Digest Supp.
- (3) *Chandelor v. Lopus*, (1603), Cro. Jac. 4; 79 E.R. 3; sub nom. *Lopus v. Chandler*, Dyer, 75, n.; 39 Digest 416, 497.
- (4) *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 39 Digest 420, 526.
- (5) *Couchman v. Hill*, [1947] 1 All E.R. 103; [1947] K.B. 554; [1948] L.J.R. 295; 176 L.T. 278; 2nd Digest Supp.
- (6) *Harling v. Eddy*, [1951] 2 All E.R. 212; [1951] 2 K.B. 739; 2nd Digest Supp.
- (7) *Birch v. Paramount Estates, Ltd.*, (1956), 16 Estates Gazette 396.
- (8) *Routledge v. McKay*, [1954] 1 All E.R. 855; 3rd Digest Supp.
- (9) *Bannerman v. White*, (1861), 10 C.B.N.S. 844; 31 L.J.C.P. 28; 4 L.T. 740; 142 E.R. 685; 39 Digest 450, 776.

Appeal.

This was an appeal by the defendant from an order made by His Honour JUDGE ROWE HARDING at Neath and Port Talbot County Court on July 17, 1956, awarding £115 damages to the plaintiffs against the defendant for breach of a warranty that a second-hand Morris 10 h.p. saloon motor car sold by the defendant to the plaintiffs was a 1948 model, whereas it was in fact a 1939 model.

The facts are stated in the judgments of DENNING and MORRIS, L.J.J., and are summarised in the headnote.

B. M. Rees for the defendant.

W. N. Francis for the plaintiffs.

Cur. adv. vult.

Nov. 13. The following judgments were read.

DENNING, L.J.: In March, 1954, a Mrs. Williams of 13, Victoria Terrace, Port Talbot, acquired a second-hand Morris car, index number ECO 503. She acquired it on the footing that it was a 1948 model at a price of £300. The transaction was put through on hire-purchase from British Wagon Co. The registration book showed that it was first registered on Apr. 13, 1948, with five changes of ownership between 1948 and 1954. During the next fourteen months the car was used a good deal by her son, Mr. W. V. R. Williams [referred to hereinafter as "the defendant"], and he often gave lifts to Mr. Ladd, a motor salesman, employed by Oscar Chess, Ltd., known as the Motor House, Port Talbot [and referred to hereinafter as "the plaintiffs"]. Mr. Ladd lived at 18, Victoria Terrace, a few doors away from the defendant. Mr. Ladd thought that the car looked like a 1948 model. In May, 1955, the defendant told Mr. Ladd that he wanted to get a new Hillman Minx car for £650 and offered the Morris car in part exchange. The defendant described the Morris car as a 1948 10 h.p. Morris and produced the registration book for it. Mr. Ladd checked up in the book the date 1948 as the date of first registration. He looked up "Glass's Guide", a book which gives current prices for second-hand cars according to the year of manufacture, and said that he would make an allowance of £290 for the Morris car. This allowance of £290 was the factor which made the transaction possible. If the defendant had not got this allowance, he would not have gone through with the transaction at all. The plaintiffs were, no doubt, ready to give him this good allowance because they would get a substantial profit on the sale of the Hillman car.

The transaction went through accordingly. The plaintiffs sold the new Hillman Minx car for £650 to a finance company who let it on hire-purchase terms to the defendant. The plaintiffs took the Morris car in part exchange, but, to do so, they had first to pay the outstanding £50 to the British Wagon Co. They charged that sum to the defendant. They then took the Morris car, allowing £290 for it,

A which sum they credited to the finance company who bought the Hillman car. Eight months later the plaintiffs discovered that the Morris car was made, not in 1948, as they thought, but in 1939. They discovered this by taking the chassis and engine numbers and sending those numbers to Morris Motors, Ltd., who looked up their card index and found that the car left the factory on Feb. 3, 1939. Strange to relate, the style and finish of Morris cars had not been changed between 1939 and 1948. Outwardly a 1948 model looked the same as a 1939 model, but the price was of course very different. If the plaintiffs had known that it was a 1939 model they would have given only £175 for it, and not £290. In describing it as a 1948 Morris, the defendant was perfectly innocent. He honestly believed that it was a 1948 model, and so, no doubt, did the previous sellers. Someone far back in 1948 must have fraudulently altered the log-book, but he cannot be traced now.

C In these circumstances the plaintiffs claim as damages from the defendant the sum of £115, the difference in value between a 1939 Morris car and a 1948 Morris car. The question depends on whether the defendant gave a binding promise to Mr. Ladd that the car was made in 1948. The evidence on this point was very short. Mr. Ladd said in examination in chief: "He offered me a 1948 10 h.p. Morris in part exchange. He produced the registration book." In cross-examination he said:

"I had often had lifts in the defendant's car. I thought it looked like a 1948 model. I checked up in the registration book."

E Mr. Ladd's evidence was accepted. Indeed, the defendant did not go into the witness-box to contradict it. On those simple facts counsel for the plaintiffs submitted to the judge that the defendant's representation that the car was a 1948 model was an essential term of the contract, that is, a condition. Alternatively, he submitted that the representation was a warranty, intended as such. The judge found that it was a condition. He said that the allowance of £290 was made by Mr. Ladd "on the assumption that the Morris was a 1948 model", and that

F "... this assumption was fundamental to the contract, a condition which, if not satisfied, would have caused him to rescind the contract if he had known it to be unsatisfied before the property in the Morris car passed to his principals."

G Thereupon the judge awarded £115 to the plaintiffs and did not go on to consider the alternative claim on a warranty.

I entirely agree with the judge that both parties assumed that the Morris car was a 1948 model and that this assumption was fundamental to the contract. This does not prove, however, that the representation was a term of the contract. The assumption was based by both of them on the date given in the registration book as the date of first registration. They both believed that the car was a 1948 model, whereas it was only a 1939 one. They were both mistaken and their mistake was of fundamental importance.

H The effect of such a mistake is this: It does not make the contract a nullity from the beginning, but it does in some circumstances enable the contract to be set aside in equity. If the buyer had come promptly, he might have succeeded in getting the whole transaction set aside in equity on the ground of this mistake (see *Solle v. Butcher* (1), [1949] 2 All E.R. 1107), but he did not do so and it is now too late for him to do it (see *Leaf v. International Galleries* (2), [1950] 1 All E.R. 693). His only remedy is in damages, and to recover these he must prove a warranty.

I In saying that he must prove a warranty, I use the word "warranty" in its ordinary English meaning to denote a binding promise. Everyone knows what a man means when he says, "I guarantee it", or "I warrant it", or "I give you my word on it". He means that he binds himself to it. That is the meaning which it has borne in English law for three hundred years from the leading case

of *Chandelor v. Lopus* (3) ((1603), Cro. Jac. 4) onwards. During the last hundred years, however, the lawyers have come to use the word "warranty" in another sense. They use it to denote a subsidiary term in a contract as distinct from a vital term which they call a "condition". In so doing they depart from the ordinary meaning, not only of the word "warranty", but also of the word "condition". There is no harm in their doing this, so long as they confine this technical use to its proper sphere, namely, to distinguish between a vital term, the breach of which gives the right to treat the contract as at an end, and a subsidiary term which does not. The trouble comes, however, when one person uses the word "warranty" in its ordinary meaning and another uses it in its technical meaning. When HOLT, C.J., made his famous ruling that "An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended"*¹, he used the word "warranty" in its ordinary English meaning of a binding promise. When VISCOUNT HALDANE, L.C., and LORD MOULTON in 1913, in *Heilbut, Symons & Co. v. Buckleton* (4) ([1913] A.C. 30), adopted this ruling (ibid., at pp. 38, 49), they used the word likewise in its ordinary meaning. These different uses of the word seem to have been the source of confusion in the present case. The judge did not ask himself, "Was the representation (that the car was a 1948 Morris car) intended to be a warranty?" He asked himself, "Was it fundamental to the contract?" He answered it by saying that it was fundamental, and, therefore, it was a condition and not a warranty. By concentrating on whether it was fundamental, he seems to me to have missed the crucial point in the case which is whether it was a term of the contract at all. The crucial question is: Was it a binding promise or only an innocent misrepresentation? The technical distinction between a "condition" and a "warranty" is quite immaterial in this case, because it is far too late for the buyer to reject the car. He can, at best, only claim damages. The material distinction here is between a statement which is a term of the contract and a statement which is only an innocent misrepresentation. This distinction is best expressed by the ruling of HOLT, C.J., "Was it intended as a warranty or not?", using the word "warranty" there in its ordinary English meaning: because it gives the exact shade of meaning that is required. It is something to which a man must be taken to bind himself.

In applying this test, however, some misunderstanding has arisen by the use of the word "intended". It is sometimes supposed that the tribunal must look into the minds of the parties to see what they themselves intended. That is a mistake. LORD MOULTON made it quite clear, in *Heilbut, Symons & Co. v. Buckleton* (4) ([1913] A.C. at p. 51), that "The intention of the parties can only be deduced from the totality of the evidence . . .". The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.[†] And this, when the facts are not in dispute, is a question of law. That is shown by *Heilbut, Symons & Co. v. Buckleton* (4) itself, where the House of Lords upset the jury's finding of a warranty.

* The words quoted, which were ascribed by LORD MOULTON ([1913] A.C. at p. 49) to HOLT, C.J., appear in the judgment of BULLER, J., in *Pasley v. Freeman* ((1789), 3 Term. Rep. 51 at p. 57; 100 E.R. 450 at p. 453), where he said: "... it was rightly held by HOLT, C.J., [in *Crosse v. Gardner* (1688), Carth. 90; 90 E.R. 656 and *Medina v. Stoughton* (1700), 1 Salk. 210; 91 E.R. 188], and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended."

† A condition is, as indicated above, a stipulation which is fundamental to a contract but a warranty is a provision which is collateral to the main purpose of the contract. The practical distinction lies in the consequences; a breach of a condition will entitle the innocent party to treat the contract as being at an end, but a breach of warranty entitles the innocent party only to damages (see 8 HALSBURY'S LAWS (3rd Edn.) 194, 195).

A It is instructive to take some recent instances to show how the courts have approached this question. When the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant, intending that the buyer should act on it and he does so, it is easy to infer a warranty; see *Couchman v. Hill* (5) ([1947] 1 All E.R. 103), where a farmer stated that a heifer was unserved, and *Harling v. Eddy* (6) ([1951] 2 All E.R. 212), where he stated that there was nothing wrong with her. So also if the seller makes a promise about something which is or should be within his own control; see *Birch v. Paramount Estates, Ltd.* (7) ([1956], 16 Estates Gazette 396), decided on Oct. 2, 1956, in this court, where the seller stated that the house would be as good as the show house. If, however, the seller, when he states a fact, makes it clear that he has no knowledge of his own but has got his information elsewhere, and is merely passing it on, it is not so easy to imply a warranty.^K Such a case was *Routledge v. McKay* (8) ([1954] 1 All E.R. 855), where the seller stated that a motor cycle combination was a 1942 model, and pointed to the corroboration of that statement to be found in the registration book, and it was held that there was no warranty.

B Turning now to the present case, much depends on the precise words that were used. If the seller says: "I believe the car is a 1948 Morris. Here is the registration book to prove it", there is clearly no warranty.^L It is a statement of belief, not a contractual promise.^M If, however, the seller says:^N "I guarantee that it is a 1948 Morris. This is borne out by the registration book, but you need not rely solely on that. I give you my own guarantee that it is", there is clearly a warranty. The seller is making himself contractually responsible, even though the registration book is wrong.

E In this case much reliance was placed by the judge on the fact that the buyer looked up "Glass's Guide" and paid £290 on the footing that the car was a 1948 model, but that fact seems to me to be neutral. Both sides believed the car to have been made in 1948 and in that belief the buyer paid £290. That belief can be just as firmly based on the buyer's own inspection of the log-book as on a contractual warranty by the seller.

F Once that fact is put on one side, I ask myself: What is the proper inference from the known facts? It must have been obvious to both that the seller had himself no personal knowledge of the year when the car was made. He only became owner after a great number of changes. He must have been relying on the registration book. It is unlikely that such a person would warrant the year of manufacture. The most that he would do would be to state his belief, and then produce the registration book in verification of it. In these circumstances the intelligent bystander would, I suggest, say that the seller did not intend to bind himself so as to warrant that the car was a 1948 model. If the seller was asked to pledge himself to it, he would at once have said "I cannot do that. I have only the log-book to go by, the same as you".

G The judge seems to have thought that there was a difference between written contracts and oral contracts. He thought that the reason why the buyer failed in *Heilbut, Symons & Co. v. Buckleton* (4) and *Routledge v. McKay* (8) was because the sales were afterwards recorded in writing, and the written contracts contained no reference to the representation. I agree that that was an important factor in those cases.^O If an oral representation is afterwards recorded in writing, it is good evidence that it was intended as a warranty.^P If it is not put into writing, it is evidence against a warranty being intended; but it is by no means decisive.^Q There have been many cases, such as *Birch v. Paramount Estates, Ltd.* (7), where the courts have found an oral warranty collateral to a written contract. When, however, the purchase is not recorded in writing at all, it must not be supposed that every representation made in the course of the dealing is to be treated as a warranty. The question then is still: Was it intended as a warranty? In the leading case of *Chandelor v. Lopus* (3) in 1603 a man by word of mouth sold a precious stone for £100 affirming it to be a bezoar stone whereas it was

not. The declaration averred that the seller *affirmed* it to be a bezoar stone, A but did not aver that he *warranted* it to be so. The declaration was held to be ill because (Cro. Jac. at p. 4): "... the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action . . ." That has been the law from that day to this and it was emphatically re-affirmed by the House of Lords in *Heilbut, Symons & Co. v. Buckleton* (4) ([1913] A.C. at pp. 38, 50).

One final word. It seems to me clear that the plaintiffs, the motor dealers B who bought the car, relied on the year stated in the log-book. If they had wished to make sure of it, they could have checked it then and there, by taking the engine number and chassis number and writing to the makers. They did not do so at the time, but only eight months later. They are experts, and, as they did not make that check at the time, I do not think that they should now be allowed to recover against the innocent seller who produced to them all the evidence which C he had, namely, the registration book. I agree that it is hard on the plaintiffs to have paid more than the car is worth, but it would be equally hard on the seller to make him pay the difference. He would never have bought the Hillman car unless he had received the allowance of £290 for the Morris car. The best course in all these cases would be to "shunt" the difference down the train of innocent sellers until one reached the rogue who perpetrated the fraud; but D he can rarely be traced, or if he can, he rarely has the money to pay the damages. Therefore, one is left to decide between a number of innocent people who is to bear the loss. That can only be done by applying the law about representations and warranties as we know it, and that is what I have tried to do. If the rogue can be traced, he can be sued by whosoever has suffered the loss: but, if he cannot be traced, the loss must lie where it falls. It should not be inflicted on E innocent sellers, who sold the car many months, perhaps many years before, and have forgotten all about it and have conducted their affairs on the basis that the transaction was concluded. Such a seller would not be able to recollect after all this length of time the exact words which he used, such as whether he said "I believe it is a 1948 model", or "I warrant it is a 1948 model". The right course is to let the buyer set aside the transaction if he finds out the mistake quickly and comes promptly before other interests have irretrievably intervened, otherwise F the loss must lie where it falls: and that is, I think, the course prescribed by law. I would allow this appeal accordingly.

HODSON, L.J.: The question is whether the statement made by the defendant that his 10 h.p. Morris car was a 1948 car was a term of the contract by which he handed over the car in part exchange for a new Hillman car or was G merely an innocent misrepresentation.

The question is usually stated as being whether words are to be interpreted as giving rise to a warranty. The House of Lords in *Heilbut, Symons & Co. v. Buckleton* (4) ([1913] A.C. 30) adopted the enunciation of the true principle of law as laid down by HOLT, C.J.: "An affirmation at the time of the sale is a H warranty, provided it appear on evidence to be so intended". Where, as here, the words of the affirmation are established, the question of intention remains to be determined.

VISCOUNT HALDANE, L.C., in *Heilbut, Symons & Co. v. Buckleton* (4) ([1913] A.C. at p. 36) expressed the opinion that, where neither the circumstances of the conversation nor its words were in dispute, the question of warranty or representation was purely one of law. LORD MOULTON, in his observations (ibid., at p. 50) thought that the question of intention was one for a jury, and said (ibid., at p. 51) that "The intention of the parties can only be deduced from the I totality of the evidence . . ."

Treating the question of intention as one of fact proper for the determination of the learned county court judge, one is driven to inquire whether there was here any evidence that the statement in question went beyond an innocent

A misrepresentation, bearing in mind the warning contained in LORD MOULTON'S speech (*ibid.*, at p. 49) against

"... attempts to extend the doctrine of warranty beyond its just limits and to find that a warranty existed in cases where there was nothing more than an innocent misrepresentation."

B I am of opinion that there was no evidence to support the conclusion that the statement that the Morris car was a 1948 car was a term of the contract. The registration book, showing that the car was first registered in 1948, was produced by the defendant to the plaintiffs' representative, a motor salesman, who was familiar with the car, having often had lifts in it, and who thought that it looked like a 1948 car and checked up on the registration book. The defendant was stating an opinion on a matter of which he had no special knowledge or on which the buyer might be expected also to have an opinion and to exercise his judgment. This is not a decisive test, as was pointed out by LORD MOULTON in *Heilbut, Symons & Co. v. Buckleton* (4) ([1913] A.C. at p. 50), but it is a feature which, he said, may be a criterion of value in guiding a jury in coming to a decision whether or not a warranty was intended. There is, in my opinion, nothing in this case to set against the criterion to which I have referred. That is to say, there is nothing to indicate that the statement as to the date of the car amounted to a promise or guarantee that the information given was accurate.

The question is similar to that which came before this court in *Routledge v. McKay* (8) ([1954] 1 All E.R. 855). There a Douglas motor cycle combination of more ancient date was sold on a representation that it was a 1942 combination.

E The information was, as here, derived from the registration book. The members of the court unanimously agreed that, applying the law as laid down in *Heilbut, Symons & Co. v. Buckleton* (4), there was no evidence that the statement amounted to a warranty. The learned county court judge distinguished *Routledge v. McKay* (8) from the present case because there was in the former case a written memorandum of the contract, before which words were used by one party

F inducing the opposite party to enter into the written contract. He also distinguished *Heilbut, Symons & Co. v. Buckleton* (4) on the same ground. So far as the latter case is concerned, on a reading of the facts it seems to me that the contract in that case was concluded at the time when the representation was made although, since the transfer of shares was involved, formal brokers' contracts were afterwards drawn up. So far as *Routledge v. McKay* (8) is concerned, I

G have read the judgments in the case with some care and I cannot find that the court based its conclusion on the distinction between words used on an occasion before the final conclusion of the contract and words used on the same occasion or incorporated in the same document, although the point was argued that, having regard to the language of the written memorandum, any earlier warranty was excluded. In any event I find such a distinction a fine one and

H one which I should be reluctant to draw unless compelled to do so. In all essential matters I am of opinion that this case is on all fours with *Routledge v. McKay* (8) and, following the authority of the House of Lords in *Heilbut, Symons & Co. v. Buckleton* (4), I reach a similar conclusion in this case. I would allow the appeal.

I MORRIS, L.J.: In June, 1955, the defendant acquired a new Hillman motor car belonging to the plaintiffs who took a Morris 10 h.p. saloon motor car in part exchange. The form which the transaction took in reference to the Hillman car was that it was sold by the plaintiffs to a hire-purchase company, from whom the defendant then hired it. The Morris car was, in fact, being hired by the defendant from a hire-purchase company, but could become the property of the defendant on payment of £50. The defendant said to the plaintiffs that the Morris car was a 1948 model. On the basis that it was, the allowance in respect of it was computed by reference to a well-known guide recording basic prices of second-hand cars in normal condition for their age. The appropriate figure for

the particular 1948 model was shown in the guide as £295. The allowance made to the defendant was £290. The plaintiffs paid £50 to the hire-purchase company from whom the defendant was hiring the Morris car and credited the defendant with the balance of £240. The result of this was that the defendant sold the Morris car to the plaintiffs for £290. A

In fact, the Morris car was not a 1948 model, but was a 1939 model, and if the plaintiffs had known this they would not have paid more than £175 for it. When in January, 1956, they discovered that the Morris car was a 1939 model, they not unnaturally claimed £115 from the defendant. Without any fault on their part they had, in effect, paid the defendant £115 too much. In these circumstances it might have been expected that the defendant would voluntarily have reimbursed the plaintiffs, unless there were some difficulties that prevented him. He did not recoup the plaintiffs, however, and they brought an action. Their case was that it was an express term of the contract that the Morris car was a 1948 model. They said that the term was a condition or, in the alternative, a warranty, and that, in the events which had happened, they were entitled to claim damages for breach of warranty. B C

The statement that the defendant made was that the Morris car was a 1948 model. This was a definite and unqualified statement. It was of this nature because the defendant did not doubt it. It was not a mere expression of tentative or qualified belief. At the hearing it was proved that it was a 1939 model. The defendant did not give evidence. The plaintiffs did not in any way suggest that the defendant had not honestly believed what he had said and they very fairly admitted that the defendant would not have embarked on the new transaction had he not been able to get £290 for his Morris car. D E

The defendant handed over the registration book of the Morris car which stated that it was first registered in 1948. In the absence of evidence it must remain a matter of speculation why the registration book referable to a 1939 car should record that the first registration was in 1948. It is possible that a 1939 car was first registered in 1948, but this seems very unlikely. In correspondence it was stated on behalf of the defendant that the car had been bought by the defendant's mother in March, 1954. She paid £300 for it—being £10 more than the amount allowed to the defendant for it fourteen months later. Her name is recorded in the book. It is, I think, only reasonable for a purchaser of a car who received a registration book which showed a first registration in 1948 to have believed that the car was a 1948 car. There was evidence, which the learned judge accepted, that the “styling” of a 10 h.p. Morris car had not changed between 1939 and 1948 “so that mere inspection of the car even by a man with knowledge of motor cars would not have indicated that the car in question was of earlier manufacture than 1948.” F G

The case can be approached, and has at all times been approached, on the basis that all concerned honestly believed that the car was a 1948 car. The plaintiffs' representative had often had lifts in the defendant's car and thought that it looked like a 1948 model. It cannot be denied, therefore, that he fully accepted and acted on the statement made to him that the car was a 1948 model. Furthermore, he was handed the registration book and from that he checked that the car was a 1948 model. In strictness, the book only showed that the date of first registration was in 1948, but any dealer in cars would, I think, regard that as confirmation of what he had been told. There was nothing at all to put him on notice that the car was a 1939 model and, indeed, it is not suggested that there was. He believed that the car was a 1948 model and it was because he so believed that he agreed the allowance in the sum of £290. Had he not so believed, he would never have allowed £290. Everything, therefore, points to the importance of the statement that the car was a 1948 model: the statement was amply corroborated when the registration book was handed over for the plaintiffs' representative to see. The learned judge held that the defendant knew that the H I

A plaintiffs' representative proceeded to calculate what allowance he would make for the car on the basis that it was a 1948 car.

The only point taken on behalf of the defendant was that the statement which was made did not form a part of the contract. The learned judge rejected this. He held that it was not only a term but an essential term. In my judgment he was correct. The statement that the car was a 1948 car was not a mere representation in respect of the subject-matter of the contract: the statement was adopted as the foundation of the contract which they made. The promise to pay £290 for that particular car (a figure arrived at by reference to the value of 1948 cars) was the counterpart of a term of the contract that that particular car was a 1948 model.

C The learned judge held that, if the plaintiffs had discovered after the making of the contract but before property in the car had passed that it was a 1939 car, they could have refused to go on with the transaction: that they could have refused for the reason that it was a condition of the contract that the car was a 1948 model. The learned judge expressed himself as follows:

D "Although it appeared that the plaintiffs' agent had often had a lift in the defendant's car (more strictly, the car let on hire-purchase terms to the defendant's mother), the actual transaction, on the evidence, appeared to me to be a sale by description of the car, described as a 1948 10 h.p. Morris car, as part of the larger and somewhat more complex transaction of letting a new Hillman Minx to the defendant on hire-purchase terms, making him an allowance of £290, the value to the plaintiffs of the said 10 h.p. Morris car, on the assumption that it was a 1948 model.

E "Mr. Ladd satisfied me that this assumption was fundamental to the contract, a condition which, if not satisfied, would have caused him to rescind the contract if he had known it to be unsatisfied before the property in the Morris car passed to his principals. The defendant did not elect to give evidence, but Mr. Ladd told me that, for the purpose of calculating the allowance he would give the defendant, he used 'Glass's Guide', a well-known reference book published monthly in the motor trade, giving the average second-hand price paid by dealers for cars according to the year of manufacture. I have no doubt the defendant knew that Mr. Ladd was calculating the allowance he would make for the car on the basis that it was a 1948 car, and it was never suggested in cross-examination that he did not. There was no suggestion that the defendant's statement that the car was a 1948 model was made otherwise than in good faith, but, so far as Mr. Ladd was concerned, that statement was fundamental, according to his evidence, and apart from Mr. Benjamin's cross-examination to elicit that the defendant had given Mr. Ladd lifts in the car, it was not suggested that Mr. Ladd did otherwise than rely on the defendant's statement as to the year of manufacture, corroborated by the evidence of the registration book, and the documents of the previous hire-purchase transaction relating to the same vehicle."

H The plaintiffs do not allege that there was any collateral oral warranty. They submit that the statement of the defendant was not something detached from the contract, but was a part of the contract and was in legal terminology a condition. I In my judgment, it was a stipulation of the contract which was a condition. But by the time that the plaintiffs ascertained that the car was a 1939 car, it was too late for them to take any other course than to treat the breach of condition as a breach of warranty (see Sale of Goods Act, 1893, s. 11). On this basis the learned judge held that the plaintiffs were relegated to a right to claim damages, which he assessed at £115, being the difference between the value which the car would have had if it had been a 1948 car and its actual true value, which he found was £175.

In deciding the case the learned judge applied his mind to the tests laid down in *Heilbut, Symons & Co. v. Buckleton* (4) ([1913] A.C. 30). In his speech in that case LORD MOULTON spoke of the importance of maintaining in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation and made it clear (*ibid.*, at p. 50) that it would be wrong to say that, merely because a representation is made in the course of a dealing and before completion of a bargain, the representation amounts to a warranty. He approved (*ibid.*, at p. 49) the statement of HOLT, C.J., that an affirmation at the time of a sale is a warranty, provided that it appears on the evidence to have been so intended. The intention of the parties is to be deduced from the totality of the evidence (*ibid.*, at p. 51).

In coming to his conclusion that what the defendant said about the car being a 1948 model was in this case a part of the contract, the learned judge distinguished *Routledge v. McKay* (8) ([1954] 1 All E.R. 855), which was one in which the principles laid down in *Heilbut, Symons & Co. v. Buckleton* (4) were applied to the facts of that case. There was a sale of a motor cycle by the fifth party to the fourth party and a later claim for damages for breach of a warranty that the cycle was a 1942 model. There was a first meeting between the parties. In answer to a question the fifth party said that the cycle was a 1942 model and pointed to the corroboration of that statement to be found in the registration book. There was a second meeting when the two parties signed a written contract. That contract made no mention of the cycle being a 1942 model. It was, in fact, a 1930 model. As to the written contract it was held (see [1954] 1 All E.R. at p. 859) that *prima facie* it recorded what the parties intended to agree when the actual transaction of sale took place and, as a matter of construction, that it would be extremely difficult to say that such an agreement was consistent with a warranty being given at the same time and so as to be intended to form a part of the bargain then made. There was no statement as to the age of the cycle made at the time of the written contract. It was, therefore, held that there was no warranty given as part of the actual bargain. It was then considered whether the statement previously made during the first meeting was a representation or a warranty, and it was held that the statement then made (at a time when there was no agreement between the parties) was not contractual and that nothing more was intended than a mere representation.

SIR RAYMOND EVERSHERD, M.R., in his judgment, said (*ibid.*):

“ This written memorandum represents *prima facie* the record of what the parties intended to agree when the actual transaction took place. Counsel for the fifth party contended that the terms of it necessarily exclude any warranty, that is to say, any collateral bargain, either contemporary or earlier in date. I am not sure that I would go so far as that. But I think that as a matter of construction it would be difficult to say that such an agreement was consistent with a warranty being given at the same time so as to be intended to form a part of the bargain then made. I think, with counsel for the fifth party, that the last words ‘ It is understood that when the £30 is paid . . . this transaction is closed ’ would make such a contention difficult. But I will assume that the warranty was given, not when the bargain was struck but on Oct. 23, 1949, on which date alone, according to the evidence, any representation about the date of the motor cycle combination was made at all.

“ If that representation is to be a warranty it has to be contractual in form. In other words, so far as I can see, once the existence of a warranty as part of the actual bargain is excluded, it must be a separate contract, and the overwhelming difficulty which faces the fourth party is that when the representation was made there was then no bargain, and it is, therefore, in my view, impossible to say that it could have been collateral to some other contract. Even apart from that, it seems to me that on the evidence there

A is nothing to support the conclusion, as a matter of law and bearing in mind LORD MOULTON's observations, that in answering the question posed about the date of the motor cycle combination there was anything more intended than a mere representation."

B The learned judge in the present case considered *Routledge v. McKay* (8) and correctly distinguished it from the present one. In the present case there was not, as in *Routledge v. McKay* (8), an antecedent statement and then a later written contract which omitted any incorporation of or reference to the statement. *Routledge v. McKay* (8) is distinguishable on three grounds. In the present case there was a statement made at the time of the transaction: there was no written contract: and, in so far as there was a document brought into existence, the document consisted of an invoice addressed to the defendant which recorded the complete transaction and which expressly described the car for which an allowance of £290 was being made as a "1948 Morris 10 saloon". The statement made which described the Morris car was, therefore, an integral part of the contract. It was, I consider, a condition of the contract, on which the plaintiffs contracted: compare *Bannerman v. White* (9) ((1861), 10 C.B.N.S. 844). In *Couchman v. Hill* (5) ([1947] 1 All E.R. 103) a statement was made that a heifer was "unserved". There was in that case a discussion whether the description "unserved" constituted a warranty or a condition. In his judgment, with which the other members of the court concurred, SCOTT, L.J., said (*ibid.*, at p. 105):

E "... as a matter of law I think every item in a description which constitutes a substantial ingredient in the 'identity' of the thing sold is a condition, although every such condition can be waived by the purchaser who thereon becomes entitled to treat it as a warranty and recover damages. I think there was here an unqualified condition which, on its breach, the plaintiff was entitled to treat as a warranty and recover the damages claimed."

F In the present case, on a consideration of the evidence which he heard, the learned judge came to the conclusion that the statement which he held to have been made by the defendant at the time of the making of the contract was a statement made contractually. It seems to me that the totality of the evidence points to that view. The statement related to a vitally important matter: it described the subject-matter of the contract then being made and directed the parties to, and was the basis of, their agreement as to the price to be paid or credited to the defendant. In the language of SCOTT, L.J., it seems to me that the statement made by the defendant was "an item in [the] description" of what was being sold and that it constituted a substantial ingredient in the identity of the thing sold. It is with diffidence that I arrive at a conclusion differing from that of my Lords, but I cannot see that the learned judge in any way misdirected himself or misapplied any principle of law, and I see no reason for disturbing his conclusion.

H *Appeal allowed. Leave to appeal to the House of Lords refused.*

Solicitors: *Helder, Roberts & Co.*, agents for *Ivor Evans & Benjamin*, Swansea (for the defendant); *Sharpe, Pritchard & Co.*, agents for *A. King-Davies & Son*, Maesteg (for the plaintiffs).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A

EVANS MEDICAL SUPPLIES, LTD. v. MORIARTY
(INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Evershed, M.R., Birkett and Romer, L.J.J.), November 27, 28, 29, 30, December 3, 4, 13, 1956.]

Income Tax—Income—Payment of lump sum for imparting secret processes and for furnishing plans etc. for erecting factory—Whether income or capital receipt—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Case I. B

The taxpayer company carried on business as manufacturers of pharmaceutical products and wholesale druggists with world-wide sales and an agency in Burma. Under an agreement with the Burmese government it undertook to supply the government with information as to secret processes (which the government undertook not to divulge) relating to the manufacture of pharmaceutical products and also technical data, drawings, designs and plans for the erection of a factory and the installation of machinery suitable for the manufacture of pharmaceutical and other products in Burma. As consideration for this undertaking it received a "capital sum" of £100,000. The Special Commissioners of Income Tax held that the sum was properly included in the computation of the company's profits for income tax purposes on the ground that it was received in respect of the provision of services and arose to the company in the course of carrying on either its existing trade or a new trade commenced at the date of the agreement. On appeal, C

Held: (i) there was evidence to justify the commissioners' finding that the sum was received in the course of the company's existing trade; but D

(ii) so much of the £100,000 as was referable to the imparting of secret knowledge relating to pharmaceutical products was a capital payment (*Handley Page v. Butterworth* (1933), 19 Tax Cas. 328 applied); and E

(iii) some part, therefore, of the £100,000 should be included in the computation of the company's profits for income tax purposes and the Case would be referred back to the commissioners to determine what part of the payment of the £100,000 was referable to the imparting of the secret knowledge and what part was referable to other considerations such, e.g., as the company's agreement to supply plans for the construction of the factory in Burma. F

Decision of UPRJOHN, J. ([1956] 2 All E.R. 706) reversed in part. G

[As to what constitute trade receipts for income tax purposes, see 17 HALSBURY'S LAWS (2nd Edn.) 147-149, paras. 306-308; as to capital payments see *ibid.*, 118, para. 222; and for cases on the subject, see 28 DIGEST 17-20, 87-99.]

Cases referred to:

- (1) *British Dyestuffs Corpn. (Blackley), Ltd. v. Inland Revenue Comrs.*, (1923), 12 Tax Cas. 586; 129 L.T. 538; 28 Digest 19, 96. H
- (2) *Edwards v. Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; 3rd Digest Supp.
- (3) *Nethersole v. Withers*, [1946] 1 All E.R. 711; *affd.* H.L. sub nom. *Withers v. Nethersole*, [1948] 1 All E.R. 400; [1948] L.J.R. 805; 28 Tax Cas. 501; 2nd Digest Supp.
- (4) *Inland Revenue Comrs. v. British Salmson Aero Engines, Ltd., British Salmson Aero Engines, Ltd. v. Inland Revenue Comrs.*, [1938] 3 All E.R. 283; [1938] 2 K.B. 482; 107 L.J.K.B. 648; 159 L.T. 147; 22 Tax Cas. 29; Digest Supp. I
- (5) *Handley Page v. Butterworth*, (1933), 19 Tax Cas. 328; 150 L.T. 262; *affd.* H.L. sub nom. *Butterworth v. Page*, (1935), 153 L.T. 34; Digest Supp.
- (6) *Margerison v. Tyresoles, Ltd.*, (1942), 25 Tax Cas. 59; 2nd Digest Supp.

A Appeal.

The appellant taxpayer company appealed to the Special Commissioners of Income Tax against an assessment to income tax made on it for 1954-55 under Case I of Sch. D to the Income Tax Act, 1952, in the sum of £281,163, less capital allowances £56,305, in respect of its profits as wholesale druggists. The question for determination was whether a sum of £100,000 paid to the company by the government of the Union of Burma was a receipt of the company's trade liable to be included in the computation of its profits for the purposes of its assessment. The sum was paid under Part I of an agreement of Oct. 20, 1953, for the supply of information as to secret processes relating to the manufacture of pharmaceutical products and technical data, drawings, designs and plans for the erection of a factory and the installation of machinery therein in Burma. Part II of the agreement related to services to be supplied by the company to the Burmese government.

The company contended that the £100,000 was not properly included in computing its profits for income tax purposes for 1954-55, and in particular because (i) it was a capital sum, since either the company was parting with items of fixed capital under Part I of the agreement to which it was solely annexed, or it was a sum received by the company for an exclusive licence to the Burmese government; or (ii) being received by the company for disposing of the fruits of its experience, the sum did not arise in the course of a trade it carried on. The Crown contended that the £100,000 was properly included in computing the company's profits for income tax purposes for 1954-55, and in particular because: (i) it was received by the company for providing services in the course of carrying on its trade as wholesale druggists; and represented the first instalment of remuneration for such services (Parts I and II of the agreement involving services to the Burmese government being inter-locking and inter-dependent); (ii) the disposal of secret processes by the company was not the sale or assignment of property of the company but a method of developing and exploiting its business by imparting its knowledge and experience to the Burmese government in return for a consideration of an income nature; and (iii) the provision of the facilities to be furnished under Part I of the agreement was within the trading objects of the company and in so far as it was received in consideration for the provision of those facilities it arose to the company either from the trade which it had previously carried on or from a new trade which it had commenced to carry on on Oct. 20, 1953.

The Special Commissioners held that the parts of the agreement could not be considered separately, that the £100,000 was not paid simply for the sale or assignment to the Burmese government of secret processes analogous to patents and the company had not sold or assigned any property; that the agreement was one for the provision of services, the provision of "facilities" not being the sale or assignment of a capital asset in consideration of a capital price or the grant of a licence in consideration of a capital payment; and that the £100,000 arose to the company either in the course of the trade which it had previously carried on or in the course of a new trade which it had commenced on Oct. 20, 1953, and was in either event properly included in the computation of the profits of the company as wholesale druggists for income tax purposes. On appeal, UPJOHN, J., held ([1956] 2 All E.R. 706) that the sum should be excluded from the company's profits, as not being part of the profits or gains of the company's trade, and as being a capital payment. The Crown appealed.

J. Senter, Q.C., and A. P. L. Barber for the company.

Sir Frank Soskice, Q.C., Sir Reginald Hills and M. Temple for the Crown.

Cur. adv. vult.

Dec. 13. The following judgments were read.

LORD EVERSHED, M.R.: The question raised on this appeal is whether a sum of £100,000 paid to Evans Medical Supplies, Ltd., by the government of

Burma pursuant to an agreement dated Oct. 20, 1953, was rightly included in the company's assessment for income tax for the year 1954-55 as part of "the annual profits or gains arising to the company from its trade" during the year of assessment under Case I of Sch. D, now incorporated in s. 122 of the Income Tax Act, 1952. A

The Case Stated shows that the company's business, which took its rise in 1809, was in the year of assessment one of world-wide scope and renown and consisted of the manufacture and sale all over the world of pharmaceutical, medicinal, bacteriological and chemical preparations of all kinds. The company itself was incorporated in 1925. In 1953 it entered into the agreement of Oct. 20 with a representative of the government of Burma, out of which the present question has arisen. Paragraphs 4 and 5 of the Case Stated show that the government of Burma, having determined on its own account to produce in Burma pharmaceutical and other products of the kind which the company manufactured and which were then wholly imported into Burma from Europe, despatched a trade mission to negotiate with some European firm or company the terms on which the government might be adequately advised and assisted in the establishment of local production in Burma. There was keen competition among firms and companies qualified for this privilege. The choice of the Burmese government fell, however, in the end on the company, and the agreement of Oct. 20, 1953, records the bargain made by the company with the government of Burma. B C D

The agreement begins by certain recitals, thus:

"(1) The government of the Union of Burma proposes to build in Burma a factory and laboratories (hereinafter together referred to as 'the factory') for the purpose of establishing an industry there for the production of pharmaceutical and other products. (2) [The company] has developed and owns processes formulae and knowledge relating to the manufacture of pharmaceutical products and to the use of machinery plant appliances and devices used in such manufacture. (3) For facilitating the building and running of such factory [the company] propose to supply the government of the Union of Burma with information and to organise the factory in the manner hereinafter mentioned." E F

The agreement is then divided into separate parts—I, II, III, IV and V—and it may be said that the second and third recitals relate particularly to Parts I and II respectively. The first part, which I will read substantially in full, is as follows: G

"Part I. In consideration of the payment to the [company] by the government of the Union of Burma of the capital sum of £100,000 sterling payable in the United Kingdom free from any deduction whatsoever (A) [The company] will provide and make available to the government of the Union of Burma all drawings designs and plans and technical and other data and 'know-how' necessary for the establishment erection and installation of the factory and the commencement of production thereat of the pharmaceutical and other products mentioned in the schedule hereto. (B) [The company] will supply to the government of the Union of Burma designs and lay-out for the erection of plant including machinery and equipment and all other requisites and shall supply full data and specifications with drawings and instructions and all other information relating to the sources and manufacturers and suppliers of such machinery and equipment. (C) [The company] will make available to the government of the Union of Burma all information relating to the supply of prototype machinery and equipment . . . (D) [The company] hereby undertake that during the currency of this agreement the facilities hereby agreed to be furnished to H I

the government of the Union of Burma under the preceding sub-clauses of this clause shall be exclusive to the said government and shall not during the currency hereof be furnished to any other person or corporation in Burma."

Part II is of greater length and consists of eight clauses, many of them subdivided. I shall not read them all. Under the first clause the company undertook to advise the government about how to proceed with the building and operation of the factory, and also provided that they would act as purchasing agents for the purchase of the plant. Clause 2 put on the company an obligation to act as managers, and, according to cl. 3, they therefore undertook to provide and train all the necessary staff, particularly to train Burmese nationals for the purpose.

In cl. 5 it is provided that:

"As remuneration for the services provided for in Part II of this agreement the government of the Union of Burma will pay to [the company] a fee in respect of each year of the continuance of this agreement amounting "

to whichever should be the greater of two sums, five per cent. of the value of the products produced at the factory, or £25,000 sterling. There were further provisions as to that payment. In cl. 6 was a provision for repaying disbursements. The rest of Part II I can, I think, for present purposes pass over.

Part III consists of one single sentence:

"With the exception of Part I of this agreement [i.e., the first obligation to give advice etc.] this agreement shall apply to alcohol and medicinal yeast."

Part IV states the term of the agreement, and it will be recalled that in para. (D) of Part I the obligations as to non-disclosure to anyone else in Burma were expressed to be for the currency of the agreement.

"The period during which this agreement shall remain in force shall be seven years from the date hereof but this agreement may be renewed on the same or similar terms",

and it is said that the parties should consider renewal by a certain date.

Paragraph 2 provides:

"Subject as hereinafter mentioned the government of the Union of Burma will not without the written consent of [the company] export to any other country any of the goods manufactured in accordance with the provisions of this agreement";

and there were provisos which qualified, to some extent not material for present purposes, that obligation.

Part V contained two provisions.

"1. The government of the Union of Burma will not divulge to any other government person body or corporation such information as is conveyed to them by [the company] under the provisions of this agreement without the written consent of [the company] which consent is not to be unreasonably withheld."

The last provision was more an aspiration than a bargain:

"It is the desire and intention of the parties to this agreement to enter into similar agreements in respect of other pharmaceutical and similar products as may be mutually agreed from time to time."

The schedule, which had been referred to, as will be recalled, in Part I, contained under five heads various types of pharmaceutical, medicinal, bacteriological,

chemical and similar products. The first was "human and veterinary anti-toxins sera and vaccines toxins and toxoids". The second was "vaccine lymph", and the third, fourth and fifth were other types of products. I have mentioned, however, specifically (A) and (B) for reasons which will later appear.

I have recited the terms of the agreement at length, since one of the complaints made by the company of the determination of the Special Commissioners is that it proceeded on an erroneous interpretation of the agreement, in so far as the commissioners declined to treat the consideration moving from the company in return for the payment of £100,000 provided by Part I as limited by the terms of Part I itself.

In the first three sub-paragraphs of para. 15 of the Case, it is stated in this way :

"We, the commissioners who heard this appeal: (i) held that it was not possible, on the evidence set out in paras. 3-12 above, to consider each part of the agreement of Oct. 20, 1953, separately. While the factory was in course of erection; while the training of staff was proceeding, [etc.] payments, which the company admitted to be of an income nature, were being made, and we were unable to take the view that the said sum of £100,000 was paid simply for the sale or assignment to the Burmese government of secret processes analogous to patents."

They went on to say that, even if the view were taken that the main part of the consideration of £100,000 was received for imparting these secret processes, "we were still of opinion that the company had not sold or assigned any property". They said,

"For example, other British and continental firms admittedly had the knowledge and did prepare anti-toxins, and the company after the signing of the agreement, as much as before, was still in a position to prepare such products according to the formulae and methods which it had perfected, which remained secret, except to the extent that some of them had been imparted to the Burmese government . . . (iii) Considering as we do that the whole agreement must be read together, we think that it is one for the provision of services. The provision by the company under Part I of the agreement of what, in cl. (D) of that Part, are called 'facilities' is not in our opinion the sale or assignment of a capital asset in consideration of a capital price, nor is it the grant of a licence in consideration of a capital payment."

It is an obvious truism that as a general rule no part of any written document can be read or construed save in the relevant context provided by the document as a whole; and, to do the commissioners justice, I am not entirely clear that they meant by the language that I have read from para. 15 of the Case to do more than acknowledge the general rule. At the same time it is true that the obligations which the company undertook in return for the payment were confined to those specified in the four paragraphs lettered (A) to (D) of the agreement, and if the commissioners thought otherwise, then they were wrong. Having said so much, I doubt whether the solution of the present problem is thereby much advanced. Part I of the agreement cannot on any view be considered in complete isolation from the rest of the agreement. To take one example, the duration of the obligations imposed in para. (D) involve a necessary reference to Part IV. Broadly speaking, it may fairly and justly be said that the obligations undertaken by the company in Part I were obligations not merely to impart secret formulae, but were obligations to give to the Burmese government the necessary instructions, information and advice to enable the government to erect and establish the local factory capable of producing thenceforward the required supply of pharmaceutical and other articles. By way of contrast, Part II imposed on the company an obligation for a specified period

to manage the production business, when started, and for that purpose to train the necessary Burmese personnel, and in the meantime to provide trained personnel itself. For the former obligation, the single sum of £100,000 was to be paid by the Burmese government; for the latter, an annual sum of not less than £25,000, from the date of the agreement. Put as briefly as possible—and this is the substance of the company's case—the payment of £100,000 was a single lump sum payment, the price, which the government of Burma agreed to pay in order to be given the necessary information so as to be put in the required position to enable them to set up in Burma the means of production of the required pharmaceutical and other articles.

In my judgment, however, this analysis of the agreement does not in the end much advance the solution of the questions which have to be determined. These are stated by the judge thus: first, whether the transaction recorded in the agreement fell within the scope of the company's business as it was carried out at the time the agreement was made; and secondly, whether, if it did, nevertheless the sum of £100,000 ought in the company's hands to be treated as capital and not as income or as part of the annual profits or gains arising from the company's trade. If either of these questions ought properly to be answered in the negative, then the company is entitled to succeed on this appeal.

The learned judge so answered both questions. As regards the first, the commissioners undoubtedly, in my judgment, purported to give an affirmative answer; to find as a fact on the evidence that the agreement of 1953, though of a special and unprecedented character imposed by special conditions dictated by Burmese government policy, was none the less within the general scope of the company's continuing existing business operations—the means which the company's board of directors chose as best adapted in the circumstances for the development of its business interests. The learned judge, however, though of opinion that the question was one of fact exclusively, came to the conclusion that the determination of the commissioners could not be supported ([1956] 2 All E.R. at p. 712).

“I am content to rest my judgment on this part of the case by saying that, in my view, there was no evidence to support the commissioners' determination or in LORD RADCLIFFE's words, the true and only reasonable conclusion contradicts their determination*.”

On this matter, I am, with all respect to the learned judge, unable to agree with him. On this question, as also on the second, it seems to me that the difficulties of the learned judge may have been increased by the suggestion originally put forward by or on behalf of the Crown that the transaction entered into with the Burmese government constituted a new departure on the company's part, an embarking by it on a distinct trade or business different from that (sometimes in the Case called, though I venture to think inadequately, “whole-sale druggists”) in which the company had previously engaged. Had this been in truth the case, the Crown would plainly have been in difficulty in sustaining the claim for the inclusion of the £100,000 in the general sum of taxable profits arising from the company's then trade for the tax year in question. During the hearing before him, UPJOHN, J., as we were informed, strongly pressed learned counsel for the Crown on this part of their contentions as recorded in para. 14 (iv) of the Case Stated, and the particular contention was ultimately abandoned before him by the Crown. It may be that this course of events in some degree influenced the judge's conclusion. Agreeing with him, however, that the question is one “essentially of fact”, I have found it impossible to accept his view that there was no evidence to support the commissioners' determination.

The situation which in Burma faced this world-wide business was that, as a matter of policy, the government of that country had determined to undertake

* See *Edwards v. Bairstow* ([1955] 3 All E.R. 48 at p. 59, letters E to F).

locally themselves or through some government agency the production of the pharmaceutical and other articles which had hitherto been imported into Burma from abroad. That being so, what, as a matter of business, was the company to do? The evidence of the company's chairman and managing director on the matter (given, no doubt, in answer to questions put by one or other of the commissioners, but none the less reliable on that account) is recorded as follows in para. 11 of the Case:

"In entering into the agreement, the company chose the method of developing its business which seemed to its directors to be the best available in the circumstances."

This evidence is picked up, as it were, and repeated in the commissioners' conclusions in para. 15 (iv) of the Case:

"We also rejected the company's alternative contention that the said sum did not arise to the company as a receipt of its trade as wholesale druggists because it had never previously entered into such an agreement. On the contrary, we held that the company had, on the evidence in this case, chosen the method which appeared to its directors to be the best means of exploiting its business as wholesale druggists, in Burma, such method being in our opinion clearly within the powers taken by the company in its memorandum of association."

Counsel for the company subjected this paragraph to considerable textual criticism. Thus, he said that the reference to the memorandum and articles indicated that the commissioners had regarded the fact that what was done in October, 1953, was *intra vires* the company's memorandum as being conclusive of the question of fact which they had to determine. I do not agree. It does not seem to me that the commissioners were doing more than note (as *BANKES, L.J.*, did in *British Dyestuffs Corp'n. (Blackley), Ltd. v. Inland Revenue Comrs.* (1) (1923), 12 Tax Cas. 586 at p. 597), that what was done was in fact within the scope of the company's business powers.

Counsel for the company also strongly criticised the final sentence of para. 15 (iv), which reads as follows:

"We, therefore, held that the said sum of £100,000, arose to the company either in the course of the trade which it had hitherto carried on or in the course of a new trade which it commenced to carry on on Oct. 20, 1953, and that in either event the said sum was properly included in the computation for income tax purposes of the company's profits as wholesale druggists for the said year 1954-55."

The sentence undoubtedly reflects the argument of the Crown that the agreement marked the adoption by the company of a new and distinct trade, to which I have already referred. But, in my judgment, the sentence records the determination of liability—possibly not with entire accuracy in the circumstances—which flowed from the finding of fact in the all-important sentence preceding it, which in turn echoed the clear finding, based on the evidence of the chairman and managing director, contained in para. 11 of the Case. I add a reference to a supplement issued by the directors to the company's report and accounts for 1953, which was exhibit D. In that document occur the following observations:

"Experience and technology, let us call it know-how, is becoming an increasingly important export commodity. Under-developed countries are no longer content to buy goods of the western world, they want to make the goods themselves. So the west must be prepared to sell know-how . . . Some time ago the Burmese government decided to set up a pharmaceutical

A industry to make Burma less dependent on outside supplies of necessary medical goods. It was no use, in Britain, to shed tears about the possible loss of future exports. Burma meant to have her new industry, and many continental firms were willing and able to provide her with the means to do so. [The company], with the approval of Her Majesty's government, joined in the competition. On Oct. 20 the agreement was signed."

B Then it states what was the substance of the agreement.

In my judgment, it cannot be doubted, with all respect to the learned judge, that there was ample evidence to justify the commissioners' conclusion of fact in para. 15 (iv) of the Case Stated.

C UPJOHN, J.'s reference to LORD RADCLIFFE in the passage from his judgment which I have read, was a reference to the noble Lord's speech in *Edwards v. Bairstow* (2) ([1955] 3 All E. R. 48). The question there was whether the purchase for resale by the taxpayer of certain spinning machinery and its later resale in parcels at a substantial profit constituted "an adventure in the nature of trade". The question had been answered negatively by the Special Commissioners, and this court, affirming the decision of the judge of first instance, had thought (in reliance on certain earlier decisions) that the determination of the Special
D Commissioners ought not to be disturbed. The House of Lords, on the other hand, held that the question whether the facts, as found to have occurred, did or did not constitute "an adventure in the nature of trade" was, in truth, one of law, and that the facts found pointed irresistibly and inevitably to the result that they did.

E I quite agree with counsel for the company that the principle stated by LORD RADCLIFFE cannot be confined to the simple question whether particular deals constituted "an adventure in the nature of trade". Whatever the specific question is—whether particular facts fall or do not fall within some formula of the statute—that question must ultimately depend on a proper interpretation of the formula. No such question, however, here arises. The point here is whether what the company did was done by it in the course of its trade then
F being carried on; and that question, as the judge himself stated, is essentially one of fact and does not involve any question of interpretation of the terms of the statute.

There remains the second question, namely, is the £100,000, though received in the course of trade generally, capital or income in the hands of the company? The learned judge decided that it was capital. He said ([1956] 2 All E.R. at
G p. 714):

"The effect of the contract was this: The company parted with its secret processes to the Burmese government for ever, but on the terms that the government would not without the consent of the company impart such information to another, such consent not to be unreasonably withheld. The
H company remained at liberty to carry on its wholesale trade there, and, in legal theory, could no doubt have thereafter set up a competing factory in Burma. In addition, the company was to supply technical data, drawings, designs and plans for the erection of a factory and of the installation of machinery appropriate and suitable for the manufacture of these known pharmaceutical products and for their processing by these secret processes.
I After the expiry of the contract (but not before) the company was at liberty to impart its 'know-how' in relation to these matters to others in Burma."

The learned judge thought, and I agree with him, that for this purpose the recitals which I have already read (particularly the second recital) were important. As appears from the passage which I have read, in his view the company was "parting for ever" with an asset. So again he says (*ibid.*, at p. 715):

"The company was, in fact, parting for ever with its secret information in its methods of preparation, packing and preservation . . . It was parting

for ever, however, with part of a valuable asset, and was doing so to enable an entirely new and competing industry to be set up there. That industry, established by the skill and 'know-how' of the company, could embark on an export trade which could compete with the company's own products in other countries. In that sense the company was dissipating its asset, and it must be remembered that a secret process once communicated to another is in jeopardy; if it gets into the wrong hands, the grantor has no protection."

In reference to that paragraph, it will, however, be recalled that the Burmese government was under obligation (subject to certain qualifications) not to export the goods and information save with the consent of the company.

The commissioners had taken a different view, as evidenced from para. 15 (ii) and (iii) of the Case, already recited. In their opinion, Part I amounted to no more than an obligation to provide services without any sale or assignment.

I have found this point one of considerable difficulty, but I take as my test the proposition stated by BANKES, L.J., in *British Dyestuffs Corp'n. (Blackley), Ltd. v. Inland Revenue Comrs.* (1) (12 Tax Cas. at p. 596):

"The real question is, looking at this matter, is the transaction in substance a parting by the company with part of its property for a purchase price, or is it a method of trading by which it acquires this particular sum of money as part of the profits and gains of that trade?"

On the side of the Crown it is said, first, that the obligations in Part I and Part II of the agreement are really of the same kind. They are, as the commissioners describe them, obligations to provide services. Secondly, it is said that, although there are references to secret processes in the argument and also in the learned judge's judgment and in the Case, there is, save in the recital in Part I, no mention in terms of such secret processes at all. Therefore, the disclosure of secret processes was merely incidental to the main obligation; and it does not follow, as counsel for the Crown pointed out, that a payment is not an income payment merely because some capital assets are thereby involved. Consequently, thirdly, once it is agreed or held that the transaction was within the scope of the ordinary existing business of the company, there is nothing amounting to a parting at all with a capital asset.

To my mind, these arguments are formidable. There is no evidence that the £100,000 was "paid for the company's superiority" in this field of business. There are no grounds, as counsel for the Crown observed, for saying that any secret processes or knowledge were necessarily impaired; it may be that their value might be enhanced. In other words, on this argument, there is no capital asset involved, and, in any case, no parting with it.

On the other side, counsel for the company has said that the secret processes were in fact extremely valuable assets, and that the obligation in Part I was to give the benefit of them to the Burmese government. In other words, says he, the sum paid by the Burmese government was to put them in a position to start up their work. An example was given in the course of the argument of a well-known beverage, made according to a secret formula. If the proprietors of that beverage agreed to disclose that formula to someone else, there is no doubt that that someone else would pay a very large price for it, and no doubt also, I should have thought, that the sum received by the proprietors would be capital in their hands.

It will be seen that the question of secret processes looms, therefore, very large, and I refer particularly to para. 10 (i) and (ii) of the Case Stated.

"The schedule referred to, forming part of the said agreement, specifies two main classes of biological products (A) and (B) and a number of pharmaceutical products enumerated under . . . (C), (D) and (E). All the products referred to are general types and do not include any of the company's proprietary products. By far the most valuable from the company's

A point of view were the secret processes involved in the preparation, storage and packaging of certain human and veterinary anti-toxins, sera and vaccines,”

being products of the kind mentioned in para. (A) of the schedule.

B “(ii) The secret processes referred to in sub-para. (i) above have been evolved at great cost in several fields over a period of fifty years and the company considers that such secret processes are superior to those evolved by other companies. At least two other companies in the United Kingdom, and firms in Western Germany and Holland have the necessary knowledge to prepare such products and do, in fact, prepare them. The company has, however, over a number of years experimented and perfected its own methods of preparing and conserving these products and has never, until it entered into this agreement with the Burmese government, communicated these methods to any other person or corporation.”

D We were referred to a very large number of cases. For the most part, they deal with such obvious subject-matters of property as patents or copyrights and show that a parting with some interest in these, even though limited, may be equivalent to parting with a capital asset, especially when supported by restrictive covenants. LORD GREENE, M.R., said in *Nethersole v. Withers* (3) ([1946] 1 All E.R. 711 at p. 715) that the only principle to be extracted was that each case depended on its own circumstances, which (states the Master of the Rolls) “is not very helpful”. Later, however, in his judgment in that case, he used these words (at p. 716) after referring to *Inland Revenue Comrs. v. British Salmson Aero Engines, Ltd.* (4) ([1938] 3 All E.R. 283):

F “This decision is a clear authority, so far as this court is concerned, that a lump sum payment received for the grant of a patent licence for a term of years may be a capital and not a revenue receipt; whether or not it is so must depend on any particular facts which, in the particular case, may throw light upon its real character, including, of course, the terms of the agreement under which the licence is granted. If the lump sum is arrived at by reference to some anticipated quantum of user it will, we think, normally be income in the hands of the recipient. If it is not, and if there is nothing else in the case which points to an income character, it must, in our opinion, be regarded as capital. This distinction is in some respects analogous to the familiar and perhaps equally fine distinction between payments of a purchase price by instalments and payment of a purchase price by way of an annuity over a period of years.”

G One case, however, is more directly in point, namely, *Handley Page v. Butterworth* (5) ((1933), 19 Tax Cas. 328; *affd.* H.L., 19 Tax Cas. 361). In that case, H part of the payment received by the taxpayer was in respect of the disclosure by him of secret processes. The question arose, therefore, as it has arisen here, whether the disclosure could be regarded sensibly as in the nature of the sale of some asset or piece of property. In that connection, ROMER, L.J., when sitting as a member of this court, said (19 Tax Cas. at p. 359):

I “A patentee has, of course, a monopoly, and that monopoly, which is a right of preventing other people utilising his invention, is a capital asset in his hands. He may exploit that capital asset in either or both of the following ways: he can himself exercise his invention for profit, or he can grant licences to others to do so on payment of royalty. The profit he derives by exercising the invention himself or the profit he derives from the royalty are profits and gains within the meaning of Sch. D, notwithstanding the fact that every year his capital asset is diminishing in value. If, on the other hand, he sells the monopoly, or if—I cannot

remember that such a case has ever happened—he surrenders his monopoly in consideration of a payment, the payment he received for the sale of the patent or the payment he received for surrendering his monopoly would be a capital asset in his hands and none the less so because, after surrendering the monopoly, he himself was in a position which enabled him, in competition with the rest of the world, still to exercise his own invention. The owner of a secret process, such as was possessed by Mr. Handley Page, stands in a very analogous position; he has not a monopoly at law, but he has a monopoly in fact—a monopoly in fact arising from the possession by him of the secret knowledge of the process that he is carrying on. That secret knowledge is as much his capital asset as is the patent monopoly the capital asset of the patentee, and, like the patent, he can use that capital asset in either or both of the following ways: he can himself carry on the secret process or he may—it is very seldom done owing to the obvious danger involved—grant a licence to a third person to carry on the secret process, securing himself against his secret process being divulged by that third party to others. In both these cases the profits he derives from carrying on the secret process himself and the royalty he might derive from the licensee would be annual profits or gains within the meaning of Sch. D. But, supposing he sells his secret process, or supposing, as here, he surrenders his quasi monopoly by making it public to the world, then I say that, if he gets paid for doing either one or the other of those things, the money he receives in payment is a capital asset. Here, at the invitation of the government, he surrendered to the world his secret knowledge, and his capital asset thereupon ceased to exist.”

I note, however, that in that case Mr. Handley Page had disclosed his secret processes to the world and had therefore destroyed the secret processes as such. Here the disclosure is only made to one person, and the substantial benefit of these processes still remains with the company.

If the true view of the transaction is that the obligations under Part I are, in substance, obligations to give advice and instruction for completing the factory and getting it ready to start production, and if communication of the secret knowledge and processes is but incidental, then it would appear to me, having regard to the answer which I have already given to question (1), that question (2) should likewise be answered in the same sense as it was answered by the commissioners; i.e., that no sale or disposition of a capital asset has been involved, but that the £100,000 was a fee for general services rendered in the course of business.

It was pointed out in support of this view that, as I have already recited, the obligations in Part I, like those in Part II, would endure over a period of time. It was also observed that the factory has not yet, in fact, been built; and counsel for the company agreed, as I understood him, that the company would have to disclose relevant information and “know-how” acquired at least up to the date when the factory was completed. Paragraph (D) of Part I is in terms linked with the whole period of the agreement, and by those terms the company undertakes not to furnish “facilities” to anyone else in Burma. In these respects, there is an obvious similarity between Part I and Part II. This is not a case of making once and for all and at one time disclosure of some secret formula or secret formulae, as in the suggested case of the beverage which I have mentioned. Moreover, there is undoubtedly some overlap between Part I and Part II—the obligation to give advice so as to enable the government to proceed with the building of the factory in para. 1 (A) of Part II is, so far as I can see, equally covered by Part I (A).

If, therefore, the alternatives available to the court were to decide the second question either wholly in favour of the company or wholly in favour of the Crown, I should myself feel, on the evidence and the other material available, strongly

A inclined, if not compelled, with all respect to the learned judge, to adopt the latter alternative. But I think these are not the only choices and that there is a middle course, having regard to the findings in para. 10 (i) and (ii) of the Case and to the law as it has been laid down in *Handley Page v. Butterworth* (5). I am not satisfied that it would be just to conclude that the disclosure of the secret processes was merely incidental to the general obligations. In my judgment,

B the company ought at least to have the opportunity of establishing that the disclosure of these processes was an important part of the obligation, and that to a substantial extent, at any rate, the sum of £100,000 ought (on apportionment if necessary) to be attributable to this disclosure and, to that extent, to be treated as a capital receipt. For it is not, in my judgment, an answer to the argument of counsel for the company in this respect that the company did not

C part with the information in the sense of making it over wholly to the other party so as to exclude the further use of it by the company anywhere in the world. The cases on patents, for example, *Margerison v. Tyresoles, Ltd.* (6) ((1942), 25 Tax Cas. 59), show that it is not a sufficient answer to a claim to treat money received as capital that only limited and non-exclusive rights were granted. In the example given of the beverage, it would be idle to say that the

D large price paid for disclosure was not capital because the proprietor still remained in possession of the secret himself, and still remained entitled to trade as before.

I would on the whole, therefore, refer the case back to the commissioners to inquire and determine to what extent the £100,000 should be attributed to the transmission by the company to the Burmese government of their secret processes. This court somewhat rarely refers back cases to the commissioners for further findings; but, having regard to the terms of their existing findings (in para. 10 (i) particularly), I think this is a case in which justice requires that we should exercise that discretion. But the right to treat the £100,000 as capital must be limited to the extent to which it was referable to secret processes properly so-called; that is, to formulae or secret processes truly analogous to the subject-matter of letters patent, copyright and things of that kind. It would not, e.g.,

F include the sort of information recorded in the plans which were shown to us illustrating the way in which the company would lay out the factory and dispose the apparatus therein. Plans and designs of that kind only represent, I think, the recorded fruit of practical manufacturing or operational experience.

The form of the order may require to be considered so as to give the greatest possible help to the commissioners and to the parties, and this can be discussed

G by counsel after my brethren have delivered their judgments. I would discharge the order made by the learned judge and substitute the order which I have indicated in its place.

BIRKETT, L.J.: I agree with the judgment of the Master of the Rolls, to which we have just listened, and I have had the opportunity of reading and considering in advance the judgment which is about to be delivered by **ROMER, L.J.**, and I agree with it. These two judgments, in my opinion, cover most adequately and most fully every aspect of this case, both of fact and of law, and I feel that any further judgment would savour, inevitably, of repetition. I am most anxious to avoid that, for no useful purpose is to be served by saying again what has been so well said before. Therefore, I am content in this appeal

I to express my full agreement with the judgment delivered by the Master of the Rolls and that about to be delivered by **ROMER, L.J.**

ROMER, L.J.: I respectfully agree with the Master of the Rolls, and for the reasons which he has stated, in the conclusion that there was evidence before the Special Commissioners on which they could properly find that the sum of £100,000 now in question was received by the respondent company in the course of its trade. There is nothing that I desire to add on that aspect of the case, and I propose to confine such observations as I have to make to

the question whether the sum should, for purposes of taxation, be treated in the hands of the company as income or as capital. A

UPJOHN, J., reversing the decision of the commissioners, held that the £100,000 ought properly to be regarded as capital; and in so far as it represented consideration moving from the Burmese government for the communication to them of the company's secret processes (properly so called) I am in agreement with the learned judge. B

The commissioners, in my judgment, approached this question on a misconstruction of the agreement of Oct. 20, 1953. Their relevant finding on the matter is stated in para. 15 (i) of the Case as follows:

"We . . . held that it was not possible on the evidence . . . to consider each part of the agreement . . . separately. While the factory was in course of erection; while the training of staff was proceeding; and while plant and machinery were being obtained, payments, which the company admitted to be of an income nature were being made, and we were unable to take the view that the said sum of £100,000 was paid simply for the sale or assignment to the Burmese government of secret processes, analogous to patents." C

It appears to me from this reasoning that the commissioners were construing the agreement in the light of what was done under it, which is not, in my judgment, a permissible course to adopt. Whether they would have come to a different conclusion if they had construed the language of the document in the light only of admissible surrounding circumstances, I do not know. D

It is, of course, quite true that regard must be had to a written instrument as a whole in order to ascertain the meaning of each and every part of it; and it would be permissible, and indeed, obligatory, to consider the whole of the agreement of 1953 in inquiring, e.g., as to the true nature of the activities into which the company was entering and whether such activities did or did not constitute a new or different trade from that which it had carried on before. E But where the commissioners went wrong, as I think, was to alter a clear and specific provision in the agreement because of the general complexion which they attributed to the agreement as a whole. The document is divided into five parts. Under Part I, the company, in consideration of the payment to it of £100,000, undertook the obligations which were set forth in that part. F Under Part II, the company undertook the further obligations therein mentioned and "as remuneration for the services provided for in Part II" was to receive the annual payments provided for by para. 5 of that part. It appears to me that the parties to the agreement deliberately isolated the consideration payable to the company under Part I from that to which the company would become entitled under Part II. G If the company had fully discharged the obligations undertaken by it under the first part and the Burmese government had then diverted away from the company the obligations which it had agreed to discharge under the second part, it seems reasonably clear to me that the company could have successfully sued for the £100,000. H From this it follows, and is in my opinion the fact, that the £100,000 was solely referable to the promises given by the company under Part I of the agreement and none the less because there appears to be some degree of overlap between those promises and the services which it agreed to perform under Part II. I Accordingly, the only relevant investigation, for the purposes of this aspect of the matter, is as to what the company had to do in order to earn the £100,000 as distinct from what it had to do before it could claim the annual remuneration.

It appears to me sufficiently clear that one of the obligations imposed on and accepted by the company under Part I of the agreement was to communicate to the Burmese government the "know-how" relating to its secret processes.

A The relevant recital in the agreement as to these is the second which, so far as is material, provides:

"[The company] has developed and owns processes formulae and knowledge relating to the manufacture of pharmaceutical products . . ."

Sub-heading (A) of Part I provides:

B "[The company] will provide and make available to the government of the Union of Burma all . . . technical and other data and 'know-how' necessary for the . . . commencement of production thereat [i.e., the factory which was to be built] of the pharmaceutical and other products mentioned in the schedule hereto."

C This obligation is clearly linked up with, and was intended to implement, the second recital; and under it the company bound itself to communicate to the government the "processes, formulae and knowledge" mentioned in that recital. That this is the effect of para. (A) of Part I is, I think, plain, for the government could not commence production of the scheduled products unless they knew how to make them; and some at least of such products were made under formulae, and in accordance with processes, which were secret. I therefore conclude that part, at all events, of the £100,000 which was to be paid to the company was in respect of secret information as to pharmaceutical products which the company was to impart to the government.

E That this information was of value sufficiently appears from certain findings of the commissioners which are stated in the Case. By para. 4, the commissioners, after referring to the Burmese government's decision in 1953 to build a factory and laboratories for the purpose of establishing an industry for the production of pharmaceutical and other products, said:

F "Accordingly, the Burmese government despatched a trade mission to Europe with a view to inducing some leading firm of manufacturing chemists to advise as to the erection of such a factory, the supply of equipment for manufacture, and to impart to them the processes, formulae and knowledge necessary to the production and manufacture of pharmaceutical products in Burma."

Then in para. 10 of the Case it is stated that all the products referred to in the schedule to the agreement

G "are general types and do not include any of the company's proprietary products. By far the most valuable from the company's point of view were the secret processes involved in the preparation storage and packing of certain human and veterinary anti-toxins, sera and vaccines. The secret processes referred to . . . have been evolved at great cost in several fields over a period of fifty years and the company considers that such secret processes are superior to those evolved by other companies . . . The company has over a number of years experimented and perfected its own methods of preparing and conserving these products and has never, until it entered into this agreement with the Burmese government, communicated these methods to any other person or corporation . . . The secret processes consist in the actual methods of preparation of the products and also in the method of storing and packaging . . . The processes . . . cannot be learned by the study of text books."

I Notwithstanding these findings, the commissioners decided that the whole of the £100,000 in question ought properly to be regarded as taxable profits of the company's trade. They did so for two reasons. First they thought that the whole agreement must be read together; and finding that, so read, it was an agreement for the provision by the company of services, they declined to regard the £100,000 as referable only to the obligations which the company

assumed under Part I. In this they were, in my judgment, as I have already said, mistaken. Secondly, they held that: A

"even if the view were taken that the main part of the consideration of £100,000 was received by the company for imparting these secret processes to the Burmese government we were still of opinion that the company had not sold or assigned any property . . . The provision by the company under Part I of the agreement of what in cl. (D) of that part are called 'facilities' is not in our opinion the sale or assignment of a capital asset in consideration of a capital price, nor is it the grant of a licence in consideration of a capital payment." B

UPJOHN, J., took a different view. After pointing out that the commissioners had misconstrued the agreement in the manner which I have already indicated, he said that the company ([1956] 2 All E.R. at p. 715) C

"... was parting for ever, however, with part of a valuable asset, and was doing so to enable an entirely new and competing industry to be set up there. That industry, established by the skill and 'know-how' of the company, could embark on an export trade which could compete with the company's own products in other countries. In that sense the company was dissipating its asset, and it must be remembered that a secret process once communicated to another is in jeopardy; if it gets into the wrong hands, the grantor has no protection." D

I find myself in complete agreement with this analysis of the position.

As to the decision of the commissioners, they were, I think, in strictness correct in saying that the company had not "sold or assigned any property". The company had not sold or assigned anything. What it did was to share commercial information which was known only to itself, information as to secret processes. In my judgment, however, it was not open to the commissioners, in view of the decision of this court in *Handley Page v. Butterworth* (5) ((1933), 19 Tax Cas. 328), to hold that the secret processes which the company owned were not "property". In referring in that case to certain designs which the well-known aircraft designer, Mr. Frederick Handley Page, had worked out, but which were not capable of being registered or of being the subject of letters patent, SLESSER, L.J., said (*ibid.*, at p. 358): E

"... what was his property? His property was the knowledge which he had acquired of the methods for constructing these machines . . . His property was his secret process and his knowledge . . ." G

ROMER, L.J., said (*ibid.*, at p. 359):

"The owner of a secret process . . . has not a monopoly at law, but he has a monopoly in fact—a monopoly in fact arising from the possession by him of the secret knowledge of the process that he is carrying on. That secret knowledge is as much his capital asset as is the patent monopoly the capital asset of the patentee . . ." H

The position, then, is in my opinion that at the date of the agreement the company was in possession of certain secret knowledge relating to pharmaceutical products; that that knowledge constituted property of a capital nature; that under the agreement it bound itself to communicate that knowledge to the Burmese government; and that the obligation which the company so incurred constituted a part, at least, of the consideration for which the company was to receive £100,000. Why, then, should that part of this sum which was properly referable to the imparting by the company of its secret processes be regarded as taxable income? The answer of the Crown is that the company I

A did not part with any capital asset and that the knowledge of the secret processes which the company had is still vested in it; that the company could still continue to exploit this knowledge for its own commercial purposes and that there was nothing in the agreement to prevent it from doing so or from carrying on its operations in Burma or elsewhere in the same way as it had been doing before; and that consequently there was no justification for the view that the value of the secret processes to the company had been in any way impaired by the communication of those processes to the Burmese government.

This appears to me to be an unrealistic way of regarding the position. The value of the processes to the company lay in the fact that they were secret; and those in question ceased to be secret from the moment when they were communicated to the Burmese government. True it is that by Part V of the agreement the government pledged itself not to divulge the information to anyone else without the company's consent; but they became possessed of the information themselves and they would possess it for ever. When, in addition to this, it is realised that the government wanted the information in order to inaugurate and carry on the manufacture and sale in Burma of products in which the company had hitherto enjoyed a factual monopoly, I cannot doubt but that the imparting of the information diminished the value to the company of its secret processes. What then is the result? LORD GREENE, M.R., said in *Nethersole v. Withers* (3) ([1946] 1 All E.R. 711 at p. 715):

E "... if the property is permanently diminished or injuriously affected, it means that the owner has to that extent realised part of the capital of his property as distinct from merely exploiting its income-producing character."

LORD GREENE was there speaking of copyright, but in my opinion exactly the same principle applies in the case of secret processes. ROMER, L.J., said in *Handley Page v. Butterworth* (5) (19 Tax Cas. at p. 360):

F "... supposing he sells his secret process, or supposing, as here, he surrenders his quasi monopoly by making it public to the world, then I say that, if he gets paid for doing either one or the other of those things, the money he receives in payment is a capital asset."

The difference between sharing a secret process with the world and sharing it with only one organisation is undoubtedly a difference in degree, but it cannot be regarded as a difference in kind; in the former case a capital asset is destroyed, whilst in the latter case its value is (in LORD GREENE's words) "permanently diminished or injuriously affected."

UPJOHN, J., treated the whole of the £100,000 as being attributable to the impairment of the value of the company's secret processes. This, I think, is unduly favourable to the company, for the subject-matter of Part I of the agreement extended also to such things as drawings, designs and plans and information relating to the supply of prototype machinery, etc., none of which, so far as I can see, is analogous to secret processes, though we have no detailed information about them. It may be, as counsel for the Crown suggested in an alternative submission, that the diminution in value of the company's secret processes resulting from the agreement is not great having regard to the world-wide activities of the company. This may or may not be so; as, however, on the true construction of the agreement, some part at least of the £100,000 related to the imparting of information as to the secret processes, that part, in my judgment, reflects the diminution in value of a capital asset of the company and is accordingly not subject to tax. The case should therefore be remitted to the commissioners so as to afford to the company an opportunity of proving what proportion of the £100,000 should be treated, having regard to all the relevant circumstances, as referable to the secret processes which were imparted

to the government; and that part, when ascertained, should be deducted from the assessment which has been made on the company. A

Appeal allowed in part. Case referred back to commissioners to determine to what extent the £100,000 was referable to the imparting of secret knowledge, with power to hear fresh evidence; commissioners to state a supplemental Case if required by either party. Leave to appeal to the House of Lords granted to both parties.

Solicitors: *Whitfield, Byrne & Dean*, agents for *Whitley & Co.*, Liverpool (for the company); *Solicitor of Inland Revenue*. B

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. BATTERSEA, WANDSWORTH, MITCHAM AND WIMBLEDON RENT TRIBUNAL, *Ex parte* PARIKH. C

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, JJ.), January 17, 18, 1957.]

Rent Control—Furnished room—“Exclusive occupation”—Contract for “paying guest” to occupy furnished room at a weekly charge—Landlady to have access to room at all times—Contract referred to rent tribunal—Jurisdiction—Furnished Houses (Rent Control) Act, 1946 (9 & 10 Geo. 6 c. 34), s. 2 (1). D

P. and his wife were the joint owners of a house. By an agreement in the form of a letter signed by F. and addressed to Mrs. P., it was agreed that F. should be “accommodated” as Mrs. P.’s “paying guest in a room on upper floor, furnished at an all-inclusive charge of £2 10s. per week.” The agreement further provided that Mrs. P. should have access to F.’s room “at all times” and that F., whose two small children were to stay with her, would “keep the premises clean and tidy”; and F. acknowledged in the letter “receipt of the keys and furnished belongings entrusted to [her]”. F. was allowed the use of certain other rooms (bathroom and kitchen) in common with other occupants of the house and her children had some meals in the dining room. The contract having been referred by F. to a rent tribunal under the *Furnished Houses (Rent Control) Act, 1946*, the tribunal reduced the rent payable by her and gave her three months’ security of tenure. P. now applied for an order of certiorari to quash the decision of the rent tribunal for want of jurisdiction on the ground that the contract referred to the tribunal, being a contract to accommodate a paying guest, did not come within s. 2 (1) of the *Furnished Houses (Rent Control) Act, 1946**, because it was not a contract whereby a grantee was given the right to exclusive occupation of part of a house. E

Held: the contract was one to which s. 2 (1) of the *Furnished Houses (Rent Control) Act, 1946*, applied, because F. was entitled by virtue of the contract to “exclusive occupation” of her room within the meaning of those words in s. 2 (1), having regard particularly to the fact that the keys were handed over to her and notwithstanding Mrs. P.’s right of access. F

Dictum of LORD GODDARD, C.J., in *Helman v. Horsham & Worthing Assessment Committee* ([1948] 2 All E.R. at p. 591) applied. G

Per CASSELS, J.: “Paying guest” is not an accurate description of a person who has to do all her own work in connection with the accommodation which she has and when the only thing with which she is provided is a little food (see p. 355, post). H

[Editorial Note.] The court were concerned with the interpretation and effect of s. 2 (1) of the *Furnished Houses (Rent Control) Act, 1946*. Therefore, although this case is authority that a lodger can have exclusive occupation for the purposes of that enactment, it is not authority that a person lodging under contract has normally such exclusive occupation as qualifies an occupant at a I

* The terms of the section are printed at p. 354, letter C, post.

A rent under a contract to be in law a tenant. The essential distinction between a lease and a licence, where the subject is the occupation of premises, is whether the grantee has the right to exclusive occupation, for, if he has, he is a tenant (see 20 HALSBURY'S LAWS (2nd Edn.) 8, 9, para. 5). In the present case the contract might have created a tenancy (see *ibid.*, p. 12, para. 7), but whether it did so was not necessary to be decided.

B For the Furnished Houses (Rent Control) Act, 1946, s. 2 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 1086.]

Case referred to:

- (1) *Helman v. Horsham & Worthing Assessment Committee*, [1948] 2 All E.R. 588; [1949] 1 K.B. 62; *affd.*, C.A., [1949] 1 All E.R. 776; [1949] 2 K.B. 335; 113 J.P. 236; sub nom. *Horsham & Worthing Area Assessment Committee v. Helman*, [1949] L.J.R. 1082; 2nd Digest Supp.

Motion for an order of certiorari.

The applicant, Ambalal Parikh, moved for an order of certiorari to remove into the High Court and to quash a decision of the Rent Tribunal for Battersea, Wandsworth, Mitcham and Wimbledon, notified on July 18, 1956, on a reference made to them by Mrs. Mavis Flynn, under the Furnished Houses (Rent Control) Act, 1946, of a contract entered into by her and Mrs. S. Parikh, the applicant's wife.

E The applicant and his wife were the joint owners of a house known as 93, Englewood Road, Clapham. Pursuant to an agreement in the form of a letter, dated Mar. 9, 1956, from Mrs. Flynn to Mrs. Parikh, Mrs. Flynn and her two young children occupied a furnished room on the upper floor of the house and were allowed the use of a kitchen and bathroom in common with the other occupants of the house. In the letter* Mrs. Flynn was described as "a paying guest". Further terms of the agreement, as set out in the letter, were that Mrs. Flynn would pay an "all-inclusive charge" of £2 10s. a week, Mrs. Parikh would have access to the room "at all times", and Mrs. Flynn would keep it clean and tidy. Mrs. Flynn further acknowledged "receipt of the keys and furnished belongings entrusted" to her.

G In June, 1956, Mrs. Flynn referred the contract to the rent tribunal. At the hearing before the tribunal on July 16, 1956, it was submitted on behalf of the applicant that the tribunal had no jurisdiction in the matter because Mrs. Flynn was a paying guest. After hearing evidence the tribunal were satisfied that the value of the board provided to Mrs. Flynn and her children was not a substantial proportion of the whole rent, within s. 12 (3) of the Act of 1946, and the tribunal decided that they had jurisdiction under s. 2 (1) to hear the case. They reduced the rent from £2 10s. a week to £1 12s. 6d. a week and gave to Mrs. Flynn three months' security of tenure under s. 5 of the Act.

H The applicant moved for the order of certiorari on the ground that the rent tribunal had no jurisdiction to make the decision because (a) the value of the board supplied to Mrs. Flynn and her children formed a substantial proportion of the whole rent, within s. 12 (3) of the Act and (b) s. 2 of the Act did not apply to a contract for the accommodation of a paying guest.

R. A. R. Stroyan for the applicant.

I *Rodger Winn* for the rent tribunal.

LORD GODDARD, C.J.: In this case counsel for the applicant, Ambalal Parikh, moves for an order of certiorari to bring up and quash a determination of the Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal to whom a reference was made by Mrs. Flynn, who was occupying a room in a house kept by Mrs. Parikh, the applicant's wife, and owned by the applicant and his wife jointly. The ground of the application is that the tribunal had no jurisdiction to

* The terms of the letter are printed at p. 354, letter G, post.

entertain the reference because Mrs. Flynn was what may be described as a lodger, boarder, or paying guest, and had no exclusive occupation of any room in the applicant's house. The section which we have to construe is s. 2 of the Furnished Houses (Rent Control) Act, 1946. The long title of the Act is:

"An Act to make provision with respect to the rent of houses or parts thereof let at a rent which includes payment for the use of furniture or for services."

Section 2 (1) provides:

"Where a contract has, whether before or after the passing of this Act, been entered into whereby one person (hereinafter referred to as the 'lessor') grants to another person (hereinafter referred to as the 'lessee') the right to occupy as a residence a house or part of a house situated in a district in which this Act is in force in consideration of a rent which includes payment for the use of furniture or for services, whether or not, in the case of such a contract with regard to part of a house, the lessee is entitled, in addition to exclusive occupation thereof, to the use in common with any other person of other rooms or accommodation in the house, it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . ."

Section 12 (3) provides:

"Nothing in this Act shall apply to a house or part of a house let at a rent which includes payment in respect of board: Provided that a house or part of a house shall not be deemed to be let at such a rent unless the value of such board to the lessee forms a substantial proportion of the whole rent."

That would allow the Act to apply if, for example, a person was taken into a house for the purpose of boarding there, but although the rent was £3 or £4 a week, the board provided was trivial in character or amount, consisting perhaps merely of a sandwich.

In this case there was an agreement between Mrs. Parikh and Mrs. Flynn in the form of a letter. Mrs. Parikh had been advised on the matter, and the following form of agreement was prepared for her:

"Dear Mrs. Parikh, I, (*Full name in block letters*) Mavis Flynn formerly residing at 26, Queen's Road, Wimbledon and at present employed as waitress with (*Full name and address of employers*) Westbury's Restaurant, Balham Hill, to whom a reference may be made as to my character and suitability, am thankful to you for accommodating me as your paying guest in a room on upper floor, furnished at an all-inclusive charge of £2 10s. per week payable in advance every Thursday or latest Friday morning on weekly basis: I have two children [their names and ages are given] who will stay with me and be in nursery during my working hours. You will at all times have access to my room and be entitled to ask me to leave the premises with a week's notice in writing or verbal; similarly I shall give you a week's notice in writing or verbal while paying you the weekly charges on Thursday or Friday if I wish to leave the premises; I shall be bound to keep the premises clean and tidy and to live as a friendly neighbour with all concerned and will in no way disturb the happy atmosphere of your house by my conduct; I acknowledge receipt of the keys and furnished belongings entrusted to me which I shall return to you intact and in good order or make good the loss if any to your property and for this I shall keep and maintain with you at least a deposit of £2 10s. at my earliest and obtain from you a receipt for the same. Again thanking you, Yours sincerely, M. Flynn."

If a landlady thinks that by the use of certain words she can avoid the provisions of the Act of 1946, she is mistaken. It is obvious that this document

A was drafted for Mrs. Parikh in the belief that, if Mrs. Flynn was called therein a "paying guest", this might have some effect on the legal relationship between them so far as the Act of 1946 was concerned, and the expressions of gratitude were put in, I suppose, with the idea that they also would have some effect. What we have to consider, however, is the effect of the document in law and not the particular expressions which the parties used.

B Some years ago, in *Helman v. Horsham & Worthing Assessment Committee* (1) ([1948] 2 All E.R. 588), which was a rating case, I expressed the following opinion (*ibid.*, at p. 591):

"It is very common for lodgers to pay so much a week. Unfurnished lodgings are perfectly well known; lodgings are not always furnished. In this case the rooms come within the Furnished Houses (Rent Control) Act, 1946, but that is not conclusive in any way because both lodgings and tenancies come within that Act."

C Those words were merely an obiter dictum because the court in that case was dealing with the question of rating. The passage was referred to by EVERSHED, L.J. ([1949] 1 All E.R. 776 at p. 784), when the case went to the Court of Appeal, but he did not express any decided opinion on it.

D We were told by counsel for the rent tribunal that the tribunals have been in the habit of treating lodgers' agreements as being referable to them under the terms of the Act of 1946. Whether or not such agreements are referable must depend, in most cases, on the terms under which the lodger, to use a convenient expression, is living in the house, that is to say, on the terms of the agreement between the person received into the house and the owner of the house. I adhere,

E however, to the view which I expressed in *Helman v. Horsham & Worthing Assessment Committee* (1) that, as a general rule, lodgers can, and do, come within the Act of 1946 provided that they have exclusive occupation of some part of the house. I cannot altogether agree with the contention of counsel for the rent tribunal that one has merely to look at the opening words of s. 2 (1) of the Act of 1946, that is to say that "Where a contract has, whether before or after

F the passing of this Act, been entered into . . .", then the Act applies. Section 2 (1) is dealing with, among other matters, the position where a person has exclusive occupation of a room or some part of the house and is using some other rooms in the house in common with the other occupants of the house. In this case, as it seems to be conceded, Mrs. Flynn had the right to use rooms other than the room which she occupied. Her children had breakfast in the dining

G room, and she had the use of the bathroom and kitchen. We have to see whether, in addition, she had exclusive occupation of the room occupied by her under the agreement. It was submitted that she did not have exclusive occupation because, under the terms of the agreement*, Mrs. Parikh was given access. I cannot think that Mrs. Parikh, by putting into the agreement words saying that she is to have access to Mrs. Flynn's room, has thereby excluded the Act or that,

H because of this, Mrs. Flynn has not exclusive occupation of the room. Mrs. Flynn was given a key and could lock the door. It may be that Mrs. Parikh could enter if she had another key, but I think that the test is: Had Mrs. Flynn the exclusive right to use the room as a residence? Mrs. Parikh, having let this room as a residence to Mrs. Flynn, had no right to come in and occupy it herself, nor had she a right to put somebody else into the room. I think that Mrs. Flynn had the exclusive right to use the room as a residence, and for that reason the rent tribunal had jurisdiction to entertain her application; this motion therefore fails.

I CASSELS, J.: I agree. I would only add that I do not think that "paying guest" is an accurate description when the "paying guest" has to do all her own work in connection with the accommodation which she has and the only thing with which she is provided is a little food.

* The terms of the agreement are printed at p. 354, letter G, ante.

LYNSKEY, J.: I also agree. I only desire to add that in this case we are construing a particular section of a particular Act, viz., s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946—that is all with which we are concerned. Section 2 (1) reads:

“Where a contract has, whether before or after the passing of this Act, been entered into whereby one person (hereinafter referred to as the ‘lessor’) grants to another person (hereinafter referred to as the ‘lessee’) the right to occupy as a residence a house or part of a house . . .”

What has to be done by the contract is to give a person a right to occupy a house or part of a house as a residence. There is nothing in the Act which requires that there shall be a letting of possession. The right with which the Act is concerned is the right to occupy, which is a different right. A right to occupy normally arises under a licence and not under a lease or agreement for a lease. The section then continues:

“ . . . situated in a district in which this Act is in force in consideration of a rent which includes payment for the use of furniture or for services, whether or not, in the case of such a contract with regard to part of a house, the lessee is entitled, in addition to exclusive occupation thereof, to the use in common with any other person of other rooms or accommodation in the house, it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . .”

It seems clear on that wording that we have to find first, before the section applies, a contract; secondly, a contract giving the person with whom it is made the right to occupy a house or part of a house; thirdly, a contract to occupy that part of a house as a residence; and fourthly, an exclusive right of occupation of that part of the house if that right of occupation is given in addition to the right to use other parts of the house in common with other persons. Exclusive occupation means exclusive occupation as a residence, and the fact that there is reserved to the landlord a right of access from time to time does not of itself destroy that right to exclusive occupation as a residence, when the furniture and keys have been handed over by the landlord. It amounts to no more than the right of a landlord to have access for the purposes of repair, and so on. Whether or not that be the true meaning of the agreement in the present case, it is a curious fact that the rent tribunal form, as filled up by the applicant, reads:

“(1) Address of premises let as paying guest—93, Englewood Road, S.W.12. (2) Name of lessee (Paying guest)—Mrs. M. Flynn . . . (5) If part only of the house is let to the lessee as paying guest (a) number and description of rooms occupied or used exclusively by the lessee—One room on upper floor with use of bath, kitchen and garden.”

It seems to me on that basis that the applicant himself is describing the premises, namely, the particular room, as being let exclusively, and in these circumstances my view of the proper construction of s. 2 (1) is reinforced by the applicant's own view of what the position was between himself and his “lessee” as described by the Act. In my view this application must be refused.

Motion dismissed.

Solicitors: *Pollards* (for the applicant); *Solicitor, Ministry of Health* (for the rent tribunal).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

FRIBANCE v. FRIBANCE.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), November 28, 29, 1956.]

Husband and Wife—Title to property—Matrimonial home—Both parties contributing to purchase—Intention of parties—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.

B

A husband and wife married in 1933. There were two children of the marriage. During the war of 1939-45 the husband joined the Royal Air Force and made a compulsory allotment to his wife out of his pay. In 1941 the question arose of his making an additional allotment, but the husband and wife arranged that the wife should take paid employment to assist in the maintenance of the family and their home, and that the husband should save the amount of the proposed additional allotment for the future welfare of the family. The wife took employment and continued to be employed at all times thereafter, using all her earnings for family purposes. On the husband's demobilisation in 1946 he had accumulated, together

C

with his gratuity, £260. The joint earnings of the spouses were thereafter used for family purposes and they bought furniture together which it was agreed belonged to them in equal shares. In 1950 the husband's savings were reduced to £130. In that year an opportunity arose to buy the lease of the dwelling-house in part of which the family was living and a deposit of £150 was required. The husband provided £130 and the wife £20, and £800 was raised by means of a mortgage. The assignment was made to the husband, and a policy of insurance was taken out to cover the amount of the mortgage. Parts of the house were let to other tenants and the rents paid by them covered most of the outgoings, the difference, which was no more than the amount of the rent formerly payable for the accommodation which the family occupied, was paid by the husband. The lease was therefore being acquired at no extra cost to the husband or wife than the amount of the deposit. In 1955 the wife obtained a decree nisi of divorce. Before the decree was made absolute, the wife applied under the Married Women's Property Act, 1882, s. 17, to determine the title to the house.

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Held: the house, though acquired in the husband's name and initially chiefly out of his savings, was acquired for the future benefit of both the husband and the wife and, the evidence not justifying any more precise calculation of their interests, the house belonged beneficially to the husband and wife in equal shares.

G

Rimmer v. Rimmer ([1952] 2 All E.R. 863) applied.

Appeal dismissed.

H

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[**Editorial Note.** In the household savings cases, of which *Blackwell v. Blackwell* ([1943] 2 All E.R. 579) is an example, the onus was on the wife to show that what she saved out of a housekeeping allowance made to her by her husband was given to her by him. The present case illustrates the continuance of a trend in favour of the principle that, where the question is between husband and wife and is a question of the ownership of "family assets", that is, property acquired by one or other of them, as a result of their joint efforts, for the future benefit of them and their family without specific intention to decide to which one of them it belongs, equality of interest is fair in the absence of evidence to the contrary, so that the onus lies, in effect, on whichever spouse claims more than an equal share.]

As to the maxim that equality is equity, see 14 HALSBURY'S LAWS (3rd Edn.) 527.

As to summary proceedings between husband and wife, see 16 HALSBURY'S LAWS (2nd Edn.) 740, para. 1211; and for cases on the subject, see 27 DIGEST (Repl.) 263-265, 2119-2133.]

Cases referred to:

- (1) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp. A
- (2) *Blackwell v. Blackwell*, [1943] 2 All E.R. 579; 27 Digest (Repl.) 105, 778.
- (3) *Re Sims*, [1946] 2 All E.R. 138; 175 L.T. 113; 27 Digest (Repl.) 133, 968.
- (4) *Hoddinott v. Hoddinott*, [1949] 2 K.B. 406; 27 Digest (Repl.) 259, 2100.
- (5) *Balfour v. Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 27 Digest (Repl.) 201, 1604. B
- (6) *Cobb v. Cobb*, [1955] 2 All E.R. 696; 3rd Digest Supp.

Appeal.

This was an appeal by a husband from an order of KARMINSKI, J., dated July 27, 1956, reversing an order of the registrar who found, on a summons issued by the wife under the Married Women's Property Act, 1882, s. 17, that the dwelling-house in which the husband and wife lived was the sole property of the husband. The facts are stated in the judgment of DENNING, L.J. C

D. Tolstoy for the husband.

H. S. Ruttle for the wife.

DENNING, L.J.: This is an application under the Married Women's Property Act, 1882, s. 17, to determine the title to the matrimonial home. The parties married in 1933 and were divorced in 1955. The summons was issued before decree absolute, so the court has jurisdiction to deal with the case. They have two children, one born in 1934 and the other in 1937. The matrimonial home is at No. 27, Gondar Gardens, London. The couple, with their two children, went there in 1940 as tenants of rooms on the ground floor. The husband went into the air force and made the ordinary compulsory allotment to his wife. In 1941 a question arose as to a further allotment. The husband wrote to his wife about it, and it was arranged between them by their letters that the wife should go out to work to help keep the household going, and the husband would save the extra money which he got by the further allotment. He said that he would save it for their future so that it could be used for the welfare of the family thereafter. In 1942 the wife went out to work and she has been out to work ever since. She used all her earnings for family purposes, dressing the children and so on, while the husband saved what he could. In 1946 the husband was demobilised and at that time his savings, with his gratuity, came to £260. (He says that only £12 of that sum came from the allotment which he saved in pursuance of the letters.) Out of the savings they went for a holiday. Afterwards he got work as a car driver and earned £7 or £8 a week and gave his wife about £6 a week out of it. She continued to go out to work and used her earnings for the benefit of the household. Together they bought furniture for the home. By 1950 the husband's savings were reduced to £130, but the wife had some savings in the shape of insurance policies. D
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In 1950 an opportunity arose to buy the leasehold of the house in which they were living. The lease had forty years to run. They bought it for £950, of which £150 was paid in cash and £800 was left on mortgage. A policy of insurance was taken out to cover the mortgage repayments. It was a good business arrangement for this couple. They were living on the ground floor themselves. The top two floors were let to other tenants. The rents from those tenants would cover most of the outgoings. The rest of the outgoings came out of the husband's earnings, but it was no more than the old rent they had had to pay for their rooms. They were therefore in a position to acquire the leasehold at no extra cost to themselves, except for the first £150 which they had to find. H
I

In order to get the £150, the husband contributed the £130 which he had left of his savings and the wife realised £20 on one of the insurance policies. The leasehold was acquired in the husband's name, and all went smoothly until 1952, when the couple fell out. The solicitors for the wife wrote to the husband about

A the financial position between them, and at that time they claimed on her behalf no share in the house but only £20. They said:

"We are also instructed to claim from you the sum of £20 being the amount which our client provided towards the purchase of the house."

No solution was reached. Eventually in 1955 the wife filed a petition for divorce on the ground of the husband's cruelty, and on May 10, 1955, she obtained a decree nisi. Before it was made absolute, she took out a summons to determine the title to the house and furniture. They are both living there still, but occupy separate rooms. In the course of the proceedings it was agreed that the furniture belongs to them both jointly in equal shares, but the question is, to whom does the house belong? The registrar held that it belonged to the husband and that the wife was only entitled to the £20 which she paid towards it. The wife appealed to KARMINSKI, J., and he held that the house belonged to them both jointly in equal shares. He thought that the case came within the decision of this court in *Rimmer v. Rimmer* (1) ([1952] 2 All E.R. 863). The husband appeals to this court and asks us to restore the order of the registrar.

Counsel for the husband has argued forcibly that the house belonged to the husband. The husband, he said, bought the lease and took it in his own name, the leasehold interest was vested in him, he paid for it out of his own savings and earnings, save only for the £20 contributed by the wife. Counsel said that the wife had no right to the house or any share in it unless she could show a contract by the husband with her or a gift by him to her or a trust by him for her in regard to it. In support of this proposition he relied on the well-known case of "savings from housekeeping", *Blackwell v. Blackwell* (2) ([1943] 2 All E.R. 579), *Re Sims* (3) ([1946] 2 All E.R. 138), and *Hoddinott v. Hoddinott* (4) ([1949] 2 K.B. 406). Then, in order to refute any suggestion of a contract, gift or trust enforceable at law, he relied on *Balfour v. Balfour* (5) ([1919] 2 K.B. 571).

I do not think that line of argument is valid today. A wife is not to be put to proof of a contract or gift as if she were a stranger. ROMER, L.J., made that clear in *Rimmer v. Rimmer* (1) ([1952] 2 All E.R. at p. 870) when he said that

"... cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers . . ."

I fully agree with that observation and I think it is the correct way of approaching these cases at the present day.

I put, therefore, the question of contract, gift, or trust on one side, and apply the law as laid down in *Rimmer v. Rimmer* (1) and *Cobb v. Cobb* (6) ([1955] 2 All E.R. 696), which I take to be this: If it is clear that the property, when it was acquired, was intended to belong to one or other absolutely, as in the case of investments, or that they intended to hold it in definite shares, as sometimes happens when they run a business, then effect must be given to their intention; and in that case the title so ascertained is not to be altered by subsequent events unless there has been an agreement to vary it. In many cases, however, the intention of the parties is not clear, for the simple reason that they never formed an intention: so the court has to attribute an intention to them. This is particularly the case with the family assets, by which I mean the things intended to be a continuing provision for them during their joint lives, such as the matrimonial home and the furniture in it. When these are acquired by their joint efforts during the marriage, the parties do not give a thought to future separation. They do not contemplate divorce. They contemplate living in the house and using the furniture together for the rest of their lives. They buy the house and furniture out of their available resources without worrying too much as to whom it belongs. The reason is plain. So long as they are living together, it does not matter which of them does the saving and which does the paying, or which of them goes out to work or which looks after the home, so long as the things

they buy are used for their joint benefit. In the present case it so happened that the wife went out to work and used her earnings to help run the household and buy the children's clothes, whilst the husband saved. It might very well have been the other way round. The husband might have allotted to the wife enough money to cover all the housekeeping and the children's clothes, and the wife might have saved her earnings. The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit—either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets—and the product should belong to them jointly. It belongs to them in equal shares. I agree with counsel for the husband that the title to the property must remain the same, whether the question arises under s. 17 before divorce, or in other proceedings after divorce, or under a will: but I think that in each case the principles laid down in *Rimmer v. Rimmer* (1) apply. I think the judge correctly applied those principles here, and I would dismiss the appeal.

HODSON, L.J.: I agree. I think that the judgment of KARMINSKI, J., was right, and that this appeal should be dismissed. It is impossible in these cases to arrive at an exact result, because it was pointed out as long ago as 1919, in the leading case of *Balfour v. Balfour* (5) ([1919] 2 K.B. 571), that a husband and wife when they are living together do not normally endeavour to regulate their domestic affairs by entering into legal contracts with one another: it is only when they separate that disputes arise and the problem as to the ownership of property becomes one which is almost insoluble. In those cases the court is really driven, I think—as the court has been driven in this case—to arrive at the best conclusion that it can on the evidence, viz., that the property is to be regarded as owned equally.

MORRIS, L.J.: I have found this case an extremely difficult one, and I think that very powerful submissions have been made on both sides. The task of the court has been to ascertain whether the wife had any title to the property, which admittedly was in the sole name of the husband. In *Rimmer v. Rimmer* (1) ([1952] 2 All E.R. 863) SIR RAYMOND EVERSHED, M.R., pointed out that in every case of this kind the decision must depend on its own particular facts. It is so often the case that arrangements are made at times when parties are not contemplating having any dispute as to what is the precise legal basis of an arrangement made. SIR RAYMOND EVERSHED, M.R., said, in his judgment in *Rimmer v. Rimmer* (1) (ibid., at p. 867):

“Where the court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to assume some more precise calculation of their shares, I think that equality almost necessarily follows.”

Counsel for the husband relies on that passage, and on other passages, and submits that the court must in the first place be satisfied that the parties have a beneficial interest; and I think that must be so. It is clear from other passages in the judgments in *Rimmer v. Rimmer* (1) and in other cases that if the court can ascertain the exact position then s. 17 does not give any power to vary what the parties did themselves decide on. DENNING, L.J., in his judgment in *Rimmer v. Rimmer* (1) (ibid., at p. 868) said:

“In cases when it is clear that the beneficial interest in the matrimonial home or in the furniture belongs to one or other absolutely, or it is clear that they intended to hold it in definite shares, the court will give effect to their intention.”

A In *Cobb v. Cobb* (6) ([1955] 2 All E.R. 696) ROMER, L.J., said (*ibid.*, at p. 700):

“ . . . I know of no power that the court has under s. 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under s. 17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair.”

B It seems to me, therefore, that one must approach this case by considering, on the evidence, in the first place, whether it is shown that the husband and wife were both beneficially interested in this property that the husband took. C It seems to me that it is at that stage that this case presents great difficulties, the learned registrar, in a powerful judgment, having formed one conclusion, and the learned judge having formed a different conclusion. It seems to me that both the husband and the wife were behaving extremely commendably at the times that are in question. It was a happy marriage: there was no thought D then of any divorce or separation, and the parties were not adjusting their arrangements with any thought that they would at a later stage be the subject of critical examination in a court of law. The husband was serving. He appears to have been a careful man, doing his best to save, and he thought of his wife and his family and of the future. That is the very setting that makes it so difficult for a court at a much later period to be able to decide what was the legal effect E of what then took place.

After the unhappy differences arose, a letter was written (in 1952, some years before the petition for divorce was filed) by solicitors on behalf of the wife in which they said:

“ We are also instructed to claim from you the sum of £20 being the amount which our client provided towards the purchase of the house.”

F The reply to that was:

“ With regard to the £20—this was voluntarily given on the understanding that when we sold the house, this sum would be returned.”

G Counsel for the husband naturally refers to those letters and submits that that is valuable evidence before the court as to what the wife thought. I do not think that these letters can be carried very far, because some of these matters depend on the application of the law to the facts; but for what it is worth that is the way in which, on behalf of the wife, the matter was being stated.

I think I have said enough to show why this case has troubled me very considerably. Doing my best to balance the considerations, I have on the whole come to the conclusion that the decision of the learned judge can be supported. My H reason for arriving finally, after considerable hesitation, at that view is that I think that it fairly reflects what the two parties in their evidence have indicated was the relationship or the agreement between them at the proper time. It is clear that the husband himself wrote a letter and suggested that there might be more for the wife but that he could save the amount. It is said now that he was referring only to an additional allowance and that that allowance was a very I small amount. It is said that the wife in her affidavit specifically says that the arrangement was to save the amount of that allowance. She did not know, however, that it was only an amount of 3d. a day. The whole spirit of the thing was that the husband was saying “ I could now give you some more, but would you like me to save it for the period after the war? ”, and that the wife acceded to that. The learned judge said:

“ I believe the true position is that the wife said she could keep herself and the children on the compulsory allotment and by earning and the

husband said he would save for after the war. Provision for the future was of a most general kind."

She did work during the war. She continued working after the war, and that did undoubtedly enable the husband to save both during the war and after the war. I think, therefore, that the approach of the learned judge was justified. The result of that is that when the discussion took place, although the wife may not have worked it out in her mind, the position was that the house, though taken in the husband's name, was taken beneficially for both of them. Then comes the application of what is laid down in *Rimmer v. Rimmer* (1), and the result then follows in the way my Lords have outlined it.

I have added these words because I have been considerably troubled by this case; and I have endeavoured to indicate why it is that, after much hesitation, I concur in the result proposed.

Appeal dismissed.

Solicitors: *Hillearys* (for the husband); *Edwin Coe & Calder Woods* (for the wife).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NEUCHATEL ASPHALTE CO., LTD. v. BARNETT.

[COURT OF APPEAL (Denning, Hodson and Morris, L.JJ.), October 22, 1956.]

Accord and Satisfaction—Amount due under contract—Payment of smaller sum by cheque—Words "In full and final settlement of account" typed by payor on back of cheque—Indorsement by payee—Intention of payee.

In September, 1955, the defendant employed the plaintiff company to put a new surface on the drive of his premises and to do certain other work. The company's bill amounted to £259, but the defendant raised some minor queries which might reduce it by £14 or £15. On Oct. 26, 1955, the defendant sent a cheque for £125, and stated in a covering letter that this sum was "on account" pending the receipt of the company's reply to outstanding queries in connection with the work. On Dec. 21 the defendant again wrote to the company, saying: "With further reference to your account, in spite of repeated requests for allowance to which I am entitled you have failed to advise me in this matter. I am therefore enclosing my further cheque for £75 in respect of this work". On the back of the cheque enclosed with the letter the defendant had typed: "In full and final settlement of account". The cheque was accepted by the company. The secretary of the company signed a receipt on the back of the cheque, under the typed words, and the cheque was indorsed by the company's rubber stamp. The defendant had thus paid £200 in all against the bill of £259. The company afterwards offered to credit him with £4 10s. in respect of his queries. The defendant replied that his cheque of Dec. 21 "was in 'full and final settlement of your account' and was indorsed accordingly and accepted by you . . . the matter must therefore now be considered as concluded". In an action by the company to recover the balance (£59) of the account,

Held: having regard to the correspondence and the surrounding circumstances, there was no intention on the part of the company to accept the cheque for £75 in full satisfaction of the company's claim, because the words "In full and final settlement of the account", typed on the back of the cheque, were inconsistent with the main object and intention of the transaction, particularly since (a) the covering letter of Dec. 21, 1955, plainly imported that the cheque was sent only on account and not in full and final settlement, and (b) it could not reasonably be supposed that, in the circumstances, the plaintiff company had agreed to a reduction of £59 in

A the account; and, therefore, the company was entitled to be paid the balance of the account.

B Per DENNING, L.J.: "It is a well settled rule of construction that, if one party puts forward a printed form of words for signature by the other and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, then the court will limit or reject the printed words so as to ensure that the main object of the transaction is achieved . . . We do not allow printed forms to be made a trap for the unwary. So, in the present case, words of this kind on the back of a cheque cannot be made a trap for the unwary: and this is so, even though they are typed and not printed" (see p. 365, letters E and F, post).

C Appeal dismissed.

[Editorial Note. Where printed or typed forms are used and are modified or amplified by written words or figures, the latter are dominant, and printed or typed matter that is inconsistent with the written words can be rejected. This principle, authority for which is gathered together in 11 HALSBURY'S LAWS (3rd Edn.) 415, para. 671, has been applied principally in shipping cases. A recent example is the case of *G. H. Renton & Co., Ltd. v. Palmyra Trading Corporation of Panama* ([1956] 1 All E.R. 209, C.A., *affd.*, [1956] 3 All E.R. 957, H.L.). The principal consideration of this principle there is, perhaps, that given by JENKINS, L.J. (see [1956] 1 All E.R. 222, letter G), where he intimates that the principle is not confined to bills of lading. The judgment of DENNING, L.J., in the present case (cf. the dictum quoted above) illustrates the application of the principle to a receipt form typed on a cheque enclosed with ordinary commercial correspondence.

E As to payment of a smaller sum than that due, see 8 HALSBURY'S LAWS (3rd Edn.) 206, para. 349; and for cases on the subject, see 12 DIGEST (Repl.) 528, 529, 3983-3991.]

F Case referred to:

(1) *Day v. McLea*, (1889), 22 Q.B.D. 610; 58 L.J.Q.B. 293; 60 L.T. 947; 53 J.P. 532; 12 Digest (Repl.) 529, 3991.

Appeal.

G The defendant, George Vanda Paul Barnett, appealed from an order made by His Honour JUDGE NORRIS at Wolverhampton County Court on June 22, 1956, in an action by the plaintiff company, Neuchatel Asphalte Co., Ltd., to recover a sum alleged to be due to the company from the defendant as the balance of an account for £134 in respect of work done for the defendant by the company. The defendant contended that the company had accepted a cheque for £75 in full satisfaction of the claim, because he had typed on the back of the cheque the words "In full and final settlement of account" and the cheque was indorsed by the company's rubber stamp and signed by the secretary of the company. The learned county court judge found, on the facts and from the correspondence between the parties, that the secretary could not have intended to accept the cheque in full satisfaction of all outstanding claims on the defendant, and, accordingly, gave judgment for the plaintiff company.

I *K. S. W. Mellor* for the defendant.

H. J. Garrard for the plaintiff company.

DENNING, L.J.: In September, 1955, the defendant, Mr. Barnett, employed the plaintiff company, Neuchatel Asphalte Co., Ltd., to put a new surface on the drive of his house, to set the kerbstones, and do other work, at a total cost of £250. While the work was being done, the company erected a retaining wall for which they sought to charge another £9, so that the total bill for the work was £259. The defendant objected to the extra £9 for the retaining

wall. He also had some queries on the work itself, such as some slight settlement in one part and some broken kerbstones. The cost of making good these matters would come to some £5 or £6, according to the evidence of the company's manager, which the judge seems to have accepted. A

Such being the position, when the company demanded payment of the £259, the defendant, on Oct. 26, 1955, sent a cheque for £125 together with a covering letter in which he said: B

"Dear Sirs, Pending my receipt of your reply to outstanding queries in connection with the work carried out at the above I enclose herewith cheque for £125 on account for which your receipt in due course will be appreciated."

That payment left £134 outstanding. The queries were discussed and not resolved when the company, in December, sent a statement for the outstanding amount, £134. On Dec. 13, 1955, the defendant replied to the company's office in London: C

"Dear Sirs, I return herewith your statement and would ask you to refer this to Mr. Park who is aware of allowances to be made. Will you please attend to this matter without further delay as I am of course unable to remit until outstanding matters are finalised." D

The London office accordingly referred the matter to Mr. Park, the Birmingham manager. Before Mr. Park had dealt with it, the defendant sent to the company a letter and a cheque which is the subject of this litigation. The letter is dated Dec. 21, 1955, and addressed to the company in London:

"Dear Sirs, With further reference to account, in spite of repeated requests for allowance to which I am entitled you have failed to advise me in this matter. I am therefore enclosing my further cheque for £75 in respect of this work. Yours truly, G. V. Paul Barnett." E

It is apparent that £75 was not nearly enough to meet the bill. The company claimed that £134 was due. The defendant had made some complaints, but, even if they were all justified, they would only reduce the bill by £9 for the wall and £5 or £6 for the other queries, so that there would still be well over £100 due. Therefore, no one could possibly think that £75 was enough. Anyone reading the defendant's letter of Dec. 21 would reasonably think that the £75 was a payment on account and nothing more; but with the letter the defendant enclosed his cheque payable to the company for £75, and on the back of the cheque he had typed these words: F G

"In full and final settlement of account.

Signed—.

Dated —."

I have no doubt that the defendant hoped that the company would sign that cheque as an indorsement, and the company did so. The cheque was indorsed by the company's rubber stamp over a 2d. stamp and signed by the secretary in the place which the defendant had provided and dated. Underneath the words "In full and final settlement of account" is the name of the company, signed by the secretary, and the date. The defendant contends that thereupon the whole matter was settled, and that he is quit of any further liability. H

To complete the story, on Jan. 2, 1956, Mr. Park, having looked into the complaints, wrote to the defendant about them, and suggested that the company might give him a credit note of £4 10s. against the amount that was outstanding. By that time, however, the defendant had received the cheque back from his bank, and he replied: I

"... my cheque ... dated Dec. 21 for the amount of £75 was in 'full and final settlement of your account' and was indorsed accordingly and accepted by you. It is unfortunate that you neglected to deal with

A my complaints to my satisfaction and the matter must therefore now be considered as concluded."

B The question for consideration is whether the company, having signed on the back of the cheque under the words "In full and final settlement of account", can nevertheless bring this action for the balance. The company's secretary was not called to explain how he came to sign this, and it was contended before us that, in the absence of any evidence by him that he made a mistake, the company must be held bound by their signature. I fully agree that the indorsement cannot be set aside on the ground of mistake. It was to all outward appearance a concluded transaction. If the secretary did make a mistake—as, for instance, if he did not read the words "In full and final settlement"—

C it was a mistake of his own making of which the defendant knew nothing, and the indorsement must stand as it is written. The whole question is: What is the proper interpretation of the transaction as it stands on the correspondence?

D If the covering letter of Dec. 21, 1955, is read by itself, it plainly imports that the cheque for £75 is sent only on account and not in full and final settlement. The surrounding circumstances bear this out. Over £100 was due and no one would reasonably suppose that £75 would settle the debt. The main object and intention of the transaction was, therefore, the payment of £75 on account. When we turn to the back of the cheque, however, we find the words "In full and final settlement of account". Those words are inconsistent with the main object and intention of the transaction as disclosed by all the other circumstances of the case. What then is to be done? It is a well settled rule of construction

E that, if one party puts forward a printed form of words for signature by the other and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, then the court will limit or reject the printed words so as to ensure that the main object of the transaction is achieved. We recently had occasion to invoke this rule in a case* when an estate agent sought to get commission on a transaction

F "subject to contract". We do not allow printed forms to be made a trap for the unwary. So, in the present case, words of this kind on the back of a cheque cannot be made a trap for the unwary: and this is so, even though they are typed and not printed. In the particular circumstances of this case, the words "In full and final settlement" can and should be rejected.

G * *George A. Woodman & Sons v. Linden & Others*, Court of Appeal (DENNING, BIRKETT and PARKER, L.JJ.), Apr. 13, 1956.

H In this case the defendants, who were proposing to sell their confectionery business, put the sale of the business and premises into the hands of the plaintiffs, who were business transfer agents. Particulars of the property to be sold were taken down and embodied in an agreement with the plaintiffs which the defendants signed. Below the particulars was a printed clause which provided that if the plaintiffs should "introduce any one willing to purchase [the property, the defendants] would on payment of the purchase price or any deposit thereon (whether subject to contract or not) pay [the plaintiffs] a commission", the amount of which was then stated. After the statement of the commission there was added in ink, above the defendants' signature, the words "plus 5 % on 1st £300 2½ % on balance on freehold price obtained if any or 10 % for the 1st year's rent for letting on lease". On May 26, 1954, one C. entered into an agreement to purchase the property and paid a deposit, but subsequently he withdrew from the agreement under a clause which rendered the agreement subject to contract and so not binding in law. The deposit was returned to C. The plaintiffs sued the defendants for commission relying on the words "(whether subject to contract or not)" in the printed clause. At the trial before HARMAN, J., the plaintiffs succeeded, but by a majority (DENNING and BIRKETT, L.JJ., PARKER, L.J., dissenting) this decision was reversed on appeal. DENNING, L.J., decided the appeal on the ground that the main object of the agreement was that the agents should find someone willing to complete the purchase, and that the printed words "any deposit thereon (whether subject to contract or not)" in the agreement were inconsistent with its main object and should be rejected. BIRKETT, L.J., decided the appeal on the ground that the condition of introducing anyone willing to purchase meant introducing a willing purchaser, i.e., a purchaser who was willing to complete his purchase, and that the plaintiffs had not done this and therefore were not entitled to commission.

I

Another way of reaching the same result is to say, as the judge said, that in the circumstances the secretary cannot have intended to accept the cheque as a final release of the defendant's indebtedness. As, however, the secretary did not give evidence, this only means that in the circumstances it cannot reasonably be supposed that the secretary did agree to accept the cheque "in full and final settlement". And why cannot this be reasonably supposed? Only because the words are inconsistent with the main object and intention of the transaction as disclosed by all the circumstances. So it all comes back to the same thing. I would dismiss the appeal accordingly. A B

HODSON, L.J.: I agree. The only question is: Was there any evidence on which the learned county court judge was entitled to come to the conclusion that there was no agreement between the parties that the cheque for £75 in this case should be accepted in full satisfaction of the plaintiff company's claim, the claim being for a sum £59 greater? C

The company's solicitors, when they were apprised of the facts of the case, viz., that the secretary of the company had signed a receipt on the back of the cheque for £75 on which the words were typed "In full and final settlement of account", followed by the name of the company, the signature of the secretary, the date and the company's stamp, wrote to the defendant stating that they had been instructed by the company in connection with the company's claim for the balance of the account, and saying: D

"We have read the correspondence which has passed between yourself and [the company] with reference to the cheque for £75 sent by you in December last, which you contend was in full and final settlement of [the company's] account, and it is clear that [the company] did not accept it on this basis, but as a payment on account." E

That was the contention which was accepted by the learned county court judge, having heard certain evidence. The only oral evidence which he heard was the evidence of the manager of the company's Midlands area at Birmingham, the account itself having been sent from London, where the head office of the company was and where the secretary was. The manager said that there was a dispute whether the defendant's complaints were justified, and that, if they were, they could not involve more than £5 or £6, so that the amount by which the defendant had written down the bill exceeded by a very large amount the area of dispute. F

The county court judge considered the correspondence, which was referred to by the plaintiff company's solicitors, and to which my Lord has referred, and he referred in particular to the letter of Dec. 21, which was sent to the London office with the cheque, and which is, at any rate, consistent with, if not only consistent with, a payment on account. In his judgment the learned judge said: G

"There was nothing said about the receipt on the back of the cheque in that letter and I think that the letter indicates that no agreement had been come to as to the final sum which was to be paid by the defendant under this contract. He says: '... in spite of repeated requests for allowance ... you have failed to advise me in this matter', and so he sends the cheque which is very much smaller than it could possibly be if it was sent in full satisfaction of the account. I am quite satisfied that in reducing this account by £59 odd he was reducing the amount far below any allowance that he was likely to obtain and any allowance for all the claims for which he had been making an appeal. And that is the state of affairs when he sends the cheque with this covering letter. The cheque gets into the hands of the company's secretary in London who puts a 2d. stamp on and signs the form of receipt on the back. I do not know what was in the mind of the secretary when he did that and he has not been called, but if he had looked at the account I do not think he could, as a business man, have signed the H I

A cheque without making inquiries of Mr. Park about this sum of £59. I do not think he can have looked at the account. I think he just signed the cheque and passed it on to put to the account. He is accepting the cheque in full satisfaction of all outstanding claims on the defendant. I think that this suggests he was not conscious that it was reducing the account by £59 odd. I do not think he ever intended to do such a thing . . . I am not at all confident that I am right about this, but I think I am doing justice in the matter in those circumstances. I do not think I am satisfied the secretary of the company did accept this cheque for £75 in full discharge of the account."

The secretary was not called as a witness, and counsel for the plaintiff says that the learned county court judge is not entitled in those circumstances to form any conclusion as to the state of mind of the secretary, whether he had any intention other than that expressed on the back of the cheque, namely, accepting the cheque in full satisfaction. I think that there is great force in that submission, but I am still of opinion that the learned county court judge was entitled to arrive at his conclusion on the facts of the case, looking at the surrounding circumstances, which are unusual: a man (i) writing to a company whose head office was in London without sending the account, and asking for a reduction of £59 in his bill when a very much smaller sum was in dispute; (ii) making no reference in his covering letter to the fact that the cheque was to be accepted in full satisfaction of any claim which the company might have on him; and (iii) writing to the London office in that way when the whole of the correspondence had been with the Birmingham office.

I ought perhaps, in fairness to the defendant, to refer to those letters, because he did write to the London office on Dec. 13, when he first received the statement and asked them to refer to Mr. Park, the company's local manager, who was aware of the allowances to be made, and, having apparently received no communication from anyone on behalf of the company, he wrote on Dec. 21, again to the London office:

"With further reference to account in spite of repeated requests for allowance to which I am entitled you have failed to advise me in this matter. I am therefore enclosing my further cheque for £75 in respect of this work."

The "further cheque for £75" was a clear reference to the fact that in his earlier letter, namely, in October, 1955, he had sent £125 expressed to be on account. It appears to be quite clear that the Birmingham office knew nothing about the payment of this cheque at that time, because on Jan. 2 Mr. Park of Birmingham wrote a letter to the defendant in which he thanked him for the letter of Dec. 13 when the statement was returned by the defendant to the company with a request to refer it to Mr. Park. The company's London office had passed this letter of Dec. 13 to Mr. Park for his comments. It is quite clear from the contents of Mr. Park's letter that at that time he knew nothing of the fact that in the meantime the cheque of Dec. 21 had been paid in, having been receipted in the way described, by the London office. That information was at once given to the Birmingham office by the defendant by a letter of Jan. 3, but it seems to me to be a reasonable inference to draw from the surrounding circumstances of this case that in construing those words "In full and final settlement of account", on the back of the cheque, the learned judge was entitled to come to the conclusion that there was no intention on the part of the company to accept the cheque in full satisfaction of the full outstanding claim. I agree, therefore, that this appeal fails.

MORRIS, L.J.: I am of the same opinion. In my judgment, there was evidence on which the learned judge could find that the plaintiff company never intended to agree to take the sum of £75 in full satisfaction of their claim.

In *Day v. McLea* (1) ((1889), 22 Q.B.D. 610 at p. 613) BOWEN, L.J., in his judgment said: A

"It seems to me, as a matter of principle as well as of authority, that the question whether there is an accord and satisfaction must be one of fact. If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact." B C

It seems to me that, in the present case, there were three features of the evidence before the learned judge which entitled him to come to the conclusion that he reached. I need only refer to them briefly. In the first place, I think that the contents of the letter of Dec. 21 furnish material. There is nothing at all said in that letter about the words which are on the back of the cheque. That letter suggests and, indeed, indicates that no agreement had been come to up to that moment. If, therefore, the defendant was putting forward a proposal that there should be an end of the matter on the basis that the plaintiff company gave up £59 of its claim, it seems to me that he should have made some express reference to that proposal. There was nothing to put the recipient of this letter on express notice that this was a proposal in that form, and no mention made in the body of the letter of the words that were on the back of the cheque. It was left for someone looking at the cheque to realise their intended significance. Secondly, I think that the finding of the learned judge as to the amount which was in dispute provides evidence on which he was entitled to come to his conclusion. The learned judge said: D E

"I am quite satisfied that in reducing this account by £59 odd [the defendant] was reducing the amount far below any allowance that he was likely to obtain and any allowance for all the claims for which he had been making an appeal." F

It seems to me that that is a second piece of evidence which shows that the learned judge could come to the conclusion that the plaintiff company never intended to give up £59 at this time. Thirdly, it seems to me that the sequence of the letters provides additional evidence. The defendant had written his letter of Dec. 13 to London, sending the statement and asking that the matter be referred to Mr. Park, who, he said, was aware of the allowances to be made. That letter was sent to Mr. Park. Mr. Park replied on Jan. 2 and dealt with the question of allowances and made a suggestion that £4 10s. might be credited. That, of course, shows that Mr. Park was considering the matter on behalf of the company after the date when the secretary had signed this cheque and after the date when the secretary had presumably sent the letter of Dec. 13 to Birmingham. All that is additional material showing that the company could not have intended to agree to remit £59 of their claim. G H

As this is an appeal from the decision of a learned county court judge, it seems to me that the question is whether there was evidence entitling him to arrive at his conclusion of fact, and, for the three reasons which I have indicated, it seems to me there was ample evidence enabling him to come to his conclusion. I, therefore, agree that the appeal fails. I

Appeal dismissed.

Solicitors: *Henry Hilbery & Son*, agents for *Thorne, Beckett & Co.*, Wolverhampton (for the defendant); *Bischoff & Co.* (for the plaintiff company).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BIRKETT v. McGLASSONS, LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, JJ.), January 16, 1957.]

Fish—Salmon—Possession of salmon within period of prohibition of sale for selling after end of period—Whether prohibited—Salmon and Freshwater Fisheries Act, 1923 (13 & 14 Geo. 5 c. 16), s. 30 (1).

In January, 1956, a number of salmon were caught by rod and line and deposited with fishmongers on the terms that if the fishermen did not require the fishmongers to return the fish before Feb. 1, 1956, the fishmongers were to be at liberty to sell the fish as agents of the fishermen. On Jan. 31, 1956, without the authority of the fishermen the fishmongers (after their normal business hours) despatched the fish to an agent in London (where they arrived on Feb. 1, 1956) for sale on an agency basis. The fishmongers were charged with having the salmon "in their possession for sale" contrary to s. 30 of the Salmon and Freshwater Fisheries Act, 1923*, which prohibits any person having such possession between Aug. 31 and the following Feb. 1.

Held: the fishmongers had not contravened s. 30 because, on the true construction of the section, it applied only to the possession of salmon between Aug. 31 and Feb. 1 for sale during the same period and, on the facts, any possession of the salmon by the fishmongers until Feb. 1 was possession for the purpose of the salmon being kept pending call but not for sale before February.

Appeal dismissed.

[For the periods of the annual close seasons and for the restrictions on sale of salmon and trout, see 17 HALSBURY'S LAWS (3rd Edn.) p. 328, paras. 582-585, and p. 331, para. 590.]

For the Salmon and Freshwater Fisheries Act, 1923, s. 30, see 10 HALSBURY'S STATUTES (2nd Edn.) 80.]

Case Stated.

This was a Case Stated by the Carlisle justices on an information preferred by the appellant, Ralph Birkett, against the respondents. The question for the consideration of the court was whether the fact that the respondents had in their possession twenty-one salmon on Jan. 31, 1956, with the intention of selling them through their London agents on Feb. 1, 1956, constituted an offence under the Salmon and Freshwater Fisheries Act, 1923, s. 30. The facts are stated in the judgment of LYNSKEY, J.

Gilbert Paull, Q.C., and J. G. Shorrocks for the appellant.

Morris Jones for the respondents.

LYNSKEY, J.: In this case an information was preferred by the appellant against the respondents, McGlassons, Ltd., who are fishmongers, and Thomas Anthony Beattie, the managing director of McGlassons, Ltd., for that they

"between Aug. 31 and Feb. 1 following, namely, on Jan. 31, 1956, did have in their possession for sale twenty-one salmon, contrary to the Salmon and Freshwater Fisheries Act, 1923, s. 30."

The facts of the case as found by the magistrates were that between Jan. 16, 1956, and Jan. 26, 1956, twenty-one salmon were caught in the River Eden by rod and line. Although it is not right or possible to get salmon by commercial

* Section 30 (1) (2) of the Salmon and Freshwater Fisheries Act, 1923, provide:—

"(1) No person shall buy, sell, or expose for sale, or have in his possession for sale any salmon . . . between Aug. 31 and Feb. 1 following.

"(2) If any person contravenes this section, he shall be guilty of an offence against this Act."

means during the season ending on Feb. 1, apparently* it is permissible to fish by rod and line as from Jan. 15, and these twenty-one salmon which were caught between Jan. 16 and Jan. 26, 1956, were lawfully caught by persons using rod and line. The fish, according to the finding of the magistrates, were deposited with the respondents on the terms that if the fishermen did not require the respondents to return the fish before Feb. 1, 1956, the respondents were at liberty to dispose of the fish by way of sale as agents of the fishermen. In other words, the effect of the finding is that the fish were left with the respondents on the terms that they were to hold them for the fishermen at call, that if there was no call for the return of the fish before Feb. 1, 1956, then the respondents would be entitled to sell the fish. Until that date arrived no power of sale was given by the fishermen who caught the fish to the respondents. The finding goes on:

"We were satisfied beyond all doubt that the fish were never in the respondents' possession to be sold between Aug. 31, 1955, and Feb. 1, 1956."

That was a clear finding that there was no intention on the part of the respondents to sell these fish prior to Feb. 1, 1956, i.e., prior to the date on which it would be lawful to sell these salmon†. At 8.30 p.m. according to the finding of the magistrates on Jan. 31, 1956, some hours after the respondents' premises had closed for business, the fish were consigned to one Bennett of London for sale on an agency basis. The respondents did not seek the authority of the rod fishermen before despatching the salmon. That apparently is a finding that the respondents in fact did not act in accordance with the terms of their bailment but broke those terms by sending the fish for sale before the due time expired when the authority to sell arose. Eventually the fish were sent to London and arrived there on the morning of Feb. 1 and would normally have gone on to Bennett's, but the Fishmongers' Company of London intervened and they intercepted the fish and thereafter they were sold, apparently, by the Fishmongers' Company or on their authority, and they hold the proceeds of sale pending some order of court.

The case for the appellant was that the respondents had the fish in their possession for sale from the date when the fish first passed into their possession. My view is that up to the time when the power of sale arose, they had the fish in their possession, not for the purpose of sale, but for the purpose of keeping them in refrigeration pending call by the owners of the fish, and the power of sale only arose if that power of recall was not exercised by the fishermen.

It is said by the appellant that the true construction of the Salmon and Freshwater Fisheries Act, 1923, s. 30, is that if a person has in his possession at any time before Feb. 1 salmon which he intends to sell after Feb. 1, he is guilty of an offence under this section because in effect during the period between Aug. 31 and Feb. 1 following he has salmon in his possession which he has for the purpose of ultimate sale after that date. In my view, that is not the correct construction. It seems to me that s. 30 (1) deals only with sales which take place or are intended to take place prior to Feb. 1. Looking at the sub-section and dissecting it: no person shall buy between Aug. 31 and Feb. 1 following; no person shall sell between the same dates; no person shall expose for sale between the same dates, and no person shall have in his possession for sale between the same dates. I read that section as meaning that a person must not have it in his possession for sale during the close period. It would have been easy, if the legislature had desired so to enact, to provide that a person must not have salmon in his possession for sale before that date even though the sale takes place after that date.

* The annual close season for salmon can be fixed by bye-law in any place: if it is not so fixed it is the period between Aug. 31 and the following Feb. 1 (Salmon and Freshwater Fisheries Act, 1923, s. 26 (3); 10 HALSBURY'S STATUTES (2nd Edn.) 78). In this instance the terminal date was fixed by bye-law.

† The period of the prohibition on sale enacted by s. 30 of the Salmon and Freshwater Fisheries Act, 1923, viz., from Aug. 31 to Feb. 1, cannot be varied by bye-law.

- A It seems to me that s. 30, on its true construction, means that, in relation to buying or selling or exposing for sale or possession for sale, the sale that is contemplated in each case is a sale between Aug. 31 and Feb. 1 following. If that is the true construction of the section, then, on the facts found in this case no offence has been committed, because if there was any possession, which I doubt, there was no possession for sale during the close period. In those circumstances, in my view, this appeal must be dismissed.

LORD GODDARD, C.J.: I agree.

CASELS, J.: I agree.

Appeal dismissed.

- C Solicitors: *Boxall & Boxall*, agents for *Oglethorpe & Hough*, Keswick (for the appellant); *Charles Russell & Co.*, agents for *Harston & Atkinson*, Carlisle (for the respondents).

[Reported by MARGARET D. ABEL, *Barrister-at-Law*.]

D HALSALL AND OTHERS v. BRIZELL AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), November 29, 1956.]

Sale of Land—Covenant—Covenants by owners to contribute to upkeep of common roads and sewers—Deed declaring trusts of roads and sewers for benefit of owners of plots—Liability of successors in title of owners to make contribution.

- E *Deed—Covenant—Positive covenant—Enforceability—Roads and sewers declared to be held in trust for owners of land—Covenant by owners to contribute to upkeep—Liability of successors in title of owners using roads and sewers.*

On May 3, 1851, forty acres of land (afterwards called Cressington Park) was purchased by O. and J. and sold in 174 building plots. After the sale of the plots, there remained vested in O. and J. the roads and a promenade along a sea wall. A deed was entered into by a large number of owners of plots and O. and J., the object of which was to declare the trusts on which O. and J. held the roads and promenade, and to provide for the payment of the expenses of their upkeep and the maintenance of the sewers which had been placed under the roads. The deed recited (as was the fact) that each of the conveyances of the plots contained, on the part of the grantees and their heirs, executors, administrators and assigns, covenants similar in terms or in effect to the covenants thereafter contained. The deed also recited and declared that the roads and promenade were vested in O. and J. on trust to permit the same to be used and enjoyed for ever by the parties thereto and their heirs and assigns and by the occupiers for the time being of the several plots of land and of the dwelling-houses erected or to be erected thereon. By the operative part, the parties (purchasers of the plots) covenanted for themselves their heirs, executors, administrators and assigns with O. and J. their heirs and assigns so far as related to their several plots (among other covenants) that they would "contribute and pay a due and just proportion in respect of the plot or several plots of land" marked with their names on an annexed plan "and of the dwelling-house on each such plot erected or to be erected . . . of all costs charges and expenses" incurred thereafter in or about the maintaining etc. of the several roads or ways described in the said plan and of the sea wall promenade also all the main drains and main sewers for the dwelling-houses. They also covenanted to observe "all such lawful and reasonable rules and regulations" as should from time to time be made by the owners for the time being of the several plots of land at any meeting ". . . for or in relation to the contribution by the owner or owners for the time being of each of the same plots of land of the means necessary towards the expenses of keeping in repair the said

roads sea wall promenade . . . and main drains and sewers . . .” Provision was made for an annual meeting of proprietors, and for the regulation of and voting at the meetings. In accordance with the deed, annual calls were made to defray the expenses. In 1931 F. purchased one of the plots and dwelling-houses in Cressington Park and the property was conveyed to him subject to the covenants contained in the deed of 1851. F. let the house to several tenants, although he made no structural division of the house into flats. Until 1950, the annual general meeting of proprietors made a levy of a certain sum in respect of each plot under the deed of 1851, but in 1950 a resolution was passed that the trustees be empowered to make an additional call in respect of any plot the dwelling-house on which had been divided in two or more dwellings, and that the amount of the call for such a plot should be the amount of the call for the current year multiplied by the number of dwellings into which such house should have been divided, but that no more than three calls were to be made on one plot. The defendants, who were F.’s executors, were willing to pay one call, but not more, and denied the validity of the resolution of 1950. On the questions of the enforceability of the covenant relating to calls and the validity of the resolution of 1950,

Held: (i) the defendants were bound to accept the burden of the covenant for contribution in the deed of 1851 as they desired to take its benefits, e.g., to use the roads leading to their house and to have the use of the sewers which were vested in the plaintiffs.

Elliston v. Reacher ([1908] 2 Ch. 665) applied.

(ii) the resolution of 1950 was invalid because it purported to authorise additional calls based on the user of plots (i.e., the division of a dwelling-house on a plot into several dwellings) and, on the true construction of the deed of 1851, the contribution to be computed was an amount in respect of a plot, not an amount in respect of the user of the plot.

[**Editorial Note.** Two legal maxims, which are not infrequently quoted, would both lead to the conclusion expressed at (i) above. The first, *qui sentit commodum sentire debet et onus* (accepted as a maxim of law in *Dean and Chapter of Windsor v. Hyde* (1601), 5 Co. Rep. 24a), is also exemplified in the cases where a person named in a deed as a party does not execute it but accepts its benefit; he will then be bound to observe the covenants on his part expressed in it, although he has not executed it (see 11 HALSBURY’S LAWS (3rd Edn.) 357, para. 579). The second is the Scottish rule that one cannot both approbate and reprobate, and, though this may strictly have no place in English law, it conveniently expresses the principle, akin to the doctrine of election, that where a person has chosen to take a benefit under a deed he is bound also to conform with its provisions and renounce every right inconsistent with them (see per LORD CAIRNS, L.C., in *Codrington v. Codrington* (1875), L.R. 7 H.L. 854, 861, 862).]

Case referred to:

- (1) *Elliston v. Reacher*, [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701; 28 Digest 448, 675.

Adjourned Summons.

The plaintiffs, the trustees of a deed of covenant, dated Aug. 19, 1851, by an originating summons, dated Sept. 1, 1955, sought the determination of the following question: whether on the true construction of the deed the plaintiffs as trustees were entitled to require the defendants as owners of a dwelling-house and land subject to the above-mentioned deed of covenant to pay to the plaintiffs the sum of £5 in respect of the financial year ending on June 30, 1952, and the sum of £6 in respect of each of the financial years ending on June 30, 1953, June 30, 1954, and June 30, 1955, by way of additional contribution towards

A the cost of the maintenance by the plaintiffs of the roadways, drains and sewers, lodge, promenade and sea wall respectively, mentioned in the said deed.

W. L. Blease for the plaintiffs.

C. A. Settle for the defendants.

B **UPJOHN, J.:** This summons raises two points on the construction of a building scheme entered into as long ago as Aug. 19, 1851, by a large number of owners of properties in what is now known as Cressington Park which is now situate in the City of Liverpool. The general scheme was this. On May 3, 1851, about forty acres of land, which afterwards became Cressington Park, were purchased for some £24,000, and sold off in 174 plots of land. Some purchasers purchased more than one plot. On the occasion of each conveyance on sale C the purchasers entered into a number of what I may call building covenants and those covenants were repeated in the deed which I have to construe.

The principal object of the deed was this. The plots having been sold off, there remained vested in the original purchasers, Mr. Okell and Mr. Jeffrey, the roads and a promenade along a sea wall. The object of the deed was to declare trusts concerning the roads and the promenade for the benefit of the purchasers D and to provide for payment of the necessary expenses proportionately by the owners in respect of the upkeep and maintenance of the roads and promenade, and also of the sewers which had been placed under the roads and of the street lighting which was by gas. The sewers have not yet been taken over by the local authority, nor have the roads serving the park, all of which remain in the plaintiffs, who are the successors of the original trustees, Messrs. Okell and E Jeffrey. With regard to the street lighting, that has been taken over by the local authority, and no question arises. The deed contained elaborate provisions for the owners of the plots to meet and to decide what was an appropriate sum to be paid annually to defray the necessary expenses of the trustees in the upkeep of the roads, the promenade, the sewers and the lighting. There were also a number of restrictive covenants in it, i.e., certain building lines had to be conformed to, F there were restrictions against building more than one dwelling-house on each plot, and so on, but with those covenants I am not directly concerned.

With those general remarks I can now turn to the consideration of the deed. The parties to it were a large number of owners of plots of the one part and Mr. Okell and Mr. Jeffrey of the other part. The relevant recitals are:

G “And whereas in the conveyance of each and every of the said plots of land to the said persons parties thereto are contained on the part of the grantees therein respectively named and their respective heirs executors administrators and assigns covenants similar in terms or in effect to the covenants hereinafter contained . . . And whereas the site of the roads and of the sea wall and promenade described in the said plan and therein for H distinction coloured yellow and also the lodge are intended to be left vested in the said William Okell and Alexander Colquhoun Jeffrey their heirs and assigns by virtue of the said conveyance of May 3, 1851, upon trust to permit and suffer the same at all times for ever to be freely used and enjoyed by the said persons parties hereto and their respective heirs and assigns I and by the occupiers for the time of the said several plots of land inscribed in the said plan with the names of the said persons parties hereto and of the several dwelling-houses erected or to be erected thereon respectively and as to such plot or plots of land as shall not be allotted to or taken by any of the said persons parties hereto Upon the trusts hereinafter declared And whereas for better securing the performance of the covenants contained in the several and respective conveyances of the said several and respective plots of land described in the said plan on the part of the several and respective grantees therein respectively named and their respective heirs executors administrators and assigns it was agreed that each of the several and

respective grantees on delivery to him her or them of his her or their respective conveyance and before parting with or conveying away the plot or plots thereby conveyed or any part thereof should execute these presents."

The deed proceeds:

"Now this indenture witnesseth that in pursuance of the said hereinbefore recited agreement each of them the said persons parties hereto of the first part but so far only as related to the several and respective plots or plot of land in the said plan inscribed with his own respective name and so far as relates to the acts and deeds of himself respectively and his respective heirs executors administrators and assigns in relation to the same several and respective plot or plots of land but not further doth hereby for himself his heirs executors administrators and assigns covenant with the said William Okell and Alexander Colquhoun Jeffrey their heirs and assigns and each of them the said William Okell and Alexander Colquhoun Jeffrey but so far only as relates to the several and respective plot or plots of land in the said plan marked with his own respective name and so far as relates to the acts and deeds of himself respectively and his respective heirs executors administrators and assigns in relation to the same several and respective plot or plots of land but not further doth hereby for himself his heirs executors administrators and assigns covenant with the other of them the said William Okell and Alexander Colquhoun Jeffrey and his respective heirs and assigns and also as a separate covenant with each of the said persons parties hereto of the first part and his respective heirs executors administrators and assigns in manner hereinafter mentioned."

Then followed a number of restrictive covenants. It is on the seventh covenant that the principal question which I have to determine arises, and it is in these terms:

"Seventhly: That each and every of them the said persons parties to these presents and his respective heirs executors administrators and assigns shall and will from time to time contribute and pay a due and just proportion in respect of the plot or several plots of land in the said plan marked with his name respectively and of the dwelling-house on each such plot erected or to be erected in common with the owners of the several other plots of land described in the said plan of all costs charges and expenses which have been already incurred and which shall from time to time and at all times hereafter be incurred in or about the forming and constructing and the maintaining and keeping in good repair and cleansing and scouring as well of the several roads or ways described in the said plan and of the sea wall promenade and lodge as also all and every the main drains and main sewers already made or hereafter to be made in or upon any part or parts of the land described in the said plan for the common use convenience and advantage of the owners for the time being of the said several plots of land described in the same plan and of the dwelling-houses erected or to be erected thereon respectively or for the general and common drainage of the same lands and that the expense of lighting the said roads or ways with gas shall be contributed and paid by the owners of such dwelling-houses as for the time being shall be erected on the said plots of land and as shall be completed and fit for habitation in equal shares and proportions and that for such respective proportionate share of all such costs charges and expenses as aforesaid of any of the said persons parties hereto of the first part or his or their respective heirs or assigns or the owner or owners for the time being of any of the said plots of land inscribed on the said plan with the name or names of any of the said persons parties hereto of the first part or of the dwelling-house or dwelling-houses thereon erected who shall refuse or neglect to pay such proportionate share of such costs charges and expenses the said William

A Okell and Alexander Colquhoun Jeffrey or the survivor of them or his
heirs executors administrators or assigns or other the trustees or trustee for
the time being under these presents shall when and so often as such refusal
or neglect shall happen have full power to distrain upon and shall and may
distrain upon the plot of land messuage or dwelling-house or several and
B respective owners whereof respectively shall have made such neglect or
refusal in the same manner as landlords are authorised to do for rent in
arrear . . .”

There then followed another clause which I need not read, and it was then
provided:

C “And lastly: That the several and respective persons parties to these
presents respectively and their respective heirs and assigns and the respective
owners for the time being of the said several and respective plots of land
inscribed on the said plan with the names of the said persons parties to these
presents respectively and of the several and respective dwelling-houses
erected or to be erected thereon respectively shall and will from time to
time and at all times hereafter abide by submit to and observe all such
D lawful and reasonable rules and regulations as shall from time to time be
made by or on the part of the owners for the time being of the same several
plots of land at any meeting to be held as hereafter mentioned for or in
relation to the promoting of the better and more convenient and advan-
tageous enjoyment of the whole of the same plots of land and the dwelling-
houses thereon or for or in relation to the contribution by the owner or
E owners for the time being of each of the same plots of land of the means
necessary towards the expenses of keeping in repair the said roads sea wall
promenade and lodge and main drains and sewers and of lighting the said
roads with gas.”

Then there is a covenant by Mr. Okell and Mr. Jeffrey to stand seised of the
roads on these trusts:

F “Upon trust to permit and suffer the same at all times for ever hereafter
to be left open and unbuilt upon and to be freely used and enjoyed by the
said several and respective persons parties to these presents and by their
several and respective heirs and assigns and by the owners and occupiers
for the time being of the said several and respective plots of land numbered
G from 1 to 174 inclusively upon the said plan and of the several and respective
dwelling-houses erected and to be erected thereon respectively.”

There is a covenant that the roads and promenade shall remain for ever left
open and unbuilt on. Then followed this clause:

H “And for the purpose of agreeing and determining upon the expenses to
be from time to time incurred in keeping the said roads promenade sea wall
lodge and sewers in repair and for lighting the said roads with gas and also
for making and determining upon the rules and regulations to be observed
for the better and more convenient and more advantageous enjoyment of
the said several plots of land and the dwelling-houses erected and to be
erected thereon and for securing all other objects of these presents It is
hereby agreed and declared between and by the said persons parties to these
I presents as follows . . .”;

that is to say, there was to be a general meeting of the proprietors once in every
year to be held on the first Monday in July. There are provisions for calling
an extraordinary meeting and provisions for giving seven days' notice of the
meeting and provisions for a quorum and the election of a chairman. The
provision as to the voting is this:

“The owner of one plot one vote, the owner of two and under six plots
two votes, the owner of six plots and under ten plots three votes and the
owner of ten plots and upwards four votes.”

Then there were provisions as to joint tenancy. There followed this:

"... the determination or resolution of every such meeting shall be binding on all the said persons parties to these presents and their respective heirs and assigns but that no expenses for repairs or otherwise shall be incurred except such as shall be sanctioned by some general or extraordinary meeting unless any accident should occur as the bursting of a sewer or any destruction by storm or otherwise of the sea wall requiring immediate repair. That no rule regulation resolution or determination of any meeting shall be annulled or altered but by the determination of two successive subsequent general meetings."

There followed provisions as to keeping minute books, and so forth. Then there followed in these terms a provision with regard to plots of land not taken up:

"It is hereby further agreed and declared between and by the said persons parties to these presents that the said William Okell and Alexander Colquhoun Jeffrey their heirs and assigns shall stand seised of and interested in the said plot or plots of the said land which shall not be allotted to or taken by any of the said persons parties hereto and also the said lodge Upon trust to let the same for the benefit of the shareholders for the time being according to their respective shares thereof but subject to the control of any meeting of the shareholders as aforesaid."

There followed a trust that the trustees might sell these unallotted plots from time to time and that clause concluded with these words:

"... if there be any surplus then do and shall pay the same between and to the said persons parties to these presents according to their respective shares thereof."

In pursuance of that covenant the estate was developed and has for many years ever since been carried on. Annual calls have been made to defray the expense of roads, sea wall and promenade and maintenance of the sewers and, until taken over, of the lighting.

In 1928, in proceedings in the Court of Chancery of the County Palatine of Lancaster begun by originating motion, it was declared that the restrictive covenants did not prevent the owner for the time being of any house erected in the park from dividing the same into two or more flats. Pursuant to that declaration a number of dwelling-houses have been so divided. The defendants are the executors of one John Finney, deceased, who was the owner of an estate in fee simple of No. 22, Salisbury Road, that being one of the plots of land. That plot and the house thereon were conveyed to him by a conveyance dated Aug. 31, 1931, and they were conveyed to him subject to the covenants contained in the deed of 1851, so far as "they related to and affected the said house and land and were subsisting and enforceable and capable of taking effect". By way of indemnity, Mr. Finney covenanted with his vendor to perform and observe the covenants so far as they were enforceable. During his lifetime Mr. Finney caused his house to be let to several tenants, but he made no structural division of it, and at the present time the property is occupied by and let to five separate tenants.

The practice, as I understand it, until 1950 was this. Each year there was this general meeting of proprietors or shareholders, as they were sometimes described in the deed, and they made a levy of an equal sum per plot on the owners. In 1950, however, a resolution was passed to this effect:

"That during the year 1950-51 and every ensuing year the trustees shall be empowered to make an additional call in respect of any plot, the dwelling-house upon which shall have been divided into two or more separate flats or dwellings, and that the amount of the call in respect of any such plot shall be the amount of the call for the current year multiplied by the number of the

- A** separate flats or dwellings into which such dwelling-house shall have been divided, provided that (a) For the purpose of this resolution if the dwelling-house stands upon parts of two or more separate plots it shall be deemed to be erected on only one plot and (b) No more than three calls should be paid in respect of any plot on which one such divided dwelling-house stands.
- B** Pursuant to that resolution, certain calls were being made on the defendants. I need not enumerate them. They are set out in para. 10 of the agreed statement of facts. By way of example, I may take the call for 1954-55 which in respect of a single plot was £3. As the defendants had five flats, bearing in mind the terms of the resolution that no more than three calls were to be made in respect of any one plot, they have been assessed in respect of 1954-55 in the sum of £9.
- C** The defendants have been willing to pay £3 in respect of the one plot, but deny the validity of the resolution purporting to make them liable to pay three calls in respect of one plot. That is the question I have to determine.

- That gives rise to two questions. First, in so far as the deed of 1851 purports to make the successors of the original contracting parties liable to pay calls, is it valid and enforceable at all? I think that this much is plain: that the defendants could not be sued on the covenants contained in the deed for at least three reasons. First, a positive covenant in the terms of the seventh covenant does not run with the land. Secondly, these particular provisions with regard to the payment of calls plainly infringed the rule against perpetuities. Of course, these parties are not parties to the contract. Finally, it is conceded that the provision for distraining on failure to pay is not valid. A right to
- E** distrain can only be annexed to a rent charge which this certainly is not. It is, however, conceded to be ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder*. If authority is required for that proposition, I refer to one sentence during the argument in *Elliston v. Reacher* (1) ([1908] 2 Ch. 665), where SIR HERBERT COZENS-HARDY, M.R., said (*ibid.*, at p. 669):

- F** “It is laid down in *COKE ON LITTLETON*, 230b, that a man who takes the benefit of a deed is bound by a condition contained in it though he does not execute it.”

- If the defendants did not desire to take the benefit of this deed, for the reasons that I have given they could not be under any liability to pay the obligations thereunder. They do desire, however, to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road. The defendants cannot rely on any way of necessity nor on any right by prescription, for the simple reason that, when the house was originally sold in 1851 to their predecessor in title, he took the house on the terms of the deed of 1851 which contractually bound him to contribute a proper proportion of the expenses of maintaining the roads and sewers, and so forth, as a condition of being entitled to make use of those roads and sewers. Therefore, it seems to me that the defendants here cannot, if they desire to use their house, as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder.
- I** On that principle it seems to me that they are bound by this deed, if they desire to take its benefits.

The second question is this: On the true construction of the deed was the resolution which I have read and which was passed in September, 1950, a valid resolution? That depends primarily on the covenant, which I have read,

* In argument reference was made to *Duncan v. Louch* ((1845), 6 Q.B. 904).

described as the seventh. I do not propose to read it again. By that covenant each of the plot owners covenanted to A

“contribute and pay a due and just proportion in respect of the plot or several plots of land . . . and of the dwelling-house on each such plot . . .”

That was in regard to the costs and charges of keeping the roads in repair and of repairing the sea wall, promenade and lodge, and maintaining the sewers. With regard to the expense of lighting, it is to be observed that the covenant is rather different because the expense of lighting the roads with gas is to be contributed to and paid by the owners of such dwelling-houses as are, for the time being, erected and completed and fit for habitation in equal shares. The owners or shareholders have power to make rules and regulations for the proper administration of the estate, and in particular for the purpose of agreeing and determining on the expenses to be from time to time incurred. B C

The question comes to this: Was this resolution one which could properly be made by the proprietors or shareholders? In my judgment, it can only be properly made if the method proposed was a proper method whereby each owner of a plot was bound to contribute “a due and just proportion”. If the resolution proposed did not result in payment of what on the true construction of the deed was a due and just proportion then, in my judgment, it would not be a valid resolution. D

On that the argument was very short. It was said that, on looking at the deed as a whole, one found that the whole of the deed was made to depend on the idea of owners of plots, that the plot was the unit for the purposes of the deed, and that, therefore, any contribution ought to be assessed on a basic plot. It might be assessed, it was said, by reference to the rateable or annual value of each plot, but, nevertheless, it must be by reference to a plot and not by reference to some user. Thus, it was said that a proprietor would not be made to contribute, for instance, to the upkeep of a road by reference to the number of motor cars that he used or by reference to the number of his family or servants that were resident in the house. So, it was said, a contribution could not depend on the user to which any particular proprietor puts his plot. If he liked lawfully under the declaration of 1928 to divide up his house into a number of tenancies, he could not be assessed, on the words of “a due and just proportion”, by reference to that user any more than by reference to the number of his children or servants or motor cars. I accept that argument. It seems to me that the whole of this document was concerned with the management of the roads, and other amenities for the benefit of the owners of the plots as such and I think that when the document refers to the contributor paying a due and just proportion in respect of the plot or several plots and the dwelling-house thereon, the parties were contemplating that there would be an assessment on each plot. As I have said, it might be an assessment according to the value of the plot. I am not concerned with that, but it is not an assessment merely in respect of the user to which the plot may be put. E F G H

Accordingly, in my judgment, the resolution, though it was passed bona fide, was not a proper resolution but was ultra vires and void, for I do not think that the deed empowered the meeting of the proprietors to exercise their discretion in that way, and I must make a declaration accordingly.

Declaration accordingly. I

Solicitors: William Rudd, Freeman & Getley, Liverpool (for the plaintiffs); Cunliffe & Mossman, agents for G. H. Hindley & Co., Liverpool (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

HARBEN v. HARBEN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), December 19, 21, 1956.]

Divorce—Custody—Child out of jurisdiction—Children taken from wife—Wife's application for custody—Order against husband to deliver child to wife within the jurisdiction—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 26 (1).

B

The parties were married in England in 1947 and there were three children of the marriage, two daughters aged eight and three and a boy aged five. The husband was a British subject whose domicile of origin was English. After the marriage the parties lived in Eire; they parted in September, 1956, the wife keeping the three children in her charge. The husband then decided not to live any longer in Eire. On Nov. 2, 1956, the wife allowed the husband to have access to the children and he immediately took them from Eire to Jersey in a privately chartered aircraft. In December the wife filed in the High Court in England a petition for divorce on the ground of the husband's cruelty. The husband entered an appearance under protest alleging that he was not domiciled in England and also presented a petition in Jersey for a divorce on the ground of the wife's adultery. On an application by the wife for an injunction restraining the husband from moving the three children from Jersey and also for an order that he should deliver up the children to her in England,

C

D

Held: the husband would be ordered to deliver the children into the care and control of the mother until further order on her undertaking not to remove them from the jurisdiction, since (i) in the exceptional circumstances of the present case the court ought to exercise its inherent jurisdiction to make an order as to the custody of the children notwithstanding that they were out of the jurisdiction (*Hope v. Hope* (1854), 4 De G.M. & G. 328 applied), and (ii) in determining whether or not to exercise that power the court did not contemplate that its order might not be obeyed (observations of ROMER, L.J., in *Re Liddell's Settlement Trusts*, [1936] 1 All E.R. at p. 248 applied).

E

F

[As to custody orders where children are out of the jurisdiction, see 12 HALSBURY'S LAWS (3rd Edn.) 392, para. 869, notes (m) (o).]

For the Matrimonial Causes Act, 1950, s. 26 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 413.]

G

Cases referred to:

- (1) *Ronalds v. Ronalds*, (1875), L.R. 3 P. & D. 259; 27 Digest (Repl.) 486, 4251.
- (2) *Hope v. Hope*, (1854), 4 De G.M. & G. 328; 23 L.J.Ch. 682; 24 L.T.O.S. 29; 43 E.R. 534; 27 Digest (Repl.) 500, 4437.
- (3) *Re Willoughby*, (1885), 30 Ch.D. 324; 54 L.J.Ch. 1122; 53 L.T. 926; 28 Digest 288, 1403.
- (4) *Re Liddell's Settlement Trusts*, [1936] 1 All E.R. 239; [1936] Ch. 365; 105 L.J.Ch. 161; 154 L.T. 558; Digest Supp.

H

Summons.

The wife, who had presented a petition for divorce, applied for an injunction restraining the husband from moving the three children of the marriage from Jersey and for an order that he should deliver them to her in England. The facts appear in the judgment of SACHS, J.

I

R. F. Ormrod for the wife.

Leonard Caplan, Q.C., and *J. G. St.G. Syms* for the husband.

SACHS, J.: This is a wife's application concerning the three children of the marriage—two girls, one aged eight and one aged three, and a boy aged five. By the application the wife seeks, inter alia, an injunction restraining the husband from moving these three children from Jersey and also an order to deliver them up to herself in England, the three children having been removed from her care

by a fraudulent ruse amounting to a kidnapping which took place in Eire on Nov. 2, 1956. The nature of the application was such that it was listed for hearing in open court, and in any event it raised issues of importance which would have necessitated adjourning the matter into court for judgment.

The parties were married in Chester in August, 1947, and in view of the plea to the jurisdiction which formed one of the points pressed on the court by counsel for the husband, I should mention at the outset that according to the uncontradicted evidence before me the husband was born and brought up in England, was educated here, is a director of an engineering company near London and is a member of a family which has been associated for generations with a well-known insurance company not far from these buildings. He has also, according to the evidence, on two occasions been divorced in the courts of this country and has apparently on those occasions not contested the issue of domicile. Since he married, the parties have in substance lived in Eire and continued to live together there until about the end of September, 1956. Then they parted and the wife not unnaturally kept the children in her charge. By mid-October the wife and the children were living with her mother and father in County Neath, and on Nov. 2 it was arranged that the father should have access to the children at the Park Hotel, Virginia, in that county. The arrangement was, according to the only evidence before me, made by the husband's brother-in-law, a General O'Gowan, and the wife was assured both by the brother-in-law and by the husband's solicitors, that she had nothing to fear from allowing this access. So the children went to the hotel accompanied by their governess, but the husband promptly drove them to an airport some forty-four miles away and in a privately chartered aircraft flew them to Jersey. It is this abduction in the face of the assurance just mentioned that has caused me to stigmatise the step as kidnapping and, in the circumstances, it can properly be described as an outrageous procedure.

On Dec. 6 the wife filed here in the High Court a petition for divorce containing allegations of cruelty. It is unnecessary to refer to those allegations in detail, but I should mention first that they are allegations of a really serious nature, secondly that the nature of some of them is indicated by that part of para. 7 which alleges that the wife became terrified for the safety of herself and the children, and thirdly that those allegations in para. 18 onwards which concern the period of July, August and September, 1956, if proved, would support that allegation of the wife. Indeed those allegations of cruelty, if established, would go a long way towards making clear that the wife was right in alleging in her affidavit in this application that the husband, in her view, is unfit to have the charge of children. On Dec. 12, the wife having become aware that the husband was temporarily in England, appeared before this court and obtained an interim injunction restraining the husband from taking the children away from Jersey, it being alleged by the wife that there was a risk of them being taken further away, that is to Rhodesia. The petition was served in London on Dec. 13, together with the wife's application which is now before me and the affidavit in support thereof. The husband has entered an appearance under protest alleging that he is not domiciled in this country. On Dec. 14 he swore an affidavit in Jersey containing facts by reason of which the court is asked to come to the conclusion that his plea to the jurisdiction is well-founded.

When the present application came on for hearing on Dec. 19 he had filed no other affidavit. At one stage it appeared he might wish to take the course of filing further evidence but it was, however, indicated by his counsel [junior counsel at the present hearing] that he did not intend to contest his wife's version of the kidnapping. On that occasion the husband also stated by his counsel in court, that a petition had, on the previous day, been filed in Jersey by the husband seeking a divorce on the ground of his wife's adultery. The fact that such a petition had just been filed had not been known to the wife's solicitors until counsel actually made that statement in open court. At the end of the day's argument

A on Dec. 19 counsel for the husband, who early in his address to the court had conceded, as he had already done before the adjournment on that day, that the court had jurisdiction to deal with the application but in fact exercised it only in exceptional circumstances, indicated that if he failed to persuade the court on the evidence then before it that the circumstances were not exceptional nor such as to lead to an injunction, he would ask for an adjournment to file further evidence
B to show cause why the order should not be made. There appeared to be in his mind a sort of demurrer procedure available to him. On my asking what sort of matters he desired to raise by way of further evidence, he indicated that it was the unfitness of the wife to have charge of these children by reason of her association with a named person. It is well to record that no other suggestion of unfitness in any other form was made at that time.

C On the resumption of the proceedings today after adjournment from Dec. 19, the application for a further adjournment was not made, but by leave two further affidavits were filed at the last moment; one made an offer to bring the children within the jurisdiction on the terms that they remained with the father until the determination of the issue of domicile, and the other sought to make an attack on the wife in a different direction (to which I will refer later) of which
D the husband had previously given no indication. The first point taken in argument on behalf of the husband and one pressed strongly both by junior counsel on Dec. 19 and by leading counsel today, was the argument that while it could not be said that this court had not got jurisdiction to deal with the matter, yet as the children are in fact located outside the jurisdiction the court should not act, for it rarely indeed did so and then only in exceptional circumstances, which it
E was argued that the present facts did not constitute. The very proper concession that the court had jurisdiction was made early in the proceedings on Dec. 19, but at one stage this morning that concession was, by leave, resiled from so far as the first daughter, the daughter aged eight, was concerned, and an argument was for some period addressed to me that by reason of the terms of the British Nationality Act, 1948, that daughter was not a British subject. That submission
F was, however, withdrawn on an examination of the terms of the statute.

In those circumstances I doubt if I need say more on the point of jurisdiction than to thank counsel for the wife for referring me to *Ronalds v. Ronalds* (1) ((1875), L.R. 3 P. & D. 259), which to my mind makes it, by analogy, clear that jurisdiction exists to deal with the present issues by virtue of s. 26 (1) of the Matrimonial Causes Act, 1950, and to *Hope v. Hope* (2) ((1854), 4 De G.M. & G. 328), the leading authority on the inherent jurisdiction of the High Court to deal with the custody of any child who is a British subject whether by parentage or even (as is exemplified by *Re Willoughby* (3) (1885), 30 Ch.D. 324) by virtue of having a British grandfather. This inherent jurisdiction exists even if the child is born out of allegiance, and it exists irrespective of where the child may be physically located at the relevant times. It has been exercised irrespective of the
H fact that one parent was also resident out of the jurisdiction and that there was no property of the child within the jurisdiction. It has been exercised even where the father was dead and the mother and child were both domiciled in a foreign country. As is pointed out in the authorities, the court can act also irrespective of the fact that the courts of the country where the child is located may also have jurisdiction to make an order. It assumes that the other court will act in a
I reasonable manner both as to whether or not it chooses to make an order and as to what order it should make; and every effort is put forth on all sides to ensure that there should be no divergence between the line taken by this court and the line either taken or likely to be taken by the other court. Whether or not this court makes an order in relation to a child outside the jurisdiction depends on the particular facts of the case, but, of course, those facts have to be really exceptional before an order is made. The very essence of a case being exceptional is that one is unlikely to find a precisely parallel set of facts in some other reported

authority; and the absence of some specific element of fact in those previous cases which have got into the books does not much assist the court to decide whether on the particular matter before it the facts are or are not exceptional.

Much stress was laid on behalf of counsel as to the husband having put in issue his domicile. From the evidence put before me it is clear that the husband is a British subject whose domicile of origin is this country, as indeed was indicated by the facts which I have already mentioned. It does not seem necessary to go into the question whether or not he acquired a domicile of choice in Eire because it is clear not only from the wife's affidavit but from his own that if he did so acquire such a domicile he has abandoned it. The evidence on the date of abandonment is not yet clear, but it is to be noted that he states that by September he had come to a decision not to reside further in Eire. On abandoning any domicile he may have had in Eire, his domicile of origin is revived unless or until he acquires a fresh domicile. As domicile entails not merely an intention to reside permanently at a place but also *de facto* residence there, and there is no clear evidence of his having taken up his residence in Jersey before November, I doubt whether there is even a *prima facie* case before me of his having acquired a domicile in Jersey before the kidnapping. It is, of course, not impossible that before he filed his petition on Dec. 18 he may have acquired a domicile there, but whether he did so in fact is something quite different, and indeed it is different from stating that he is, on the facts as put before this court, likely to have acquired such a domicile. It is a matter of speculation whether he could convince the Royal Court in the exercise of its matrimonial jurisdiction acquired in 1949* that after a few weeks residence in Jersey he who only came to the island when his marriage was breaking up in a country where in substance there are no facilities for divorce, had established a domicile in the way that he alleges. His points that he has acquired there a house and is attracted by the taxation position in the island may, if the issue comes before the Royal Court, fall to be weighed against such knowledge as it may possess as to the proportion of cases where men of wealth do acquire property with those advantages in view and yet depart after a relatively short space. It is in any event a case in which a court would scrutinise with some care the evidence that might be adduced before it.

However, I do not think that the decision on the present application for injunction either does or should in the unusual circumstances of the present case turn to any substantial extent on what may be the result of the domicile issue—a matter which has still to be litigated. The plain fact remains that as neither party is at present either resident in or domiciled in Eire, the courts of that republic can in practice be ruled out from consideration which is the proper place for the wife to bring her application. That leaves as alternatives the High Court of this country and the Royal Court of Jersey. It is not my view that a wife whose children have been kidnapped in the way which I have described should necessarily be asked to follow the kidnapper to such part of the globe as he may state that he is selecting as his new domicile. I consider that in the very exceptional circumstances of this case the wife was justified and entirely reasonable in making her application to this court to deal with the matter at this particular stage, and further that this is one of those cases in which at this stage the court should exercise its jurisdiction by reason of the exceptional circumstances in which she comes before it. In coming to that conclusion I have rejected the argument of counsel for the husband, that it was the Royal Court of Jersey which could and should now deal with questions concerning these children. Assuming, as I do, that it has a jurisdiction in the matter, I very much doubt, after taking into account the reasoning and the authorities cited to me, whether it would in this particular case wish to exercise it at the instance of the father. In a parallel case here, if the High Court of Justice were asked, contrary to the desires of a mother, to make an order on the application of

* Matrimonial Causes (Jersey) Law, 1949, art. 3 (1).

A a father who had by false means or fraud brought but a short time previously into this country children, if it appeared that neither they nor their parents nor grandparents had before that display of false means or fraud lived here, and if proceedings had already been recently instituted in the country where the court would more aptly assume the function of *parens patriae*, it is my view that this court would be more than chary of acceding to such an application.

B I now propose to deal, in exercising the court's jurisdiction, with the first two paragraphs of the application—those which seek injunctions. As regards those paragraphs the evidence of the kidnapping is cogent and ample time has elapsed for it to be answered, if any answer there were. Further, junior counsel for the husband indicated that those facts were unlikely to be in dispute. It has always been the practice of this court to ensure that a parent should not gain advantage by the use of fraud or force in relation to the kidnapping of children from the care of the other spouse, save perhaps where there was some quite overwhelming reason in the children's interest why the status quo should not be restored by the court before deciding further issues. In the present case I am concerned with three young children, two of whom are girls and the youngest is aged only three. It is a particularly wicked thing to snatch such children from the care of a mother, and in saying that I have in mind not merely the mother's position but the harm that can be done to the children. No affidavit of the husband tendering either his regrets or any vestige of excuse for his action has been proffered.

E When first I asked junior counsel for the husband what was the nature of the case which he might wish to make, if so minded, for depriving these children of a mother's care, he only spoke of her association with a certain man and never suggested that she had in any way whatsoever failed to look after the children properly. Whilst such an improper association with another man is one of the factors which the court would, if it were established, take into account as likely to affect the children, it is far from being something which entitles a husband to take the law into his own hands in the way that this particular husband has done.

F In many cases, indeed it may be in the majority of cases, where the children are very young, the court, after ensuring that there shall be no contact between the children and the man in question, does not disturb them from the care of the mother. In the present case there is already an undertaking by the wife not to bring the children into contact with that man, and there is no evidence that such association has in any way affected the children at any time. Today at the very last moment an affidavit was filed suggesting that the upbringing of the children

G by the wife was at fault. There is no scintilla of evidence before me of such a complaint having ever been made by the husband before and he has no doubt, on advice, refrained from venturing to go on oath on the subject. It seemed right, however, to admit the affidavit on the file and for the court to call the wife into the witness-box. In the particular circumstances of the present case there was no opportunity for a full investigation of the matter complained of, but it is right also to say that on such material as was available and on such judgment as could be formed in a brief space, the suggestion made in the affidavit was not one which appeared at all likely to be substantiated. I would add that over the relevant periods a nurse and a governess were employed to look after the children and help with their upbringing.

H I I next turn to the fact that should further investigations into the question of interim custody be required by this court, account would have to be taken of the nature of the charges made by the wife against the husband. On the material so far before me, those charges, if proved, show the husband to be wholly unsuited to have the care of young children; in that respect they are far graver than anything which has been alleged against the wife; further, the wife has also put on oath that in her view the husband is a person unfit to have the charge of children. Whatever then might in due course prove to be the appropriate order as regards the custody and care and control of these children, on the

evidence before me there is nothing that should deflect the court from its normal practice of restoring, so far as it can, the position to what it was before the husband kidnapped these children. When one is dealing with a person or persons of the resources of this particular husband, and they are large resources, it makes no difference whether the children happen to be in a different country from their mother, or, as in the present case, in the Channel Islands. A

As regards the prospects of the husband complying with the order, I have in mind that he has already said that he was prepared to give a certain undertaking to bring the children to England but on conditions which sought to take advantage of his own wrong. I have also in mind that part of the judgment of ROMER, L.J., in *Re Liddell's Settlement Trusts* (4) ([1936] 1 All E.R. 239), where he stated (at p. 248): B

"It is not the habit of this court, in considering whether it will or will not make an order in personam, to assume that the order is going to be disobeyed . . ." C

I have further in mind that, on facts appeared to be agreed between counsel, there are certain substantial assets of the husband in this country available for any attempt that might be made to secure compliance with the present order by sequestration proceedings. Accordingly, the order of the court will be that the husband do on Dec. 31 deliver these children into the care and control of the wife and that the wife do have their care and control until further order of the court. The effect of this will be that the children will be brought to the house of the wife's sister-in-law at Hawkhurst where the children will have ample accommodation, and also the company of other children of the same age. The order will be made on the wife's undertaking not to remove the children from the jurisdiction and on her surrendering her passport to her solicitors, not to be returned to her except by leave of the court. D

This order is neither intended to nor does prejudice the rights of the parties to raise either before or after the determination of the issue of domicile such points as they may desire in relation to interim custody. In that respect I do, however, hope that once the children have been so delivered to the wife, the parties, by their legal advisers, will come to some reasonable arrangement as to what is to be done until, at any rate, the issue of domicile has been determined; after that the matter could properly come before the court again if the parties found it necessary. The order is simply intended to ensure that the children be restored to the natural care of their mother and that they should continue there unless and until the husband, by due process of law, can establish that some other order is proper. E

Order accordingly. F

Solicitors: *Gregory, Rowcliffe & Co.* (for the wife); *Gordon, Dadds & Co.* (for the husband). G

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

A

MAWJI AND ANOTHER v. REGINAM.

[PRIVY COUNCIL (Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), November 29, December 3, 4, 1956, January 15, 1957.]

B

Privy Council—Eastern Africa—Criminal law—Conspiracy—Husband and wife charged with conspiracy—Potentially polygamous marriage—Whether rule of English criminal law that husband and wife cannot be guilty of conspiracy applicable in Tanganyika and to a potentially polygamous marriage.

Criminal Law—Conspiracy—Husband and wife—Whether the rule that husband and wife cannot be guilty of conspiracy may apply to a potentially polygamous marriage.

C

The rule of English criminal law that a husband and wife cannot be guilty of conspiracy is applicable in Tanganyika under s. 4 and s. 110 (a) of the Penal Code to a husband and wife of any marriage valid by the law of Tanganyika including a potentially polygamous marriage.

Appeal allowed.

D

[As to the effect of the relationship of husband and wife in regard to a charge of their conspiring together, see 10 HALSBURY'S LAWS (3rd Edn.) 291, 292, para. 542, note (q); and for cases on the subject, see 14 DIGEST (Repl.) 79, 80, 423, 424.

As to the applicability of English law to Tanganyika, see 5 HALSBURY'S LAWS (3rd Edn.) 699, para. 1487.]

Cases referred to:

E

(1) *Kowbel v. R.*, [1954] 4 D.L.R. 337; [1954] S.C.R. 498; 110 Can. C.C. 47; 3rd Digest Supp.

(2) *Baindail (otherwise Lawson) v. Baindail*, [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320; 2nd Digest Supp.

Appeal.

Appeal by special leave by husband and wife, Kassam Ali Karim Mawani and Laila Jhina Mawji, from a judgment of the Court of Appeal for Eastern Africa, dated Aug. 1, 1955, affirming a judgment of the High Court of Tanganyika dated Mar. 17, 1955, dismissing the appellants' appeals against their convictions in the District Court of Dar-es-Salaam on Jan. 3, 1955, of (i) conspiracy to obstruct, prevent, pervert or defeat the course of justice, contrary to s. 110 (a) of the Penal Code of Tanganyika (c. 16 Laws of Tanganyika, 1947) and (ii) retaining property feloniously stolen or obtained, contrary to s. 311 (1) of the

G

Penal Code of Tanganyika. The appellants were sentenced to two months' imprisonment (hard labour) on the charge of conspiracy, which was increased to one year's imprisonment by the High Court and affirmed by the Court of Appeal, and to four months' imprisonment (hard labour) on the charge of retaining, which was increased to one year's imprisonment on the wife and two years' imprisonment on the husband, sentences on both charges to run concurrently, by the High Court. The Court of Appeal allowed the wife's appeal on the charge of retaining and quashed her conviction. The husband was refused special leave to appeal to the Privy Council against his conviction on the charge of retaining. The appellants were lawfully married in accordance with the rules of the Khoja Sect (a sub-sect of the Shia Sect of Mohammedans), and were living together in a common matrimonial home under conditions in all respects

I

similar to a monogamous union.

A. R. Campbell for the appellants.

James Stirling, Q.C., and *D. A. Grant* for the Crown.

LORD SOMERVELL OF HARROW: The appellants were charged with two offences: first conspiring to obstruct the course of justice contra s. 110 (a) of the Penal Code; secondly, retaining property feloniously stolen contra s. 311 (1) of the Penal Code. This appeal is concerned with the conspiracy charge.

The first appellant is described in the charge as wife of the second appellant, and both as Ismaili Khojas. At the end of the evidence for the prosecution, it was submitted for the defence that the accused being husband and wife could not be guilty of conspiracy. It was submitted that the rule of English law to this effect applied to the appellants. This raised two issues. First whether, under provisions of the law of Tanganyika to be referred to later, this rule of English criminal law was applicable in Tanganyika; secondly whether, if it was applicable, it applied to the appellants whose marriage was, it is now conceded, potentially polygamous. The magistrate decided that the rule of English law was applicable in Tanganyika but did not apply to a potentially polygamous marriage. Both appellants were convicted on both counts. The High Court and the Court of Appeal for Eastern Africa were of the same opinion as the magistrate on the two points. The female appellant's conviction on the second count was quashed by the Court of Appeal. On June 1, 1956, the appellants were given special leave to appeal limited to the count of conspiracy. The decision on the first point was, of course, in the appellants' favour.

The Crown submitted before the Board that the courts below were wrong on this point and it is convenient to deal with it first. Section 110 of the Tanganyika Penal Code is as follows:

"Any person commits a misdemeanour who—(a) conspires with any other person to accuse any person falsely of any crime or to do anything to obstruct, prevent, pervert or defeat the course of justice . . ."

Section 4 of the Code is as follows:

"This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."

The question is whether the rule is incorporated into s. 110 (a) by s. 4.

The rule is stated in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd Edn.), p. 22:

"A husband and wife cannot alone be found guilty of conspiracy, for they are considered in law as one person, and are presumed to have but one will."

The authority cited is HAWKINS' PLEAS OF THE CROWN (1 Hawk. c. 27, s. 8). HAWKINS begins by quoting the Statute Ordinacio de Conspiratoribus (33 or 21 Edw. 1) "that conspirators be they that do confeder or bind themselves by oath, covenant", etc. He goes on to consider the scope of the offence and its punishment. He deals with this matter in s. 8:

"It plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also. Also upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will."

As in the present case, HAWKINS was considering, inter alia, whether the rule modified the generality of words used in a statute or ordinance. HAWKINS refers to STANFORD'S PLEAS OF THE CROWN, p. 174, which refers to the rule as accepted in the fourteenth century. Citations from other authorities and textbook writers can be found in *Kowbel v. R.* (1) ([1954] 4 D.L.R. 337). It was not disputed that the rule is part of the English criminal law.

It was submitted for the Crown that, in applying s. 4 of the Penal Code, substantive law must be distinguished from "interpretation" and "meaning".

A It may be difficult to define the limits of the effect of s. 4. The contrast between substantive law and interpretation does not seem to assist. The most obvious form of interpretation will extend or restrict the application of words and thereby effect the substantive law. Their Lordships are of opinion that the rule is incorporated into the provisions of s. 110 (a). The words "conspires" and "conspiracy" in English criminal law are not applicable to husband and wife alone: the words "other person" in s. 110 (a), if English criminal law is applied to their "interpretation" or "meaning", cannot, in this context, include a spouse. On this point their Lordships agree with the courts below.

B On the second point, the Court of Appeal came to their conclusion "after much consideration", and their Lordships agree that the point is not an easy one. Their Lordships accept the submission of the Crown that the rule is an example of the fiction that husband and wife are regarded for certain purposes, of which this is one, as in law one person. Some of the consequences of the fiction have been removed or modified by statute. This has not. In the criminal law of Tanganyika, the words husband and wife, if unqualified, are not restricted to monogamous unions. If it is desired to deal with monogamous as distinct from other marriages express words are used. For example, s. 155 of the Criminal Procedure Code* deals, in sub-s. (1), with the wife or husband of a person charged being a competent witness for the prosecution. Sub-section (2) restricts the competence in the case of a wife or husband of a monogamous marriage. There are several sections not restricted to monogamous marriages which may be said to recognise the "unity" of husband and wife in relation to criminal responsibility. A wife who assists her husband to escape punishment does not become an accessory after the fact (Penal Code, s. 387). Section 264 is as follows:

"A person, who, while a man and his wife are living together, procures either of them to deal with anything which is, to his knowledge, the property of the other in a manner which would be theft if they were not married, is deemed to have stolen the thing, and may be charged with theft."

F This assumes the general common law principle that a wife could not steal from her husband. Section 161 (d) [of the Criminal Procedure Code] provides that neither husband nor wife can be made to disclose communications made by one to the other during marriage.

G It is clear, of course, that the marriages primarily contemplated by the rule in England were monogamous marriages, but, the rule being now part of the criminal law of Tanganyika, their Lordships are of opinion that it applies to any husband and wife of a marriage valid under Tanganyika law. It was submitted for the respondent that the rule could not apply to the appellants unless it would apply to them if the alleged conspiracy had taken place in this country. Their Lordships do not accept this submission. Potentially polygamous marriages have been recognised for various purposes in this country (*Baindail (otherwise Lawson) v. Baindail* (2), [1946] 1 All E.R. 342). It may be that such a marriage would be recognised for the purpose of this rule. Their Lordships express no opinion on that point. The rule plainly applies here at least to marriages recognised as fully valid, and it should, therefore, apply in Tanganyika to marriages recognised as fully valid there. It was not suggested that the appellants' marriage was not in that category.

I Their Lordships have, therefore, humbly advised Her Majesty that the appeal should be allowed and the convictions on the first count quashed and the sentences set aside.

Appeal allowed.

Solicitors: *Theodore Goddard & Co.* (for the appellants); *Charles Russell & Co.* (for the Crown).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

* C. 20 Laws of Tanganyika, 1947.

BARNETT v. BARNETT AND BROWN.

[CARDIFF DISTRICT REGISTRY (His Honour Judge Temple-Morris, Q.C., sitting as a special commissioner in divorce), October 22, November 30, 1956.]

Divorce—Adultery—Consensual act—Adultery with child twelve years of age—Child incapable in law of consenting to act of sexual intercourse.

A girl aged twelve years who commits an act of sexual intercourse cannot be guilty of adultery since by reason of her age she cannot at law consent to the act.

[As to adultery as a consensual act of sexual intercourse, see 12 HALSBURY'S LAWS (3rd Edn.) 235, para. 444, note (m); and for cases on the subject, see 27 DIGEST (Repl.) 312, 2600-2602.]

Cases referred to:

- (1) *Ivens v. Ivens*, [1954] 3 All E.R. 446; 3rd Digest Supp.
- (2) *Redpath v. Redpath & Milligan*, [1950] 1 All E.R. 600; 114 J.P. 199; 27 Digest (Repl.) 312, 2602.
- (3) *R. v. Waite*, [1892] 2 Q.B. 600; 61 L.J.M.C. 187; 67 L.T. 300; 14 Digest (Repl.) 58, 219.
- (4) *R. v. Williams*, [1893] 1 Q.B. 320; 62 L.J.M.C. 69; 14 Digest (Repl.) 58, 220.
- (5) *R. v. Harling*, [1938] 1 All E.R. 307; 26 Cr. App. Rep. 127; Digest Supp.

Petition.

The wife petitioned for divorce on the grounds of the husband's cruelty and of his adultery with the intervener. The intervener was the wife's sister who at the date of the alleged adultery was twelve years of age and the case is reported on the question whether a girl of that age can be found guilty of adultery. The facts appear in the judgment.

J. C. Rutter for the wife.

P. L. W. Owen for the Official Solicitor as guardian ad litem for the intervener.

Cur. adv. vult.

Nov. 30. **MR. COMMISSIONER TEMPLE-MORRIS, Q.C.:** This is a wife's petition on the grounds of cruelty, and adultery with a young girl who is the sister of the wife. The husband entered an appearance but did not appear at the hearing on Oct. 22 or today. The infant intervener entered an appearance and delivered an answer denying adultery through her guardian ad litem, the Official Solicitor.

The facts of the case can be stated briefly. The marriage took place on July 21, 1948, and there are three children. The parties lived at various addresses, eventually at Rumney and then at Ely. With regard to the first part of the married life the wife says that she rarely saw her husband; he was constantly drunk; he was coming in at all hours and he upset her very much by saying that one of the children of the marriage was not his child. She left him because of his conduct and was away from him for approximately eighteen months. Then they moved to a house in Ely in the City of Cardiff and the same conduct continued. His work was delivering coal and he would come home drunk and get into bed without bathing or cleaning himself, with all the coal dust over him. When the wife was pregnant her young sister (who is the infant intervener) came to the house with the object of helping the wife with her domestic responsibilities and it was during that time that the husband committed adultery with her. The husband was arrested, came home on bail, did not inform his wife that he had been arrested or that he was on bail and just told her that he was leaving. He was committed for trial by the Cardiff city magistrates and on Nov. 15, 1954, at the Glamorgan Assizes on three charges of carnal knowledge, to which he pleaded guilty, he was sentenced to imprisonment for the period of three years on each charge, the periods to run concurrently. The wife was not allowed to go to the

A court, she did not know the full facts and she says she has never forgiven him. The charges to which he pleaded guilty were: carnal knowledge of a girl under thirteen years, between Dec. 23, 1953, and July 31, 1954, and also carnal knowledge of a girl under the age of thirteen years between July 1, 1954, and Sept. 17, 1954. To make the sequence of dates complete, the child with which the wife was then pregnant died on Jan. 6, 1955. The age of the infant intervener at the material time was a little over twelve years, as her date of birth (which has been strictly proved from the mouth of her own mother) was Dec. 21, 1941.

On those facts four questions arise: (i) Is there evidence that the husband has committed adultery with the infant intervener? (ii) Is there evidence of cruelty against the husband? The third question is possibly the most important question of all—(iii) Can a female infant intervener of twelve years of age be found guilty of adultery? If not, that is the end of the matter so far as she is concerned: but if yes, then there is a fourth question. (iv) Is there evidence on which the infant intervener can be found guilty of adultery with the husband?

With regard to question (i): Is there evidence that the husband has committed adultery with the infant intervener? The answer to that is: Yes, the clearest possible evidence—his own plea of guilty at his trial and his own confession which was produced in evidence. (ii) Is there evidence of cruelty against the husband? My answer to that question is: Yes, there is evidence of cruelty in his conduct, which has been systematic, which has obviously been aimed at his wife, and which can be compared with the conduct in *Ivens v. Ivens* (1) ([1954] 3 All E.R. 446). The cruelty relied on in that case was indecent conduct to a step-daughter, and in the present case part of the cruelty relied on is carnal knowledge of an infant sister. In *Ivens v. Ivens* (1) LORD GODDARD, C.J., used these very significant words (*ibid.*, at p. 448):

“I can imagine nothing more likely to affect the woman’s health, as in fact it did in this case.”

Therefore, without any further examination of the facts, there is evidence of cruelty against the husband.

(iii) Can an infant intervener of twelve years be found guilty of adultery? I am very grateful to counsel for the Official Solicitor for his most helpful argument on this point. Like him, I have made very thorough investigation and I can find no direct authority on it. It appears to me, therefore, that the matter has not been definitely decided. The question is: Can an infant intervener of twelve years be found guilty of adultery? My answer to that question is: No, she can not. The reasons which have led me to this conclusion are reasons arrived at by processes of comparison and analysis. For the purpose of relief in the Divorce Division adultery may be defined as

“consensual sexual intercourse between a married person and a person of the opposite sex during the subsistence of the marriage.”

I take that definition from RAYDEN ON DIVORCE (6th Edn.) at p. 111, and for my purposes the most important word is “consensual” and “consensual” obviously means “by consent”. The law throughout its development highly regards consent, and consent can only be given by those eligible to give it, that is to say, by people who are not legally disqualified by age from so doing. For the purpose of analysis one looks at the Age of Marriage Act, 1929, s. 1 (1)*, and the Marriage Act, 1949, s. 2†, which raised the marriageable age to sixteen for both male and female and by which a marriage under that age is made void. I stress for the purpose of comparison the word “void” and not “voidable”. Therefore, it follows that if by some chance or other the infant intervener had gone through a ceremony of marriage that marriage would have been void.

* See 11 HALSBURY’S STATUTES (2nd Edn.) 776.

† See 28 HALSBURY’S STATUTES (2nd Edn.) 655. The proviso to s. 1 (1) of the Age of Marriage Act, 1929, was not repealed by the Act of 1949.

I proceed a stage further. A woman who is raped is not guilty of adultery. The sexual intercourse would not be by consent. In *Redpath v. Redpath & Milligan* (2) ([1950] 1 All E.R. 600), BUCKNILL, L.J., laid great stress on the fact that adultery must be a "consensual" act. One follows it on from there and develops it a stage further: that in addition to a woman who is raped not being guilty of adultery a boy of fourteen cannot commit rape. In *R. v. Waite* (3) ([1892] 2 Q.B. 600), it was held that a male under the age of fourteen could not be convicted under s. 4 of the Criminal Law Amendment Act, 1885, of the offence of carnal knowledge of a girl under the age of thirteen years. I take that a stage further to note that whereas that is still good law, and is a most important authority so far as boys are concerned, it must be read with the reservation that a boy under the age of thirteen may be convicted of indecent assault (see *R. v. Williams* (4), [1893] 1 Q.B. 320).

Now, arriving at that point, that a boy of fourteen cannot be convicted of rape, I ask myself this question by way of comparison: Why should a boy be placed in a more favourable position than a girl? I appreciate that it is vital to take into consideration the fact which was stressed very strongly in *R. v. Harling* (5) ([1938] 1 All E.R. 307) where HUMPHREYS, J., said (at p. 308):

"... while [a girl under the age of sixteen] is perfectly capable of consenting, and, as everyone who tries these cases knows, frequently does consent, to sexual intercourse, such consent affords no defence to the accused man."

Bearing those points in mind, it seems to me that it would be illogical to find guilty of adultery a girl of the age of twelve years who went through an act of sexual intercourse to which she was ineligible and disqualified from giving her consent, and in respect of which the man who perpetrated on her this foul act is now in prison. In my view she cannot be guilty of adultery. To make such a decision would be against sound sense, good decency and morality. I go so far as to say this, that to find a girl of twelve guilty of adultery would be highly against public interest. It is most undesirable that a young girl of twelve years of age, in these circumstances, should live the rest of her life branded as an adulteress when she had no legal voice or acquiescence in the criminal deed which was perpetrated on her.

In the event of my being wrong on that I face the last question which is: If she can be guilty of adultery, is there evidence on which the infant intervener can be found guilty of adultery with the husband? My answer to that is: No, there is not. There are in her statement only two relevant sentences which I read without comment:

"When they were out we would sometimes do the business. He would put his private into my private . . . He opened the front of his trousers and put his private in mine."

Those are statements, obviously, against interest. They are the only statements which are evidence against her. The evidence against the husband is one thing and the evidence against the intervener is another. When I ask myself the question "What evidence is there against the infant intervener"? there are only these two meagre statements. The courts do not like to act on confessions. One does look for corroboration and in my view the evidence of adultery, resting on those two statements only, falls far short of the standard required before a person can be found guilty of adultery.

The wife is asking for discretion. Her discretion statement has been considered and I say, without any further comment on that, that it is a proper case in which to exercise the court's discretion in her favour. I grant a decree nisi to the petitioner wife on the grounds of her husband's cruelty and on the grounds of

A her husband's adultery, with costs against the husband. The infant intervener is dismissed from the suit, with costs against the husband.

Decree nisi.

Solicitors: *F. C. J. Elias*, Cardiff (for the wife); *Official Solicitor*.

[*Reported by SEYS LLEWELLYN, ESQ., Barrister-at-Law.*]

B

RIGBY v. WOODWARD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, J.J.), January 16, 1957.]

C

Criminal Law—Evidence—Evidence by one prisoner against another—Right of latter to cross-examine—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f) (iii).

D

Case Stated—Jurisdiction—Case Stated by magistrates' court—Conviction of appellant and acquittal of co-defendant—Refusal of justices to allow cross-examination of co-defendant who gave evidence incriminating appellant—Conviction wrong in law—Whether jurisdiction to order re-trial—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), s. 6—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 87 (1).

E

The appellant and a co-defendant were charged with unlawful and malicious wounding. The co-defendant gave evidence on his own behalf which incriminated the appellant. The appellant's solicitor wished to cross-examine the co-defendant but the justices refused to allow him to do so. The co-defendant was acquitted and the appellant was convicted. On appeal by Case Stated,

F

Held: the appellant's conviction must be quashed since (i) in refusing to allow cross-examination of the co-defendant the justices had departed from the ordinary principles of justice (*R. v. Hadwen*, [1902] 1 K.B. 882 applied) and their decision was "wrong in law" within those words in s. 87 (1) of the Magistrates' Courts Act, 1952; and (ii) the proceedings being by Case Stated, not by application for certiorari, no other course was open to the court, in view of the acquittal of the co-defendant, than to quash the conviction of the appellant.

G

Semble: neither under s. 87 (1) of the Magistrates' Courts Act, 1952, nor under s. 6 of the Summary Jurisdiction Act, 1857, was there power to order a re-trial.

H

[**Editorial Note.** The decision should be compared with that in *Taylor v. Wilson* (1911), 76 J.P. 69; see 21 HALSBURY'S LAWS (2nd Edn.) 729, para. 1261, note (g).

As to the right to cross-examine co-defendant in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 482, para. 881, note (m); and for cases on the subject, see 14 DIGEST (Repl.) 316, 3028, 3029.

For the Criminal Evidence Act, 1898, s. 1 (f) (iii), see 9 HALSBURY'S STATUTES (2nd Edn.) 614.

For the Summary Jurisdiction Act, 1857, s. 6, see 14 HALSBURY'S STATUTES (2nd Edn.) 820.

I

For the Magistrates' Courts Act, 1952, s. 87 (1), see 32 HALSBURY'S STATUTES (2nd Edn.) 488.]

Case referred to:

(1) *R. v. Hadwen*, [1902] 1 K.B. 882; 71 L.J.K.B. 581; 86 L.T. 601; 66 J.P. 456; 14 Digest (Repl.) 316, 3029.

Case Stated.

This was a Case Stated by the Reading justices in respect of their adjudication as a magistrates' court sitting at Reading on May 9, 1956. On Apr. 29, 1956, an information was preferred by the respondent, Charles Woodward, a chief

inspector of police, against the appellant, David Stanley Rigby, that he, together with one Quelch, the co-defendant, unlawfully and maliciously wounded the complainant, Raymond Lanning Waters, contrary to the Offences against the Person Act, 1861, s. 20. In the course of the trial before the justices on May 9, 1956, the co-defendant gave evidence on oath that the appellant hit the complainant from behind. The appellant's solicitor then desired to cross-examine the co-defendant. After the justices had retired, *R. v. Hadwen* (1) ([1902] 1 K.B. 882) and a note in the Law Society's GAZETTE of May, 1956, containing a reference to the point at issue, were brought to their attention. The justices were of opinion that in any event they ought to exclude from their minds evidence of one co-defendant tending to incriminate another co-defendant and refused to allow the appellant's solicitor to cross-examine Quelch. They also were of opinion that the evidence of Waters was conclusive against the appellant and convicted him and sentenced him to six months' imprisonment. The justices acquitted the co-defendant.

H. B. Grant for the appellant.

Paul Wrightson for the respondent.

LORD GODDARD, C.J.: The charge against the appellant in the present case was a charge of unlawful and malicious wounding. The appellant and another man, Quelch, the co-defendant, who was charged with the appellant, were alleged to have attacked Waters, the complainant, in a public convenience by hitting him with a bicycle chain, one of the worst forms of coshes known, and if they did it, it was a cowardly and brutal assault. I am surprised, especially as the appellant had been convicted before, that the justices thought that it was proper for them to adjudicate on the case; they should have sent him for trial. Besides that, it was a very serious attack. However, the justices decided to try the case themselves. The co-defendant went into the witness-box, I presume on his own behalf, and in his evidence he said that it was not he but the appellant who hit the complainant. The co-defendant thus gave evidence against the appellant. Naturally enough, the appellant's solicitor desired to cross-examine him, and for some reason which this court finds it very difficult to understand, the justices decided that they would not allow the witness to be cross-examined. They say that they retired to consider the point; I should have thought that their clerk would have told them at once that they must allow the co-defendant to be cross-examined. Perhaps he did, and perhaps the justices refused. They retired to consider the matter, and their attention seems to have been called to *R. v. Hadwen* (1) ([1902] 1 K.B. 882), which decided in terms, soon after the Criminal Evidence Act, 1898, s. 1 (f) (iii) came into force, that if one prisoner gives evidence against the other he is liable to be cross-examined by the other prisoner's counsel, and their attention was apparently called to a note in the Law Society's GAZETTE of May, 1956, to the same effect. Yet, the justices still persisted in their refusal to allow the cross-examination, and now they say that they did so because they thought that it was their duty to put out of their minds the evidence which the co-defendant had given. One talks about putting evidence out of one's minds but one cannot do it. The evidence had been properly given by the co-defendant. The justices considered, as they were bound to do, that evidence and acquitted the co-defendant. The justices seem to have entirely overlooked the fact that if cross-examination had been allowed the appellant's solicitor might have managed to get some admissions out of the co-defendant or shown him to be such an unreliable witness that it could have thrown doubt on whether the appellant was the assailant. One cannot stop a witness who has given evidence against a prisoner from being cross-examined, nor can one pay attention to the evidence he has given for one purpose but not for another purpose. I am always loth to blame justices for making mistakes, and I am not going to do it except to say that I cannot understand why they refused to allow the cross-examination. I am certain that no

A experienced justices' clerk would ever have allowed justices to take up this line.

The much more difficult question is to decide what course this court can take. Ordinarily this matter would have been brought before the court on a motion for certiorari and it would have been said to be a departure from the common principles of justices in not allowing a witness who had given evidence against the prisoner to be cross-examined. We should then have had to consider whether the irregularity was such that we ought to quash the conviction. It has been brought before us by Case Stated; it is an unusual proceeding and it would have been far more regular to have proceeded by way of certiorari.

B The enactments which deal with Cases Stated are two. First, the Magistrates' Courts Act, 1952, s. 87 (1), which provides:

C "Any person who was a party to any proceedings before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved."

D It seems to me that the appellant in the present case does question the decision of the justices on the ground that it is wrong in law, because if justices proceed in this way it cannot be said that the conviction is one which has been obtained in the due and proper course of law. A radical departure from the well-known principles of justice and procedure seem to me to make a decision given after that departure wrong in law.

E The second enactment is the Summary Jurisdiction Act, 1857, s. 6, which first enabled courts of summary jurisdiction to state Cases and which (as amended by the Act of 1952) provides:

F "The court to which a case is transmitted under the Magistrates' Courts Act, 1952, shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices, with the opinion of the court thereon, or may make such other order in relation to the matter, and may make such orders as to costs, as to the court may seem fit . . ."

G Sometimes justices before they have decided a case have some question of law arising before them and they state a Case and ask for the opinion of the court. There are other cases in which justices dismiss the information and the prosecutor brings the case up saying that there has been a mistake of law or on the facts proved and that it follows that the only proper decision should have been a conviction; or again a defendant may bring up the case and say that on the facts found by the justices he was entitled to be acquitted. There is no power here to order a re-trial. From time to time where justices have dismissed an information the court has, on finding they were wrong in dismissing the information, ordered that they should resume the hearing of the case because, for example, they have not heard the defence. If we sent the present case back, I do not see how it could be dealt with. The co-defendant, having been acquitted, might not be found. We do not know where he is or whether he can be called. We cannot make the prosecution call him. Here an unfortunate departure from the ordinary principles of justice has resulted in a conviction, and although it may be that the appellant is guilty and that the justices were right to convict him, we cannot allow a proceeding of this sort to stand. We must decide the question of law that is raised here in favour of the appellant and, having done that, as it is impossible for us to order a re-trial, which we have no power to do, it follows that the conviction must be quashed. I regret that that is the only decision which we can give.

CASSELS, J.: I agree.

LYNSKEY, J.: I agree with great reluctance, but it seems to me that the justices have gone clearly wrong. They have deprived the appellant of the right to obtain certain evidence from the co-defendant. That co-defendant has now been acquitted. The result is that we cannot order a new trial because the co-defendant cannot be brought back. The result is that the justices made an error which we cannot put right, and that being so there is no course open to us except to quash the conviction. *Conviction quashed.*

Solicitors: *Martin & Nicholson*, agents for *M. Owen Wellbelove*, Reading (for the appellant); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Reading (for the respondent).
[Reported by MARGARET D. ABEL, Barrister-at-Law.]

WEST HARTLEPOOL CORPORATION v. NORTHERN GAS BOARD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, JJ.), January 24, 1957.]

Rates—Gas boards—Rate period beginning after Mar. 31, 1952, and before Apr. 1, 1956—Calculation of amount of rates leviable—Repayment or allowance of difference between amount leviable and amount actually levied—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), Sch. 4, para. 2 (1).

The appellants, who were the rating authority, allowed during the period 1952-56, a discount of $2\frac{1}{2}$ per cent. on rates being paid within fourteen days of demand. In calculating the amount of refund due under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, to the respondents, a gas board, viz., the difference between "the total amount of the rates actually levied" and a sum calculated under para. 2 (1)* of Sch. 4 to the Act of 1955, the appellants computed the total amount "actually levied" as the total amount of the rates less the discount of $2\frac{1}{2}$ per cent. The respondents contended that the amount "actually levied" was the full amount of the rate.

Held: the amount "actually levied" was the amount of the rates before the discount was allowed.

Appeal dismissed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, Sch. 4, para. 2, see 35 HALSBURY'S STATUTES (2nd Edn.) 417.]

Case Stated.

This was a Case Stated by justices for the county borough of West Hartlepool in respect of their adjudication as a magistrates' court sitting at West Hartlepool on Sept. 7, 1956.

On Aug. 10, 1956, a complaint was preferred by the appellants against the respondents praying that the respondents be summoned to show cause why they had not paid the sum of £204 5s. 4d. in respect of current rates. The following facts were found. On Mar. 1, 1956, the appellants, being the rating authority for the county borough of West Hartlepool, made and approved a general rate of 16s. in the pound in respect of the period from Apr. 1, 1956, to Mar. 31, 1957. The making of the rate was published in accordance with the Rating and Valuation Act, 1925, s. 6. In the current valuation list the rateable value of the hereditaments which the respondents, a gas board, were to be treated as occupying was specified as £4,694. The respondents had not appealed against this assessment. The appellants, as rating authority, made and approved the following rates:—(i) on Apr. 2, 1952, a rate of 18s. 6d. in the pound in respect of

* The provisions of para. 2 (1) are set out at p. 396, letter I, to p. 397, letter A, post.

- A the period from Apr. 1, 1952, to Mar. 31, 1953; (ii) on Apr. 2, 1953, a rate of 21s. 6d. in the pound in respect of the period from Apr. 1, 1953, to Mar. 31, 1954; (iii) on Mar. 4, 1954, a rate of 21s. in the pound in respect of the period from Apr. 1, 1954, to Mar. 31, 1955; on Mar. 3, 1955, a rate of 20s. in the pound in respect of the period from Apr. 1, 1955, to Mar. 31, 1956. The making of each of these rates was published in accordance with the Rating and Valuation Act, 1925, s. 6. The appellants had omitted to raise separate assessments on the respondents in respect of two houses in Lancaster Road, West Hartlepool, occupied by them during the rating periods set out above. The rateable value of these properties was respectively £14 and £15. On Dec. 21, 1955, a demand note was served by post on the respondents in respect of the properties in Lancaster Road, in the sum of £117 9s., being unpaid rates for the period 1952-53, 1953-54, 1954-55 and 1955-56. A receipt of this demand was acknowledged by the respondents. On Apr. 18, 1956, a demand note was served by post on the respondents in the sum of £1,877 12s., being the first instalment of the general rate assessment (£4,694 at 8s. in the pound) then due. Receipt of the demand note was acknowledged by the respondents. On May 26, 1956, a cheque was received from the respondents in the sum of £1,790 15s. 8d. A statement accompanying the cheque indicated that £204 5s. 4d. had been withheld from the general rate in respect of an amount claimed by the respondents to be outstanding in respect of the composite settlement required in accordance with the Rating and Valuation (Miscellaneous Provisions) Act, 1955, Sch. 4, para. 2 (1), but that there had been set off against this deduction the sum of £117 9s. mentioned above, thus making a net deduction from the sum demanded of £86 16s. 4d. In a letter dated May 28, 1956, the appellants pointed out that the payment made was £204 5s. 4d. short. By virtue of the transitional provisions relating to the rating of gas boards contained in Sch. 4 to the Act of 1955 a refund in respect of rates overpaid during the rating periods April, 1952-53, April, 1953-54, April, 1954-55, and April, 1955-56, became due to the respondents. The respondents had computed the refund due to them from the appellants in accordance with the Act of 1955 at £9,193 14s. 6d., and the appellants computed the refund due to the respondents at £8,989 9s. 2d. The respondents took advantage of the discount allowance of 2½ per cent. in paying rates during the periods 1952-53, 1953-54, 1954-55, and 1955-56, and paid the gross amount less discount. On Apr. 6, 1956, the appellants paid to the respondents the sum of £8,989 9s. 2d. in purported discharge of the refund due.
- G It was contended on behalf of the appellants (i) that the justices had no jurisdiction to determine what amount, if any, was still due to the respondents as a refund in addition to the amount already refunded by the appellants on Apr. 6, 1956; (ii) that it was the justices' duty solely to determine whether the respondents had paid the rate demanded and, if it was found that they had not, to grant a distress warrant, leaving it open to the respondents, if they chose, to sue the appellants elsewhere for the recovery of £204 5s. 4d.; (iii) that the amount of rates actually levied on the respondents during the rating periods 1952-53, 1953-54, 1954-55, and 1955-56, within the meaning of the words "actually levied" in para. 2 of Sch. 4 to the Act of 1955 was the amount actually demanded in the demand note; (iv) that as required by s. 8 of the Act of 1925, the amount of discount allowable on payment of rates before a date specified by the appellants was shown on each demand note, and, therefore, the amount demanded up to the last date for allowance of discount was the gross amount of rates less the discount, and only that amount could have been recovered by the respondents; and (v) that the amount of the refund due to the respondents under the provisions of the Act of 1955 should, therefore, be calculated as follows—rates actually demanded, i.e., gross amount less discount, less rates due according to new assessment, i.e., gross amount on amended value, less discount. On this basis the amount of the refund was, therefore, £8,989 9s. 2d., and the appellants

had paid this amount to the respondents. The respondents had, it was therefore contended, withheld £204 5s. 4d. from their current rates without valid reason, and a distress warrant should be issued to the appellants. It was contended on behalf of the respondents (a) that the justices had jurisdiction to determine what amount, if any, was still due to the respondents as a refund; (b) that the amount of the refund due to the respondents by virtue of the operation of Sch. 4 to the Act of 1955 depended solely on the interpretation of the words "actually levied" and "so leviable" in para. 2 of Sch. 4; (c) that the words "actually levied" meant "actually demanded" and not "actually collected" or "actually recovered". In this connection, the respondents contended that under s. 16 of the Act of 1955 the words "levy" or "levied" must bear the same meaning in the Act of 1955 as in the other Acts referred to in that section, and the following references showed the distinction between the word "levied" and the words "collected" or "recovered", viz., Rating and Valuation Act, 1925, s. 2 (3), s. 7, s. 11 (4), Local Government Act, 1948, s. 51. The amount actually demanded by the appellants would thus be the gross amount as shown on the demand notes, and no account should be taken of discount. The amount of the refund due to the respondents under the provisions of the Act of 1955 should, therefore, be calculated as follows:—gross amount demanded on previous assessments less gross amount due on revised assessment. On this basis the amount of the refund due was £9,193 14s. 6d. and in respect of the refund the appellants had paid the sum of £8,989 9s. 2d., which was accepted by the respondents on account, leaving a balance of £204 5s. 4d., which the respondents were entitled to set off against the demand for current rates.

The justices dismissed the complaint and the appellants now appealed.

R. E. Megarry, Q.C., and *W. B. Harris* for the appellants.

Percy Lamb, Q.C., and *W. R. Steer* for the respondents.

LORD GODDARD, C.J.: This is a Case Stated by justices for West Hartlepool, before whom a complaint was preferred by the appellants, who are the Corporation of West Hartlepool and the rating authority,

"praying that the respondents be summoned to show cause why they had not paid the sum of £204 5s. 4d. in respect of current rates."

They were asking for the enforcement of a sum of money due for rates, and the whole question seems to me to turn on the true construction of a few words in Sch. 4 to the Rating and Valuation (Miscellaneous Provisions) Act, 1955. That Act was passed after national boards, such as gas boards, had been set up. Schedule 4 contains the transitional provisions, and a new form of valuation was established in relation to these gas boards. It will be best if I read para. 1 and para. 2 of Sch. 4: "1. For the purposes of the levying of rates on gas boards"—I call attention to those words

"for any rate period beginning after Mar. 31, 1949, and before Apr. 1, 1952, —(a) any alteration made in a valuation list after Mar. 18, 1955, shall be disregarded, and (b) without prejudice to any alteration made on or before that day, no effect shall be given after the passing of this Act to any proposal for altering a valuation list.

"2.—(1) For the purposes of the levying of rates by a rating authority on a gas board for any rate period beginning after Mar. 31, 1952, and before Apr. 1, 1956, there shall be calculated what amount of rates would have been so leviable in the following circumstances, that is to say, if—(a) the provisions of s. 6 of this Act, and of Sch. 3 to this Act, had been in operation during that rate period, and (b) references in those provisions to Mar. 31, 1956, had been references to Mar. 31, 1952 . . ."

Then comes the important part, the establishment of the sliding scale,

"and, if the amount calculated in accordance with the preceding provisions of this sub-paragraph is less than the total amount of rates actually

A levied on the board by that rating authority for that rate period, the difference shall be repaid or allowed, or, if the amount so calculated is greater than the amount actually levied, the difference shall be paid and may be recovered as if it were arrears of those rates . . .”

B The appellants are one of the boroughs which have exercised the power given by the Rating and Valuation Act, 1925, s. 8, to allow ratepayers a discount of $2\frac{1}{2}$ per cent. if they pay their rates promptly within fourteen days. So it is said by the appellants that the amount actually levied by the rate is the amount of the rate less $2\frac{1}{2}$ per cent. If they are right in that, then £204 5s. 4d. was due from the respondents. The respondents say that the rate that is levied is the full amount. The amount that may be collected may be $2\frac{1}{2}$ per cent. less than that if the ratepayer pays promptly, but the words of the Act are, first of all, C “for the purposes of the levying of rates”, in para. 1 of the Schedule, and then, in para. 2 (1),

“and, if the amount calculated in accordance with the preceding provisions of this sub-paragraph is less than the total amount of rates actually levied . . . or, if the amount so calculated is greater than the amount actually levied . . .”

D In my opinion, the actual amount levied is the demand which is made on the ratepayer. Notice is given to a ratepayer that the rating authority have made a rate at so much in the pound and, his valuation being so much, the amount due from him is £X. That is the amount levied, and the point becomes even more clear by reference to the Rating and Valuation Act, 1925, where you find the expressions “making the rate”, “levying the rate”, “collecting the rate”, E and “recovering the rate”. Levying and collecting are quite different things. If Parliament had meant that these discounts should be taken into account, instead of referring to the rate levied they would have referred to the rate actually collected.

F In my opinion, the justices came to a perfectly right decision on the construction of the Act, and, once they had come to a decision on the construction, the case seems to me to be at an end. It is said that the justices had no power to inquire into what was the amount leviable, but the appellants had gone to the justices for the purpose of enforcing arrears of rates; they were asking, I suppose, for a distress warrant. The first thing the justices have to do is to be satisfied that some sum was due and owing and, as has been pointed out in the course of the argument, under Sch. 4, para. 4 (b), there is the express provision that G

“any amount repayable or allowable to the gas board by the rating authority, or recoverable from the board by that authority, by virtue of para. 2 of this Schedule, shall be subtracted from, or, as the case may be, added to, the proceeds of the rates leviable by that authority in respect of the year in which that amount is found to be so repayable, allowable or H recoverable.”

The respondents were contending that £204 5s. 4d. had not been allowed to them; that it ought to have been allowed to them and had not been allowed. If it had been allowed, nothing would be due. In my opinion, the justices were not only entitled but bound to consider whether anything was due. They have found on their construction of the Act, with which we agree, that there was I nothing due. For these reasons, I think the justices came to a perfectly proper decision in point of law, and this appeal is dismissed.

CASSELS, J.: I agree.

LYNSKEY, J.: I agree.

Appeal dismissed.

Solicitors: *Lewin, Gregory, Mead & Sons*, agents for *Town clerk*, West Hartlepool (for the appellants); *Kerly, Sons & Karuth*, agents for *J. F. Jackson*, Newcastle-upon-Tyne (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

R. v. DARLINGTON CORPORATION JUVENILE COURT, A.
Ex parte WEST HARTLEPOOL CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, JJ.),
 January 22, 1957.]

*Children and Young Persons—Fit person order—Order committing child to care
 of local authority—Supervision order in force when fit person order made—
 Need for consent of local authority to making of fit person order—Need for
 recital of such consent in fit person order—Children and Young Persons
 Act, 1933 (23 Geo. 5 c. 12), s. 76 (1), as substituted by Children Act, 1948
 (11 & 12 Geo. 6 c. 43), s. 5 (1).* B

A juvenile court made an order committing a child, in respect of whom a supervision order was then in force, to the care of a local authority as a fit person. The order was made in the belief that the local authority had consented to its being made, but the local authority had not in fact consented. The order did not recite that the consent of the local authority had been given, but showed on its face that the supervision order had been made. On motion for certiorari to quash the order on the ground that by virtue of the proviso to s. 76 (1)* of the Children and Young Persons Act, 1933, as substituted by s. 5 (1) of the Children Act, 1948, the juvenile court had no jurisdiction to make the order without the local authority's consent, C

Held: the order was bad on its face and should be quashed.

Per CURIAM: such an order [i.e., an order to commit a child or young person to the care of a local authority when a probation order or supervision order was in force as respects the child or young person] should recite that the consent of the local authority had been obtained. It should set out on the face of the order sufficient to show that the justices had jurisdiction to make it (see p. 399, letter F, post). D

[As to the committal of a child to the care of a local authority as a fit person, see 17 HALSBURY'S LAWS (2nd Edn.) 748, para. 1523. E

For the Children and Young Persons Act, 1933, s. 76 (1) (as substituted by the Children Act, 1948, s. 5 (1)) and the Children Act, 1948, s. 5 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 1026, 1110.] F

Motion for an order of certiorari.

The applicant, the Council of the County Borough of West Hartlepool, applied for an order of certiorari to bring up and quash an order dated Apr. 18, 1956, and made by the respondent juvenile court committing a child to the care of the applicant as a fit person. The facts appear in the judgment of LORD GODDARD, C.J. G

W. B. Harris for the applicant, the county borough council.

The respondent justices did not appear and were not represented.

LORD GODDARD, C.J.: Counsel for the applicant in this case moves for an order of certiorari to bring up and quash an order dated Apr. 18, 1956, made by the juvenile court of the county borough of Darlington committing Irene Turner, a child within the meaning of the Children Act, 1948, to the care of the applicant, the Council of the County Borough of West Hartlepool, until she attains the age of eighteen years. H

The child had been originally brought before the Darlington justices and a fit person order committing her to the care of the Council of the County Borough of Darlington had been made. That was because a parent of the child had been found guilty of an offence against the child†. Subsequently, the father of the child applied for that order to be revoked on the ground that he could properly look after the child and was willing to perform his duties as a parent. I

* The relevant terms of s. 76 (1), as substituted, are printed at p. 399, letter D, post.

† The child's parent had been convicted of an offence under s. 1 of the Children and Young Persons Act, 1933.

A The justices were willing to give him a chance of showing that he could look after the child properly and revoked the fit person order but made a supervision order under which the lady probation officer was appointed to supervise this child. Meanwhile, the parents and the child removed to West Hartlepool, and the child was brought by the probation officer under the supervision order before the Darlington justices because she was of opinion, and the justices were, too, that once again a fit person order ought to be made. The justices made an order committing the child to the care of the applicant.

B The point taken is that the applicant had not given consent to that course. Section 5 (1) of the Children Act, 1948, provides:

C “In any case where, under the Children and Young Persons Act, 1933, a court has power to commit a person brought before the court to the care of a fit person, the assent of a local authority shall not be required for the making by the court of an order committing him to the care of the authority unless a probation order or supervision order is in force or the court proposes to make such an order at the same time as the order committing the child to the care of the authority, and accordingly the following sub-sections shall be substituted for s. 76 (1) of that Act . . .”

D I need not read the whole of s. 76 (1), but the proviso to the sub-section is as follows:

E “Provided that where a probation order or supervision order is in force as respects a child or young person, or the court proposes to make such an order at the same time as an order for committal to the care of the local authority*, the last-mentioned order shall not be made unless the local authority consent to the making thereof.”

F In point of fact the chairman, for reasons† with which I quite sympathise—no one is blaming the justices in this case—thought that the applicant had given consent, but in fact it never had, and that is a ground for saying that the justices had no power to make the order which they did make. The matter is clinched in my opinion because the order that they did make is defective on its face. It asserts that a supervision order had been made in respect of this child, and it then goes on to commit the child to the care of the applicant and does not recite, as it ought to have done, that the consent of the applicant had been obtained. It is necessary that an order of this sort should set out on its face sufficient to show that the justices had jurisdiction to make the order which they did make, exactly in the same way as, in a bastardy order, the justices have to set out that the evidence of the mother was corroborated in a material respect, because they only have power to make the order if there has been corroboration. The order must show everything that is necessary to give the justices jurisdiction.

G That is really the only important thing in this case. The justices, no doubt, were fully aware of the provisions of the Act, but made a mistake in thinking that consent had been given when in fact it had not. I desire to point out that this order is bad on its face, because it recites that a supervision order had been made in respect of this child and does not go on, when committing the child to the care of the local authority, to recite that the local authority had consented. For these reasons the order of certiorari must go.

I CASSELS, J.: I agree.

LYNSKEY, J.: I agree.

Solicitors: *Lewin, Gregory, Mead & Sons*, agents for *Town clerk*, West Hartlepool (for the applicant).

[Reported by HENRY SUMMERFIELD, Esq., *Barrister-at-Law*.]

* A local authority is deemed, by s. 76 (1) of the Act of 1933, as substituted by s. 5 (1) of the Act of 1948, to be a fit person willing to undertake the care of a child.

† The justices had set out their reasons in affidavits which were before the court.

POWELL v. REPRESENTATIVE BODY OF THE CHURCH IN WALES.

[CHANCERY DIVISION (Wynn-Parry, J.), January 15, 22, 1957.]

Ecclesiastical Law—Church in Wales—Peculiar—Marriage licences—Right of rector concurrent with bishop of diocese to grant—Whether right continued after date of disestablishment of the Church in Wales—Welsh Church Act, 1914 (4 & 5 Geo. 5 c. 91), s. 3, s. 23—Welsh Church (Temporalities) Act, 1919 (9 & 10 Geo. 5 c. 65), s. 6.

Immediately before Mar. 31, 1920 (being the date of the disestablishment of the Church in Wales) the Rector of Hawarden had authority (concurrently with the bishop of the diocese of St. Asaph) to grant marriage licences within the ancient parish of Hawarden. The question arose whether in consequence of the Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919, the authority of the rector continued to subsist.

Held: the rector's authority was abolished by s. 23 of the Act of 1914 (and not by s. 3 of that Act) as from the date of disestablishment, but on the repeal of s. 23 by s. 6 of the Act of 1919 his authority was restored or preserved and continued to subsist.

[As to peculiars, see 13 HALSBURY'S LAWS (3rd Edn.) 72, para. 152; as to the disestablishment of the Church in Wales, see *ibid.*, pp. 20 et seq., and as to marriages in churches in Wales, see *ibid.*, p. 27, para. 37.

For the Welsh Church Act, 1914, s. 3, and the Welsh Church (Temporalities) Act, 1919, s. 6, see 7 HALSBURY'S STATUTES (2nd Edn.) 1213, 1245.]

Adjourned Summons.

The plaintiff, the Reverend Norman Sydney Baden Powell (the Rector of Hawarden who claimed authority to grant marriage licences within the area comprised in the ancient parish of Hawarden and to receive fees in respect thereof) applied to the court by originating summons for the determination of the following questions: (i) whether on the true construction of the Ecclesiastical Commissioners Act, 1836, and of the Order in Council No. 20642 dated Aug. 27, 1896, and made thereunder, the authority of the Rector of Hawarden to grant marriage licences within the area comprised in the ancient parish of Hawarden was effectively abolished by the said Order in Council; (ii) if the answer to question (i) was in the affirmative, whether on the true construction of the Ecclesiastical Jurisdiction Act, 1847, the said authority of the Rector of Hawarden was restored by that Act; (iii) (a) whether on the true construction of the Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919, all such authority as was vested in the Rector of Hawarden immediately before Mar. 31, 1920 (the date of the disestablishment of the Church in Wales) to grant marriage licences within the said area was abolished as from that date, and if so (b) whether on the true construction of those Acts the Bishop of St. Asaph or some other person or persons, and if so who, had authority to grant marriage licences within the said area. HIS LORDSHIP made a declaration, agreed by counsel, on questions (i) and (ii) of the summons, see p. 402, post. HIS LORDSHIP gave judgment on question (iii). The facts were as follows:

The ancient parish of Hawarden in the County of Flint (hereinafter referred to as "the ancient parish") comprised the present parish of Hawarden (including the districts of Broughton, Pentrobin, Sandycroft, Sealand and Ewloe) and the neighbouring parishes of Buckley and Shotton, which were carved out of the ancient parish at the end of the nineteenth or beginning of the twentieth century.

The ancient parish was on the west side of the River Dee and had for many centuries been included in the principality of Wales; but it lay to the east of Offa's Dyke and was at one time a part of the Kingdom of Mercia and as such was originally included in the Mercian Diocese of Lichfield. When, in the reign of King Henry 8, the diocese of Lichfield was split up and (in 1541) the new

- A diocese of Chester was erected, the ancient parish was included in the latter diocese, in which it continued to be locally situated until 1849. By an Order in Council dated July 30, 1849, made under the Ecclesiastical Commissioners Act, 1847*, published in the *LONDON GAZETTE* on Aug. 17, 1849, and which became operative three weeks after publication, all parts of the County of Flint then comprised in the diocese of Chester were transferred to the diocese of St. Asaph; and the order provided in particular that

“ the parish of Hawarden in the County of Flint, now so to be transferred from the diocese of Chester to the diocese of St. Asaph, shall be included in and form part of the deanery of Mold and the archdeaconry of St. Asaph.”

- C For many years before 1846 the rectors of the ancient parish had enjoyed and exercised certain peculiar privileges which included the granting of marriage licences, the probate of wills, and the holding of their own courts and having their own proctors. A number of marriage licences for use in the ancient parish or for alternative use either in that parish or in some other specified parish in the diocese were also from time to time granted by the Bishop of Chester prior to 1846; but much research would be needed to ascertain the circumstances in which the latter licences were issued.

- D By Order in Council No. 20642 made under the Ecclesiastical Commissioners Act, 1836, and dated Aug. 27, 1846, which was published in the *LONDON GAZETTE* on Sept. 18, 1846, and came into force on Oct. 1, 1846, it was provided (amongst other things) that all parishes and places then locally situated within the limits of the diocese of Chester and of the several archdeaconries thereof (as the ancient parish then was) and all churches and chapels and the whole clergy and others Her Majesty's subjects locally situate within the limits of such parishes and places respectively, should notwithstanding any peculiar or other ecclesiastical jurisdiction or exemption from jurisdiction which they might possess or be subject to, be respectively under and subject only to the jurisdiction and authority of the bishop of the diocese (with certain immaterial exceptions); and that with the like exceptions, all such parishes, places, churches and chapels as aforesaid, and all other parishes, places, churches and chapels locally situate within the diocese, should be included in and form part of the diocese.

- F Notwithstanding this Order in Council, marriage licences were granted from time to time by the Rector of Hawarden in his own right within the area of the ancient parish from the passing of the Ecclesiastical Jurisdiction Act, 1847, until the disestablishment of the Church in Wales on Mar. 31, 1920; and during the same period marriage licences were also from time to time granted by the bishop of the diocese or his surrogates. Marriage licences were granted by the rector on the assumption that his peculiar rights in so far as they were abolished by the Order in Council were as regards marriage licences restored by the Act of 1847 and again became exercisable.

- G H Shortly after the disestablishment of the Church in Wales, the defendants were advised by the legal committee of the Representative Body that the privileges of the peculiar of Hawarden in the matter of marriage licences were unchanged by the Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919. Marriage licences continued to be granted (as before) by the successive Rectors of Hawarden within the area of the ancient parish until the death of the last rector on Mar. 15, 1952, when the question of the right of the rector to grant such licences was again raised.

* The Ecclesiastical Commissioners Act, 1847 (10 & 11 Vict. c. 108), provided for the continuance of the Dioceses of St. Asaph and Bangor, which had been the subject of legislation for union, as separate dioceses. The Act extended to Her Majesty in Council and to the Ecclesiastical Commissioners existing powers of making orders in council for the purposes of carrying into effect the recommendations then made for the continuance of the dioceses as separate dioceses. It seems that this was the origin of the jurisdiction under which the Order in Council referred to above was made.

It was conceded by the plaintiff (the present Rector of Hawarden) and the defendants, the Representative Body of the Church in Wales, that until the date of the disestablishment of the Church in Wales (Mar. 31, 1920) the ancient parish of Hawarden was a peculiar, the rector of which had a right, concurrently with the Bishop of St. Asaph, of granting marriage licences, and on this footing the plaintiff and defendants desired to obtain a decision of the court whether on the true construction of the Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919, the authority of the plaintiff as Rector of Hawarden to grant marriage licences within the ancient parish still subsisted as an authority concurrent with that of the bishop of the diocese.

R. O. Wilberforce, Q.C., and *K. J. T. Elphinstone* for the plaintiff, the Rector of Hawarden.

R. Gwyn Rees and *W. S. Wigglesworth* for the defendants, the Representative Body of the Church in Wales.

Cur. adv. vult.

Jan. 22. **WYNN-PARRY, J.**, read the following judgment: This summons raises the question whether or not the plaintiff, as the Rector of Hawarden in the County of Flint, is entitled to grant marriage licences within the ancient parish of Hawarden and to receive fees in respect thereof.

The summons raises three questions, but as matters developed it became unnecessary for me to hear any argument on the first two questions, because it was agreed between the parties that at any rate until Mar. 31, 1920, the date of the disestablishment of the Church in Wales, the ancient parish of Hawarden was a peculiar, the rector of which had a right, concurrently with the Bishop of St. Asaph, of granting marriage licences. I propose, therefore, to deal with questions (i) and (ii) by making a declaration which has been agreed by counsel, and of which I approve, in the following terms:

"Declare that immediately before Mar. 31, 1920 (being the date of the disestablishment of the Church in Wales) the Rector of Hawarden had authority (concurrently with the bishop of the diocese of St. Asaph who had the like authority) to grant marriage licences within the area comprised in the ancient parish of Hawarden such authority of the said rector either never having been abolished or (if abolished) having been restored by the Ecclesiastical Jurisdiction Act, 1847."

There remains the third question, which involves a consideration of the impact of this right in question of the Welsh Church Act, 1914, and the Welsh Church (Temporalities) Act, 1919.

There is no doubt that the draftsman of the Welsh Church Act, 1914, set out to abolish the right of both the bishop and the rector to grant marriage licences; and there can be no doubt that the Act carries out this intention. The question is, by which section of the Act was this achieved? The plaintiff contends that the abolition was achieved by s. 23; while the defendants contend that it was done by s. 3. It is, therefore, necessary to consider these two sections.

Section 3 (1) of the Welsh Church Act, 1914, reads as follows:

"As from the date of disestablishment ecclesiastical courts and persons in Wales and Monmouthshire shall cease to exercise any jurisdiction, and the ecclesiastical law of the Church in Wales shall cease to exist as law."

Pausing there, I would say that if this were the only relevant provision to consider, there would be ground for saying that this sub-section is capable of abolishing the right of any ecclesiastical person in Wales and Monmouthshire to grant marriage licences, because, as was agreed by counsel for both parties, and as appears from the Canons 101 and 103 of 1603, the Marriage Acts of 1823 and 1836, and the Matrimonial Causes Act, 1857, the granting of a marriage

A licence involves the exercise of a jurisdiction. The matter, however, does not rest there. The object and scope of s. 3 is made clear by sub-s. (2); it is to re-establish the Church in Wales on a contractual basis; and sub-s. (1) contains preliminary matters necessary to this end. The scope of the section is therefore essentially wide.

B Now, if s. 23 had not been included in the Act of 1914, it would appear to me that "the law relating to marriages in churches of the Church of England" would have continued to apply in Wales and Monmouthshire, though only as part of the contract which emerges from sub-s. (2). It is, therefore, at least doubtful on the language of s. 3 construed by itself whether the word "jurisdiction" in sub-s. (1) ought to be held to cover the granting of a marriage licence. The language of s. 23 is completely apt to cover the abolition of the right in any ecclesiastical person to grant marriage licences. The phrase "the law relating to marriages in churches of the Church of England" must cover the question who can grant marriage licences and on what terms and subject to what conditions. Further, a perusal of the section as a whole discloses that its scheme is to regulate marriages in churches of the Church in Wales as in the case of marriages in nonconformist churches or chapels, with the result that no licence D from any ecclesiastical person, bishop or ordinary, would be required.

I come therefore to the conclusion that it is s. 23 and not s. 3 of the Act of 1914 which abolished the right of an ecclesiastical person to grant marriage licences.

I turn now to s. 6 of the Welsh Church (Temporalities) Act, 1919. This section read* as follows:

E "Nothing in this Act or in the Welsh Church Act, 1914, shall affect—
(a) the law with respect to marriages in Wales or Monmouthshire; or
(b) the rights of bishops of the Church in Wales to license churches for the solemnisation of marriages or to grant licences to marry; and s. 23 of the Welsh Church Act, 1914, is hereby repealed."

F In view of the provision repealing s. 23 of the Act of 1914, I conclude that the phrase "the law with respect to marriages" in s. 6 has the same content as the phrase "the law relating to marriages" in s. 23 of the Act of 1914. Putting aside for the moment para. (b) of s. 6 of the Act of 1919, I would conclude that the effect of the repeal of s. 23 of the Act of 1914 was to restore or preserve the right of the plaintiff, and in this connection it is, in my view, immaterial that the rectorship of the ancient parish of Hawarden is no longer a corporation sole.

G It remains therefore to consider the effect of para. (b) of s. 6. Express provision is made that the right of the bishops of the Church in Wales to grant marriage licences is not to be affected by either of the Acts; but nothing is said about the rights of other persons, which previously existed, to grant marriage licences. The section is essentially a preserving section and not one whose object is to effect any abolition. In those circumstances I can see no room for the application of the doctrine "expressio unius est exclusio alterius", or the doctrine "expressum facit cessare tacitum".

H In my view, therefore, the right claimed by the plaintiff survives, and he enjoys that right concurrently with the Bishop of St. Asaph. There will be appropriate declarations under question (iii) accordingly.

I *Declarations accordingly.*

Solicitors: *Freshfields* (for the plaintiff); *Trower, Still & Keeling* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

* The words "and s. 23 of the Welsh Church Act, 1914, is hereby repealed" were subsequently repealed by S.L.R. Act, 1927.

Re POWELL-COTTON'S RE-SETTLEMENT.
HENNIKER-MAJOR AND OTHERS *v.* POWELL-COTTON
AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), January 24, 25, 1957.]

Settlement—Investment—“Ordinary preferred stock or shares”.

The investment clause in a settlement dated Jan. 31, 1940, permitted investment in (among other things) “the debentures debenture stock or rent-charge guaranteed or preferred stock or shares of any company incorporated by special Act or by or under any public general Act or Acts of the Imperial Parliament” and also in “the ordinary stock or shares of any such company a fixed or minimum rate of interest or dividend on which is guaranteed by the government of the United Kingdom . . . and in or upon ordinary preferred stock or shares but not on deferred stock or shares of any such company . . .” It was accepted that a preferred stock was a stock which had some preference or priority over the ordinary or common stock. On the question of the meaning of “ordinary preferred stock” in this clause,

Held: “ordinary preferred stock” was a sub-class of ordinary stock which had some preference or priority over another sub-class of ordinary stock, and bore the same meaning as the commercial description “preferred ordinary stock”.

[As to the usual forms of investment clause and the range of investments, see 16 ENCY. FORMS AND PRECEDENTS (3rd Edn.) 208 et seq.; and for an example of a clause covering a wide range and including the more commercial term “preferred ordinary or ordinary shares or stock”, see *ibid.*, 278.]

As regards investment by trustees of settlements, see 29 HALSBURY'S LAWS (2nd Edn.) 772, 773, para. 1079.]

Case referred to:

- (1) *Andrews v. Gas Meter Co.*, [1897] 1 Ch. 361; 66 L.J.Ch. 246; 76 L.T. 732; 9 Digest (Repl.) 235, 1530.

Adjourned Summons.

The plaintiffs, Richard Henniker-Major, Arthur Neville Garratt, Kelvin Clayton Pollock, and Forbes Spottiswoode Weir, the present trustees of a settlement dated Jan. 31, 1940, applied to the court by originating summons for the determination of questions (among others) under R.S.C., Ord. 55, r. 3, as to the meaning of the terms (i) “preferred stock or shares” and (ii) “ordinary preferred stock or shares” as used in cl. 12 (1) (the investment clause) of the settlement. No argument to the contrary being advanced, HIS LORDSHIP held that “preferred stock” was a stock having some preference or priority over the ordinary or common stock. The question for determination with regard to the description “ordinary preferred stock or shares” was whether the description meant (a) “ordinary or preferred stock or shares”, or (b) “preferred ordinary stock or shares” or (c) “preferred stock or shares not being participating preferred stock or shares” or whether the description had some other meaning.

P. W. E. Taylor for the plaintiffs, the present trustees of the settlement.

G. A. Rink, Q.C., for the first and fifth defendants, beneficiaries.

M. Browne for the second, third and fourth defendants, infant beneficiaries.

ROXBURGH, J.: The question which I have to determine arises on part of an investment clause in a settlement, and its importance is due to the fact that in some respects, though not in all, it follows a precedent which must have been adopted in thousands of settlements, and yet on analysis could hardly be described as artistic.

A The material words in this case are in cl. 12 (1), which provides so far as is relevant:

B “. . . or in stock of the Bank of England or Metropolitan or London County stock or in or upon the debentures debenture stock or rent-charge guaranteed or preferred stock or shares of any company incorporated by special Act or by or under any public general Act or Acts of the Imperial Parliament or the legislature of any colony or royal charter or in or upon the ordinary stock or shares of any such company a fixed or minimum rate of interest or dividend on which is guaranteed by the government of the United Kingdom or India or any colony or any foreign government or state or in or upon ordinary preferred stock or shares but not on deferred stock or shares of any such company . . .”

C The most material words are the last—“in or upon ordinary preferred stock or shares but not on deferred stock or shares of any such company”. In the earlier part of the passage which I have read, the words are “guaranteed or preferred stock or shares”. That is a departure from the precedent in respect of the word “preferred”, and, therefore, does not raise any question of general importance. I have already held, however, that a preferred stock was a stock D which had some preference or priority over the ordinary or common stock. I do not wish to retract my holding in any way, though in fact the point was never argued, because there was no opposition. In my judgment, on a logical analysis, there is no difference in this context between the meaning of the words “preferred” and “preference”.

E This investment clause in fact extends far outside the United Kingdom, but the settlement has to be construed as an English settlement in which presumably English words must bear their natural meaning, and be related, at any rate in the first instance, to English company practice. I will not complicate my language by adopting or referring to some different terminology which is commonly or often used in other English speaking countries. I have already mentioned one F when I referred to “common stock”, which is a phrase that is unusual in England, but certainly not unusual in the United States or Canada.

G In England it is usual, though not universal, to classify shares in relation to ordinary shares. Normally, though by no means invariably, the order of classification is that preference shares rank above ordinary shares, and deferred or founder or management shares rank below ordinary shares. In that context, the language dealing with these three categories or classes of shares is related to ordinary shares which stand in the middle. At some time, which my researches have not exactly ascertained, there developed the practice of splitting the class of ordinary shares in such a manner that some part of the ordinary class was preferred to some other part of the ordinary class. It was not the creation of a new class but the sub-division of the ordinary class into two categories, one of which H had priority over the other within the class. It may be that the practice first began in the case of British railways. This much is quite certain, that in 1935 and afterwards there were millions of pounds' worth of capital in British railway stocks to which the designations “preferred ordinary” and “deferred ordinary” were applied. I should be surprised if this were not the result of some or other of the sub-divisions of ordinary shares into preferred ordinary shares and deferred I ordinary shares. I think (though this again has only been lightly touched on) that if a company took power to split its capital under its memorandum, it had power to do so under the Companies Acts. British railway companies were not incorporated under the Companies Acts, and it is not necessary to consider exactly by what machinery they split their shares. So far as companies incorporated under the Companies Acts were concerned, I think that it is fairly clear that at all times, if the memorandum gave the power to split, splitting was possible. A good deal of light is thrown on the subject by the case of *Andrews v. Gas Meter Co.* (1) ([1897] 1 Ch. 361). It was only in about 1897, I think, that it

became settled that a company could take this power by an alteration of its articles. I cannot help thinking, though this is pure guesswork in this extremely ill-documented case, that it was that decision which created some stir in the minds of the editors of KEY & ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, because this rather extraordinary phrase "ordinary preferred stock or shares" first made its appearance in the sixth edition of KEY & ELPHINSTONE which was published in 1899. It is not to be found in the fifth edition published in 1896, and it last appeared in the fourteenth edition published in 1940. It was in the edition current (i.e., the thirteenth edition) at the date when this settlement was executed on Jan. 31, 1940. It seems to me that that circumstance makes it quite impossible for me to say that these words represent a lapsus calami. If the phrase had not been intended, I think it could not have survived all those editions of such a well known precedent book without any criticism, and without any explanation, or deletion. There is not a word of comment on those words to be found anywhere.

I have not the least doubt in my own mind that the draftsman of this document deliberately inserted those very words in this settlement. And why not? Strictly speaking (and I toy with the idea that perhaps the draftsman of the precedent was more interested in logic than in dealings on the stock exchange) in logic the phrase "preferred ordinary" is a contradiction in terms, because if it is "preferred" it is not "ordinary", and yet, as we know, millions of pounds' worth of shares were dealt with on the stock exchange under that designation.

On the other hand, logically, if ordinary shares are divided into two sub-classes, one sub-class having a preference over the other sub-class, one would call it ordinary preferred stock and ordinary deferred stock. Many people would do that exactly in the same way as, if the category or class is A and one wanted to divide it into two sub-classes, one would call them I imagine A1 and A2, and not 1A and 2A. On the other hand, the reason why city men on the stock exchange did the opposite is equally obvious. The important thing for business purposes was to distinguish the two sub-classes one from the other, and for that reason they put the distinguishing sub-class ahead of the original class in denoting shares. All these are only broadly descriptive titles. For the precise position one has to look in every case at the instrument conferring the rights. Therefore, it seems to me that the phrase "ordinary preferred stock" is logically a lawyer's description of what the market, for equally good reasons, called "preferred ordinary stock". It seems to me there is no real ambiguity about it, and that there is nothing logically wrong in that conclusion. Indeed, I think that logically it is the right conclusion. No doubt, if one could put a bracket round the word "preferred", it would be more obvious still, but the bracket is not there, and, in my judgment, it is not needed. Whether or not there are many preferred ordinary stocks now, I do not know. The evidence is singularly fragmentary on the point. But there were millions of pounds' worth in 1935, and I have no reason to suppose there were not millions of pounds' worth at the time this settlement was executed. Therefore, there is no question of trying to find something to which it could refer. It is quite obvious to what it refers. In my judgment, therefore, "ordinary preferred stock" is a sub-class of ordinary stock which has some preference or priority over another sub-class of ordinary stock.

I want to say a word about the words "deferred stock". I think there is some doubt about the precise meaning of the words "deferred stock" in this clause.

[HIS LORDSHIP gave reasons showing that it was not necessary to decide whether "deferred stock" in the investment clause should be read as "deferred ordinary stock", and stated that "deferred stock" *prima facie* did not "mean a sub-division of ordinary stock, but a different class, a class postponed to

A ordinary stock". His LORDSHIP intimated that he did not decide whether the term in this clause meant "deferred stock" strictly so called or "deferred ordinary stock".]

Order accordingly.

The summons was referred back to chambers on the other questions.

Solicitors: *A. F. & R. W. Tweedie* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

TRUSTEES OF THE NATIONAL DEPOSIT FRIENDLY SOCIETY *v.* SKEGNESS URBAN DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, J.J.), January 24, 1957.]

Rates—Limitation of rates chargeable—Hereditament occupied for the purposes of non-profit making organisation—Friendly society—Whether organisation whose main objects are charitable or are otherwise concerned with the advancement of social welfare—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1).

The appellants were a registered friendly society and had many members and great assets. By their rules a person could become a member if he satisfied certain conditions. As a member he was entitled to certain benefits dependent on the contributions that he paid, the benefits being determined in accordance with the appellants' rules and being benefits of insurance or determined on an actuarial basis. The appellants were not, so it was found, established for profit. The respondents, the rating authority, demanded payment of rates in respect of a hereditament, viz., a convalescent home and premises, occupied for the purposes of the appellants. The amount demanded exceeded the amount of the rates for the previous year. The appellants appealed against the rate and the demand on the ground that they were an organisation which was not established or conducted for profit and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and that, therefore, the amount of the rates should have been limited to the amount of the previous year in accordance with s. 8 (2).

Held: the appellants' main objects were not the advancement of social welfare, as the appellants conducted an assurance business and were concerned only with the provision of benefits for their own members; therefore the hereditament which they occupied was not within s. 8 (1) (a) of the Act of 1955.

Appeal dismissed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Case Stated.

This was a Case Stated by justices for the County of Lincoln, Parts of Lindsey, in respect of their adjudication as a court of quarter sessions sitting at Lincoln on Sept. 17, 1956. By notice of appeal, dated June 18, 1956, and given under the Poor Relief Act, 1743, s. 4, the appellants, the trustees of the National Deposit Friendly Society, appealed against a rate made by the respondents, the Skegness Urban District Council, on Mar. 20, 1956, and a demand for payment issued by the respondents thereon, in respect of a convalescent home and premises at North Parade, Skegness, on the ground that, in making the demand, the respondents had failed to allow to the appellants the relief from liability provided by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8. The

following facts were found. The appellants were a friendly society founded in 1868 and first registered under the Friendly Societies Acts on Aug. 27, 1872. The respondents were the rating authority for the urban district of Skegness for the purposes of the Rating and Valuation Act, 1925. The rules of the appellant society, which were effective at all material times, were contained in the National Deposit Friendly Society Rules, as revised 1949. The appellants carried on all the activities of their constitution and, *inter alia*, were the occupiers of the convalescent home and premises concerned. The home was open to members of the society whose subscriptions were not more than four months in arrear in accordance with the rules and without charge. The policy of the appellants in the investment of their accumulated funds was to choose investments which offered the highest return of income consistent with security of capital. No attempt was made to select investments with a view to capital accretion. The appellants' income was devoted to the payment of interest on the deposit accounts of members, the maintenance of sufficient funds to provide on an actuarial basis for the benefits to which their members were entitled in accordance with the rules, and the payment of expenses and management. No member received any dividend or share of income other than interest at 2½ per cent. on moneys standing to the credit of his deposit account and such sickness or other benefits as were provided by the rules. So far as the questions were questions of fact (i) the appellants were not established or conducted for profit and (ii) apart from the welfare of individuals who subscribed, there was absent any element of advancement of the good of the community because the benefits were not available to anyone who was not a member. The amount demanded by the respondents by way of rates on the convalescent home and premises in the year beginning Apr. 1, 1956, was £1,983 4s. The amount of rates (including any special rates) so charged in respect of the premises in the year ending Mar. 31, 1956, was £786 10s.

It was contended on behalf of the appellants that they were an organisation not established or conducted for profit, whose main objects were concerned with the advancement of social welfare, and that the hereditament was one to which the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, applied. It was contended by the respondents that the appellants were no such organisation.

The justices dismissed the appeal and the appellants now appealed.

Percy Lamb, Q.C., and J. P. Widgery for the appellants.

Sir Arthur Comyns Carr, Q.C., C. E. Scholefield and J. D. James for the respondents.

LORD GODDARD, C.J.: This is a Case Stated by quarter sessions for the Parts of Lindsey, and it raises a point under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. That section makes special provisions with regard to the rates payable by charitable and other organisations. By sub-s. (1) (a), the provisions apply to

“any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare.”

The sole question is whether the appellants, who are a very big friendly society with a great number of members, many branches and many buildings, come within those words.

The first observation that I would make is this. If the appellants are to be entitled to have the benefit of these provisions, so must many others of the great friendly societies which exist. Speaking for myself, I should think it was remarkable, if Parliament had intended that friendly societies which carry on the activities which the appellants carry on should have special treatment with

A regard to rates, that it would not have said so in plain terms, in just the same way as in some of the taxing statutes—and, after all, rating statutes are taxing statutes in one sense—special provision is made for friendly societies. When one looks at the appellants' rules and sees what are their activities, I cannot see how it can be said that their main object is social welfare. Their main object, as I see it, is to carry on an insurance business. They carry on just as good an insurance business as any insurance company that one likes to think of, and, of course, there is the additional advantage that the Friendly Societies Acts apply so that the registrar can keep an eye on them and the accounts and so forth.

B On looking at the rules, one finds a fasciculus of rules starting with r. 83, which deals with the terms of admission of members. The members may be required to pass a medical examination before they are accepted. It is provided by para. 2 (c), that

“A candidate shall be in good health, of sound constitution, with no hereditary family complaint and shall not be following an occupation considered by the committee of management to be risky or injurious to health.”

D This is not a body which anybody can join. They can join if they fall within the rules and the appellants choose to accept them. It is perfectly true that the rule goes on to say, in para. 2 (d):

“A candidate unable to fulfil the conditions contained in para. 2 (c) of this rule may be admitted in a class lower than that to which his age entitles him.”

E Then one finds that the benefits which are given depend on the person paying his contributions. Whereas the national health insurance scheme, which was set up under the National Health Service Act, 1946, and which applies to every man and woman in this country, is no doubt a social welfare service, the ordinary life insurance or accident and sickness insurance which a person takes out with a company or an institution cannot, in my opinion, be said to be a social welfare service. Again, when one turns to r. 108, one finds that there is an elaborate set of rules with regard to whole life insurance and endowment assurance. Therefore, I think that the appellants are carrying on an insurance business. That is their main object, and I cannot see, therefore, that their main object can be social welfare.

G The organisation must also be carried on not for profit. We have not really considered that very closely, because there is a finding by quarter sessions that the appellant society is not carried on for profit. I find it somewhat difficult to understand how an insurance company can carry on its business at all if it does not make profits, for whence is it to get the funds with which to pay? However, I do not think that we need go into that, although counsel for the respondents said he was prepared to challenge that finding.

H Quarter sessions put their finding that the appellants were not entitled to the benefit of this section on one short ground. They said the main objects of the appellants were not concerned with the advancement of social welfare, being concerned only with the provision of benefits for their own members. I think that that is one reason why it can be said that they are not concerned with social welfare. The main object of the appellants was to carry on an insurance business and to pay insurance benefits to those people who became entitled to them by reason of their not only having been made members but also having paid for those benefits.

I For these reasons, I think quarter sessions came to a right decision, and that the appellants are not entitled to the benefit of this section.

CASSELLS, J.: I agree, and I should like to add just one or two observations. The appellants have been in existence for about eighty-seven years. By one

of the exhibits, which has been put in, one realises that they must have been carrying on a very successful concern and, in order to support their activities in providing for the insurance and the number of benefits that they do provide for their members, they have necessarily established themselves in a sound financial position. Exhibit "B"*, to which I will now refer, demonstrates that for the year ending 1955 the appellants were in possession of not less than £22,000,000 worth of investments, and, in so far as land is concerned, they also possessed property, it may be some freehold and some not, to the value of more than £1,000,000, which seems to demonstrate that it is successfully conducted.

I agree that quarter sessions arrived at the proper conclusion, and this court is not to be moved by the fact that some other quarter sessions may have arrived at a different conclusion. The only difference between the two cases is that one has come here and the other has not. I agree that this appeal must be dismissed.

LYNSKEY, J: I agree. I only desire to add that when one looks at the context of the words which we have to construe, one finds that the hereditament is to be

"occupied for the purposes of an organisation . . . which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

It seems to me that, the words "social welfare" in that context coming after the words "are charitable or are otherwise concerned", it rather looks as if one has to give some eleemosynary effect to the words "social welfare". If one finds in existence a body that provides benefits only for those who are subscribers and who pay for them and does so apparently according to rules on an actuarial basis, it cannot be said for one moment that the main purpose of the body is of any eleemosynary effect.

In my view, though I am not prepared to say (I do not think that any court could say or define) what is, in effect, social welfare, this particular organisation is not one which comes within the definition of an organisation whose main purpose is social welfare.

The result is that I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woolley, Tyler & Bury* (for the appellants); *Wrentmore & Son*, agents for *Clerk to Skegness Urban District Council* (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

* The eighty-seventh annual report for the year ended Dec. 31, 1955.

A BOARD OF TRADE *v.* OWEN AND ANOTHER.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Somervell of Harrow), November 19, 20, 21, 22, 26, 1956, January 29, 1957.]

Criminal Law—Conspiracy—Conspiracy to commit crime abroad—Whether indictable in England.

The respondents were convicted of conspiracy. They had conspired in England to make false representations in Germany and thereby to obtain from a department of the Federal Republic of Germany licences to export strategic metals from the Republic of Germany, which licences, but for the falsity of the representations, would not have been granted. On appeal by the Crown from a decision of the Court of Criminal Appeal quashing the convictions,

Held: a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie in England; the conspiracy in the present case was to obtain by unlawful means something that could lawfully be obtained and, since the unlawful means and the object to be attained were both outside the jurisdiction, the conspiracy was not indictable in England.

Quære whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad (see p. 422, letter B, post).

R. v. Kohn ((1864), 4 F. & F. 68) explained.

Decision of the COURT OF CRIMINAL APPEAL (sub nom. *R. v. Owen*) ([1956] 3 All E.R. 432) affirmed.

[**Editorial Note.** Certain crimes are punishable in England wherever the acts are done; examples are murder, bigamy and certain statutory offences (see p. 417, letter D, post and [1956] 3 All E.R. at p. 436, letter F). It is to such crimes that the qualification stated in the holding above, "unless the contemplated crime is one for which an indictment would lie in England", is directed.

As to the limits of criminal jurisdiction, see 10 HALSBURY'S LAWS (3rd Edn.), 316 et seq.; as to the offence of conspiracy, see *ibid.*, 312-314, para. 570; and for cases on the subject, see 14 DIGEST (Repl.) 121 et seq.]

Cases referred to:

- (1) *R. v. Warburton*, (1870), L.R. 1 C.C.R. 274; 40 L.J.M.C. 22; 23 L.T. 473; 35 J.P. 116; 14 Digest (Repl.) 125, 868.
- (2) *Poulterers' Case*, (1610), 9 Co. Rep. 55b; 77 E.R. 813; sub nom. *Stone v. Walter*, Moore, K.B. 813; 14 Digest (Repl.) 124, 861.
- (3) *R. v. Bernard*, (1858), 8 State Tr. N.S. 887; 1 F. & F. 240 (175 E.R. 709); 15 Digest 787, 8491.
- (4) *R. v. Tchorzewski*, (1858), 8 State Tr. N.S. 1091; 14 Digest (Repl.) 155, 1178.
- (5) *R. v. Kohn*, (1864), 4 F. & F. 68; 176 E.R. 470; 14 Digest (Repl.) 126, 877.
- (6) *R. v. Brisac*, (1803), 4 East, 164; 102 E.R. 792; 14 Digest (Repl.) 149, 1122.
- (7) *R. v. Whitchurch*, (1890), 24 Q.B.D. 420; 59 L.J.M.C. 77; 62 L.T. 124; 54 J.P. 472; 14 Digest (Repl.) 123, 859.
- (8) *R. v. Martin*, [1956] 2 All E.R. 86; [1956] 2 Q.B. 272.

Appeal.

Appeal by the Crown pursuant to the certificate of the Attorney-General* from an order of the Court of Criminal Appeal (LORD GODDARD, C.J., ORMEROD

* Under s. 1 (6) of the Criminal Appeal Act, 1907; 5 HALSBURY'S STATUTES (2nd Edn.) 927.

and ASHWORTH, J.J.), dated Oct. 2, 1956, and reported sub nom. *R. v. Owen*, [1956] 3 All E.R. 432, allowing in part appeals against the convictions of the respondents, Henry Geoffrey Owen and Patrick Sidney Ernest Seth-Smith, at the Central Criminal Court (DONOVAN, J., sitting with a jury) on May 18, 1956, of conspiracy to defraud and conspiracy to utter forged documents. The respondents were both convicted on counts 3 and 5 of the indictment, which contained in all six counts, and the respondent Owen was convicted on count 6. They both appealed to the Court of Criminal Appeal on counts 3 and 5 and the respondent Owen on count 6. The Court of Criminal Appeal quashed the convictions on count 3 but dismissed the appeals in respect of counts 5 and 6. The Crown now appealed against the quashing of the convictions on count 3. The facts are summarised at p. 413, letters C to E, post.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Neville Faulks and David Hirst for the Crown.

Neil Lawson, Q.C., and Sebag Shaw for the respondent Owen.

Alexander Karmel, Q.C., and I. C. Baillieu for the respondent Seth-Smith.

The House took time for consideration.

Jan. 29. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, LORD TUCKER, and, fully agreeing as I do with his reasoning and conclusions, I shall satisfy myself by moving that this appeal be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, I, too, have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, LORD TUCKER, and I agree that the appeal should be dismissed for the reasons which he gives.

LORD TUCKER: My Lords, the respondents to this appeal, which is brought pursuant to the fiat of the Attorney-General, were convicted at the Central Criminal Court on May 18, 1956, after a trial before DONOVAN, J., and a jury, on two counts of an indictment charging them with conspiracy; the respondent Owen was also convicted on a further count which charged him with uttering a forged document. They appealed to the Court of Criminal Appeal, who quashed the conviction on the first of the conspiracy counts and dismissed the appeals in respect of the other counts. The counts referred to above were numbered 3, 5 and 6 in the indictment, and it is in respect of the order of the Court of Criminal Appeal quashing the convictions on count 3 that this appeal is brought by the Crown. It is unnecessary to refer to counts 1, 2 and 4, two of which were quashed and on the third of which no verdict was given. Counts 3 and 5 must be set out in full.

Count 3, as amended at the trial, reads as follows:

"Statement of Offence—Conspiracy to defraud.

"Particulars of Offence—Henry Geoffrey Owen and Patrick Sidney Ernest Seth-Smith between Dec. 1, 1951, and Dec. 1, 1953, in the City of London and elsewhere conspired together and with Austay London Limited and Alfred Robert Cummings and with other persons unknown to defraud Gruppe Zentrale Ausfuhrkontrolle of the Bundesstelle für den Warenverkehr der Gewerblichen Wirtschaft of the Federal Republic of Germany (known as and hereinafter referred to as 'Z.A.K.') that is to cause Z.A.K. to grant licences to export certain metals from the Republic of Germany by fraudulently representing to Z.A.K. that the said metals would be supplied to and consumed by Irish manufacturers, well knowing that such metals were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R."

A Count 5:

"*Statement of Offence*—Conspiracy to utter forged documents.

B

"*Particulars of Offence*—Henry Geoffrey Owen, Patrick Sidney Ernest Seth-Smith and Leslie Eric Hamson between Dec. 1, 1951, and Dec. 1, 1953, in the City of London and elsewhere conspired together and with Austay London Limited and with other persons unknown to utter forged documents purporting to be end-user certificates made and given by the Secretary of the Department of Industry and Commerce of the Republic of Ireland on behalf of the Minister of the said Department certifying that certain metals to be imported into the said Republic would not be re-exported therefrom knowing the same to be forged and with intent to defraud."

C

The general nature of the respondents' operations as disclosed by the evidence is to be found conveniently summarised in the judgment of the Court of Criminal Appeal as follows ([1956] 3 All E.R. at p. 434):

D

"The conspiracy and the method adopted to effect it can be quite shortly stated. The German government would not grant licences for the export of strategic metals to Eastern European countries. The [respondents] were directors of a company called Austay London, Ltd. and the second [respondent] was chairman of an Irish company called Smith Miller (Eire), Ltd. Austay London, Ltd., bought metal in Germany and the [respondents] put false documents before Z.A.K., the licensing authority of the German government, purporting to show that the metal would be exported only to Ireland whereas in fact it was to be exported to 'Iron Curtain' countries. They also obtained through Smith Miller (Eire), Ltd. and presented to Z.A.K. documents which are known as end-user certificates which purported to be given by a government department of Eire certifying that the metal would not be exported from but would be used in Ireland. These documents, six of which were proved in evidence, were bought for a substantial sum of money from a person named Higgins who apparently carried on a business in Dublin of supplying forged certificates."

F

My Lords, it may be convenient at this stage, before passing to the principal question raised in this appeal, to make some observations with regard to these two counts and the nature of criminal conspiracy in English law. The Court of Criminal Appeal (LORD GODDARD, C.J., and ORMEROD and ASHWORTH, JJ.) in their judgment, delivered by LORD GODDARD, observed (*ibid.*):

G

H

"It is not altogether easy to appreciate what offence it was intended to allege in the first of these counts, which was called throughout the case count 3, as distinct from that alleged in the other, called count 5. The evidence would seem to be identical on both counts. Presumably count 3 was intended to refer to the fraudulent representations as to the destination of the goods and to the false shipping documents used in support, while count 5 is confined to the forged end-user certificates subsequently produced in support of the earlier representations. With regard to count 3 the court has felt considerable doubt whether it was right to charge an intent to defraud and not an intent to deceive."

I

They expressed no concluded opinion on this point in view of their decision on the main question on which the trial judge had granted his certificate of appeal, viz., whether a conspiracy in England to commit a crime or to effect an unlawful object abroad is indictable in this country. A good deal of argument was directed to your Lordships on the hearing of the appeal with regard to the words "with intent to defraud". It is, however, to be observed that, in count 3, with which alone your Lordships are concerned, the words "with intent" do not appear whereas, by contrast, in count 5 they do appear.

Whether or not the matters alleged in count 3 and the evidence adduced in support thereof are correctly described as a conspiracy to defraud, I have no

doubt that they disclose a conspiracy which would be indictable here if the acts designed to be done and the object to be achieved were in this country. It is a conspiracy by unlawful means, viz., by making representations known to be false, to procure from a department of government an export licence which, but for such representations, could not have been lawfully obtained. It is an example of a conspiracy by unlawful means to achieve an object in itself lawful, i.e., the issue of an export licence. If, however, a conspiracy of this nature is aptly included in the wide category of conspiracies known as conspiracies to cheat and defraud and if it is necessary to aver and prove that the acts designed to be done or the object to be achieved will result in some person acting to his detriment, I feel little doubt that a government department so acts if it issues a licence which enables something to be done which the department is charged with the duty to prevent.

Although count 3 does not expressly state the locality where the fraudulent representations were made or the licence obtained, the evidence showed not only that the representations were in fact made in Germany and the licence was issued there but that the circumstances were such that the conspiracy must have been one in which the representations were designed to be made in Germany and the licence to be obtained there. Count 3 is, accordingly, to be distinguished from count 5 where the crime designed to be committed was the uttering of a forged document in this country with intent to defraud, it being immaterial whether the person or persons to be defrauded were in Germany or elsewhere. Such a count is admittedly triable here.

My Lords, I will, accordingly, deal with count 3 on the basis that, if the evidence adduced in support of it had established a conspiracy here to make false representations in this country and thereby obtain in this country a licence of this nature, it would have constituted a criminal conspiracy. The question then remains whether the fact that the evidence disclosed a conspiracy here to make false representations in Germany and obtain a licence there renders the conspiracy one which cannot be made the subject of a criminal prosecution, and, if the answer is that it is not indictable here, is that because it was not a conspiracy to commit a crime, or are all conspiracies to do acts abroad, whether criminal or only unlawful, outside the purview of the criminal courts of this country? If such conspiracies are punishable in the criminal courts of England, it is, in any case, remarkable that in the long history of the English criminal law no case has been found in which anyone has ever been convicted of such an offence. I shall refer later to *R. v. Warburton* (1) ((1870), L.R. 1 C.C.R. 274), and explain why I do not consider that this case is an exception to this general statement. The matter has, however, been the subject of discussion for many years, and different views have from time to time been expressed by judges and writers of legal text-books.

Before passing to such authorities as there are, it may be helpful to refer to some observations of Mr. Justice R. S. WRIGHT in his *LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS* published in 1873. At p. 80 he prefaces his conclusions by posing the question:

“ what is the proper place or use in the criminal law of the mere mental act or state of agreement or concurrence;—an act or state which in itself is plainly neutral and conveys no associated idea of praise or blame.”

In attempting to answer the question he says that the first step is to distinguish between (i) agreements for the commission of crimes; (ii) agreements for minor offences; and (iii) agreements for acts which in the absence of agreement would not be crimes or offences. He treats the first class as being merely auxiliary to the law which creates the crime. As to agreements for minor offences, he says (*ibid.*, at p. 83):

“ It is next to be considered in what manner agreements ought to be treated when they are for offences punishable only on summary prosecution

A and by minor penalties. There is great difficulty in discovering the principles which are here applicable; but the difficulty will be diminished by dismissing at the outset all offences which ought in a good penal system to be treated as crimes, but which happen to be treated only as minor offences in any particular penal system. These being eliminated, the remaining offences consist in the production of results which, *ex hypothesi*, are not in themselves of grave enough consequence to be matters for indictment; and, if so, it must in general be immaterial whether the results are produced by one person or by two or more persons. To permit two persons to be indicted for conspiracy to make a slide in the street of a town, or to catch hedge-sparrows in April, would be to destroy that distinction between crimes and minor offences which in every country it is held important to preserve."

C In dealing with the third class, i.e., agreements for acts which in the absence of agreement would not be crimes or offences, after referring to two peculiar classes, i.e., (a) acts which are necessarily collective and cannot for physical reasons be committed by one person; and (b) certain frauds or perversions of justice which are not, but ought to be, punishable irrespective of agreement, he proceeds (*ibid.*, at p. 86):

D "Apart from cases falling within one or other of these two classes, there appear to be great theoretical objections to any general rule that agreement may make punishable that which ought not to be punished in the absence of agreement; for if the act is one which can be done by a person acting alone, and when so done ought not to be punished, it is difficult to see at what point and on what ground criminality can be generally introduced by the fact that two or more persons concur in the act."

E And in the last paragraph of the book, in summarising his conclusions he says, with reference to this last class of agreement (*ibid.*, at p. 88):

F "In an imperfect system of criminal law the doctrine of criminal agreements for acts not criminal may be of great practical value for the punishment of persons for acts which are not, but ought to be made punishable irrespective of agreement, and especially for some kinds of fraud; but this use of the doctrine involves an important delegation of a legislative power in a matter in which the exercise of such power ought to be carefully guarded, since the legislature admits its own inability to discover the principles on which legislation ought to proceed."

G My Lords, I have thought it right to cite these passages to show how ill-defined and uncertain were the limits of this crime in 1873, and I may add that neither subsequent judicial decision nor legislation has helped to set limits or afford more certainty. It is the law on this subject which your Lordships are now asked to expound in relation to agreements to commit crimes or other unlawful acts out of the jurisdiction in a country where criminal conspiracy is, according to the evidence given at the trial, unknown to its own law. The gist of the offence being the agreement whether or not the object is attained, it may be asked why should it not be indictable if the object is situate abroad. I think the answer to this is that it is necessary to recognise the offence in order to aid in the preservation of the Queen's peace and the maintenance of law and order within the realm with which, generally speaking, the criminal law is alone concerned. Furthermore, historically it appears to be closely allied in its development to the law with regard to attempts. SIR WILLIAM HOLDSWORTH, in his HISTORY OF ENGLISH LAW, Vol. 5, at p. 203, dealing with conspiracy, writes as follows:

I "STEPHEN remarks that 'Conspiracy has much analogy to an attempt to commit a crime.' And we shall see that this analogy at this period comes out clearly enough in the manner in which it was treated by the court of Star Chamber. But we have seen that, historically, conspiracy is more closely connected with offences against the administration of justice; and

that it was almost exclusively from this point of view that it was treated by the medieval common law. The modern law on this subject really springs from these two diverse yet connected roots."

After referring to the manner in which the Star Chamber punished conspiracies as well as false and malicious accusations made before itself or the Court of Chancery, he continues (*ibid.*, at p. 204) as follows:

"But it is clear that under these circumstances the element of conspiracy will tend to evaporate. The gist of the offence will be rather the malicious attempt to ruin another by a false charge than the conspiracy to effect this result. It was inevitable, therefore, as STEPHEN has said*, that conspiracy should come to be regarded as a form of attempt to commit a wrong. It was so regarded in the sentence given in the Star Chamber against those who attempted to fight duels; and in the *Poulterers' Case* (2) ((1610), 9 Co. Rep. 55b) it was ruled in the Star Chamber that the mere conspiracy, though nothing was executed, was an offence. But, if a conspiracy is so regarded, why restrict it to conspiracies to commit some offence in relation to legal proceedings? The Star Chamber acted upon this view; and just as it punished all kinds of attempts to commit wrongful acts, so, a fortiori, it punished all kinds of conspiracies to commit the many varied offences punishable either by it or by the common law courts. When the Star Chamber was abolished, the two divergent streams of doctrine which resulted from the medieval precedents and the rules evolved in the Star Chamber, produced some very complex developments in the law of crime and tort."

As a footnote to the above, he quotes the following passage from COKE (9 Co. Rep. at f. 56b):

"the usual commission of oyer and terminer gives power to the commissioners to inquire etc. de omnibus coadunationibus, confederationibus, et falsis alligantiis . . . in these cases, before the unlawful act executed, the law punishes the coadunation, confederacy or false alliance, *to the end to prevent the unlawful act* [my italics]. . . . And in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it."

Accepting the above as the historical basis of the crime of conspiracy, it seems to me that the whole object of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt, and that it is all part and parcel of the preservation of the Queen's peace within the realm. I cannot, therefore, accept the view that the locality of the acts to be done and of the object to be attained are matters irrelevant to the criminality of the agreement.

Returning to the present case, the trial judge, in his summing-up, directed the jury as follows:

"You have in particular to accept it from me, and this is what the argument was all about during one of the occasions when you were out, that if two people conspire in this country to do something unlawful by the law of this country, for example commit a fraud, or utter forged documents, then it is an offence even if they agree to commit their fraud or their uttering of forged documents abroad."

After verdict and sentence and in granting a certificate of appeal, DONOVAN, J., explained in detail his reasons for giving this direction. He said:

"I regard it as unlawful in English law to defraud a foreign subject in such a way that the foreign subject could sue the tortfeasor in this country—which I think Z.A.K. could have done, and could still do in the present case."

* STEPHEN'S HISTORY OF THE CRIMINAL LAW, Vol. 2, p. 227.

A I think, however, his decision was really based on broader grounds, as shown by the passage which immediately follows:

B “Then remembering that it is the agreeing which constitutes the crime, whether the unlawful object is effected or not, I cannot on principle see how the conspiracy constituted by such an agreement becomes untriable here, simply because the crime or tort has been committed abroad. Logic does not compel such a conclusion. Considerations of public weal do not compel it either. It would be of no benefit to this country if it became the sanctuary for conspirators, provided only that they concluded their unlawful plots abroad. Anomalies there may be, of course, but they exist whatever the true conclusion.”

C In the above passage I have no doubt that the learned judge, in using the words “simply because the crime or tort has been committed abroad”, meant “simply because the crime or tort is to be committed abroad.”

These observations have great force, and it was on this foundation that counsel for the Crown based his case before your Lordships. The Court of Criminal Appeal, after considering the authorities and pointing out that, by statute, certain acts are crimes punishable in England wherever committed, e.g., murder, bigamy, offences against the Foreign Enlistment Act, 1870, the Official Secrets Act, 1911, and the Merchant Shipping Act, 1894, proceeded ([1956] 3 All E.R. at p. 436):

E “In our opinion the true rule is that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. That does not mean that there must always be found a statutory provision declaring that the crime is punishable here because if persons do acts abroad for the purpose of defrauding someone in this country, they are indictable here and accordingly a conspiracy to do such an act would be indictable. For instance, if two persons agreed here to stage a sham burglary abroad in order to collect insurances from English underwriters the conspiracy would be indictable here though the overt act was to be done abroad, because if the plot were carried out the obtaining or attempting to obtain the insurance money would be clearly indictable. In the present case, the plot, though formed here, was carried out in Germany and assuming, as we have, that Z.A.K. were defrauded and not only deceived, the persons defrauded were Germans in Germany. In our opinion no offence was committed in Germany for which the [respondents] could have been indicted in England and consequently in our opinion the conspiracy is not indictable.”

Referring to s. 4 of the Offences against the Person Act, 1861, which makes a conspiracy in this country to murder any person abroad whether within the Queen's domains or not and whether the person is or is not a subject of the Queen a misdemeanour punishable with a maximum of ten years' imprisonment, the court observed (*ibid.*, at p. 435) that as, at any rate since 33 Hen. 8 c. 23* a British subject had been indictable in this country for murder committed abroad and the Offences against the Person Act, 1828†, expressly provided for the trial of any of His Majesty's subjects charged in England with murder committed on land out of the United Kingdom whether within the King's dominions or without, it followed that being an accessory to murder abroad or conspiracy to murder abroad was triable here. They were, accordingly, of opinion that s. 4 of the Act of 1861 did not alter the common law, but provided a special penalty, and made it clear that such a conspiracy by anyone in this country was indictable. This reasoning was not contested before your Lordships by either side and is clearly right. In this connection it should, perhaps, be noted that further

* Repealed by the Offences against the Person Act, 1828.

† Repealed by 24 & 25 Vict. c. 95.

statutory recognition of conspiracies to commit crimes is to be found in the Quarter Sessions Act, 1842, the Criminal Justice Act, 1925, and the Administration of Justice (Miscellaneous Provisions) Act, 1938, whereby courts of quarter sessions have jurisdiction to try (i) conspiracies to commit any offence which such court can try when committed by one person; (ii) conspiracies to cheat and defraud; and (iii) conspiracies to commit offences punishable on summary conviction. A

My Lords, I turn now to refer to some of the authorities, but, as none of them are decisive and as there is no dispute as to the essential elements of the crime if everything is to take place within the jurisdiction, I have not been able to derive a great deal of assistance therefrom. In *R. v. Bernard* (3) ((1858), 8 State Tr. N.S. 887), the defendant, an alien, was indicted as an accessory before the fact to the murder in Paris of one Nicolas Batty who had been killed in the Orsini plot to assassinate the Emperor Napoleon III. He was charged under 9 Geo. 4 c. 31, s. 7, which provided that B

“ if any of His Majesty’s subjects shall be charged in this country with any murder . . . or with being accessory before the fact to any murder . . . the same being . . . committed on land out of the United Kingdom, whether within the King’s dominions or without ” C D

he might be tried here under a Special Commission. LORD CAMPBELL, C.J., in his charge to the grand jury, told them that the accused, although an alien residing here, was as much amenable to this provision as a native-born subject. He was acquitted and an indictment against him for conspiracy which had been found against him at the Central Criminal Court and removed into the Queen’s Bench was not proceeded with. In the same year there is to be found in the same volume of State Trials reference to *R. v. Tchorzewski* (4) ((1858), 8 State Tr. N.S. 1091), in which the defendant was indicted for publishing in French a seditious libel justifying the attempt to murder the Emperor. The defendant having expressed his regret, the Crown was willing to accept a verdict of “ Not Guilty ”, but LORD CAMPBELL, C.J., made the following observation at the conclusion of the proceedings (*ibid.*, at p. 1095): E F

“ But those who find an asylum here must ever bear in mind that while they have the protection of the law of England they are bound to obey that law, and they are equally liable with the subjects of Her Majesty for any crime which may be committed by them while they are resident within the realm. I hope they will bear this in mind and will understand that it is a crime on the part of a British subject, or for a foreigner owing temporary allegiance to the Crown of England, to plot and conspire for the commission of a crime in a foreign country, or for the commission of a crime in this country.” G

There had, of course, been no argument on the matter and the defendant had not been charged with conspiracy. *R. v. Kohn* (5) ((1864), 4 F. & F. 68), is undoubtedly the most relevant case, though it is by no means easy to determine from the report what was or was not decided expressly or by inference by WILLES, J. The prisoner was indicted for conspiring at Ramsgate with the owner and master and mate of a ship named the *Alma* to cast away or destroy the vessel with intent to prejudice Belgian underwriters. The prisoner was a foreigner and the ship a Prussian merchant vessel. She was loaded at Ramsgate. Six days from the date of sailing she was scuttled and sunk far from the English coast and out of the jurisdiction of the court sitting at Maidstone Assizes. Evidence of the conspiracy to which the accused was alleged to have been a party consisted of a number of statements made by him to the mate of the British vessel *Helena*, by which the crew of the *Alma* had been rescued, and to a clerk to the Salvage Association of Lloyds and other persons after his arrest. He said that, on the captain’s orders, he had cut a piece out of the side of the ship at Ramsgate and H I

A bored holes in her and then plugged the holes; later, when the *Helena* was hailed, he removed the plugs. He spoke to a conversation with the mate in which the latter had stated the vessel would never reach her destination and spoke of making away with her. The prisoner had then remarked: "Then you may as well sink her at once, on the bar." To this the mate had replied that it would be too close to land. It is clear that there was no express agreement one way or the other whether the vessel was to be scuttled within or without territorial waters, but she was, in fact, destroyed outside. On this evidence, WILLES, J., directed the jury as follows (*ibid.*, at p. 72):

C "The ship was a foreign ship, and she was sunk by foreigners far from the English coast, and so out of the jurisdiction of our courts. But the conspiracy in this country to commit the offence is criminal by our law. And this case does not raise the point which arose in *R. v. Bernard* (3), as to a conspiracy limited to a criminal offence to be committed abroad. For here, if the prisoner was party to the conspiracy at all, it was not so limited, for it was clearly contemplated that the ship might be destroyed off the bar at Ramsgate, which would be within the jurisdiction. The offence of conspiracy would be committed by any persons conspiring together to commit an unlawful act to the prejudice or injury of others, if the conspiracy was in this country, although the overt acts were abroad. The parties who concocted the conspiracy, it is obvious, could only have an object to prejudice or injure some other persons. For the principal offence committed, the destroying or casting away the vessel, the prisoner could not be indicted in this country, as he is a foreigner, and the ship was foreign, and the offence was committed on the high seas. The question then is, was it agreed and consented to by and between the prisoner and any other person at Ramsgate, that the ship should be destroyed, whether at sea or in port? The prisoner's confession places it beyond a doubt that he was a party to the act of scuttling the ship; but was he a party to a previous conspiracy to that end?"

F The jury returned a verdict of "Not Guilty". I think it is clear that WILLES, J., took the view that, on the evidence, it was not possible for the jury to find that the conspiracy was limited to scuttling on the high seas. He says in terms: "Here it was not so limited". Accordingly, it was not necessary for him to direct them as to the law applicable to a conspiracy so limited. On the other hand, if he had thought that a conspiracy limited to scuttling in territorial waters would alone have been indictable, he no doubt would have directed the jury to acquit. He left it to the jury to decide whether the prisoner was party to a conspiracy which, on the evidence, was one which left open where the scuttling was to take place. This he regarded as a criminal conspiracy because it was not limited to the high seas. The case is, in my opinion, therefore inconclusive as to the law with regard to conspiracies so limited.

H The Court of Criminal Appeal interpreted this case as authority for the following four propositions:—(i) That an alien who scuttled a foreign ship out of the jurisdiction is not indictable here; (ii) That to conspire to scuttle out of the jurisdiction is not indictable; (iii) To conspire to scuttle whether the ship should be within or without the jurisdiction is indictable as the ship might be scuttled in an English port or within English territorial waters; (iv) That to conspire to injure persons within by doing an act out of the jurisdiction is indictable. I agree as to (i) and (iii) but I do not think it is an authority for (ii) and (iv).

I STEPHEN, J., in referring to this case in *ROSCOE'S CRIMINAL EVIDENCE* (7th Edn.) at p. 244, expressed a view similar to that which I have indicated above as to what was actually decided, but added "but on principle it ought to be criminal". In his *HISTORY OF THE CRIMINAL LAW OF ENGLAND*, Vol. 2, at pp. 13 and 14, dealing with the question of conspiracies in England to commit crimes abroad (other than murder), he regards the law as unsettled, and expresses the view that it is the duty of the legislature to remove all doubt by putting such

conspiracies, subject to certain possible exceptions, on the same footing as crimes committed in England. *R. v. Brisac* (6) ((1803), 4 East, 164), was a case of conspiracy in a British ship on the high seas, and turned on the question of the venue necessary to found the jurisdiction for trial at Westminster, it having been contended that the offence was only triable under the Admiralty Commission. It is, accordingly, of no assistance in this case. In *R. v. Warburton* (1), the defendant was indicted for conspiring with Joseph Warburton and W. H. Pepys to cheat and defraud his partner Lister. The partnership was English, but part of the business was carried on at Urbigau in Saxony. The defendant had given notice for dissolution of the partnership between himself and Lister which would necessitate the taking of an account of the partnership property and its division, after payment of liabilities, between the partners. The conspiracy was by false documents and false entries in the books in Saxony to make it appear that Pepys was a creditor of the firm, so that certain partnership property was to be withdrawn and handed to Pepys or otherwise abstracted and kept back for division between the defendant Pepys and Joseph Warburton to the exclusion of Lister. Although the fraudulent acts were to be performed abroad, the ultimate taking of the account and division of the partnership property would take place in England. No objection was raised on the ground that the fraudulent acts were to be performed abroad. The only point taken was that the fraud at that date was one which, apart from conspiracy, was neither actionable nor criminal, and, therefore, the conspiracy could not be criminal. It was held that the acts agreed to be done constituted a civil wrong and, therefore, the conspiracy was criminal. As the final act necessary to effect the fraud was to be carried out in this country on a person here, this also is a case from which I am unable to derive much assistance.

One further case must be mentioned, viz., *R. v. Whitchurch* (7) ((1890), 24 Q.B.D. 420). In this case three persons, one of whom was Elizabeth Cross, were charged with conspiring to procure the abortion of the said Elizabeth Cross. The offence of administering to herself any poison or other noxious thing or unlawfully using any instrument or other means with intent to procure her abortion requires that the woman should be with child. Elizabeth Cross was, in fact, not pregnant. In the case, however, of persons other than the woman herself the Offences against the Person Act, 1861, s. 58, enacts:

“ . . . and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony.”

All the accused were convicted. In the case of Elizabeth Cross, WILLS, J., the trial judge, stated a Case for the Court of Crown Cases Reserved. In it he stated his opinion that, whether or not it was no offence for a woman not pregnant to do such acts to herself intending thereby to procure abortion which was actually impossible, it was none the less criminal in her to conspire to commit a felony (which the administration of drugs and the use of instruments would have been in her as well as in the men if she had been pregnant), because the commission of the felony was rendered impossible by circumstances unknown to her. But he went on to state his further opinion that for the woman to conspire with the men to have certain things done to her, the doing of which constituted a felony on the part of the men, was criminal, although the object to be attained, if effected by herself alone and without the help of the men, might not have been criminal. He had, accordingly, directed the jury, if they believed the evidence, to convict the prisoners. The conviction was upheld, but none of the judgments indicate whether this was on the basis of the first part of WILLS, J.'s opinion or on the second. If either was correct, the conviction had to stand. It is true that no distinction is drawn between the two alternative bases for the judge's

A opinion, but I do not think this case affords a very firm ground for drawing any fundamental conclusions with regard to the law of criminal conspiracy.

Counsel for the Crown based his case principally on the contention that, the essence of the crime being the agreement, it is immaterial where it is intended to be carried out, or on whom the crime or fraud is to be perpetrated. It is, he said, unnecessary to allege in the count the locality of the scene of the designed operations, while it is necessary to state the locality of the agreement to give jurisdiction to the court of trial. But, alternatively, while saying he was not concerned to show in what particular category of conspiracy the present case came, he submitted that, being a conspiracy to defraud, it came within the class of conspiracies to do acts which are mala in se and, as such, clearly criminal in their nature, irrespective of locality. He contended that acts which were criminal at common law, such as murder and theft, although subsequently made statutory offences, were to be regarded as crimes, even if for procedural or other reasons they were not punishable here. And in this category he sought to include "frauds". By way of illustration he cited certain passages from the judgment of DEVLIN, J., in the recent case of *R. v. Martin* (8) ([1956] 2 All E.R. 86 at pp. 91, 92).

D My Lords, this argument is an attractive one and it accords to some extent with the views expressed by Mr. Justice WRIGHT in the passages already cited from his LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS, where he refers more than once to acts which "ought to be" regarded as "crimes", although they may not, in fact, be punishable, and suggests this as the test for determining whether a particular conspiracy should be regarded as criminal. But it is significant that he also considered the task of classifying the acts which would determine the criminality of conspiracy was one for the legislature. Ideas as to what acts are mala in se vary widely in different periods of time and in different parts of the civilised world. This classification is none the less one which may still be of assistance in certain spheres of the law, but the criminal law requires the maximum degree of definition, and so uncertain a test as this seems to me ill-suited for the determination of the limits of criminality in the field of conspiracy. Moreover, I think the following passage in 10 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 271, para. 501:

"A crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment",

G correctly defines the nature of a crime in the criminal law.

My Lords, I share the views of Mr. Justice R. S. WRIGHT and Mr. Justice STEPHEN that the task of determining what conspiracies, if any, in this already indeterminate field are to be triable and punishable in this country when the acts planned would not themselves have been indictable here if carried out abroad, is not one which is suitable for your Lordships sitting in your judicial capacity. In this connection, I would make further reference to SIR WILLIAM HOLDSWORTH. At p. 277 of vol. 3 he wrote:

"Moreover, at all periods of our history it has been far more difficult to extend the criminal law by a process of judicial decision than any other branch of the law. There has always been a wholesome dread of enlarging its boundaries by anything short of an Act of the legislature."

I No one has ever been convicted of such a conspiracy, and, if it is in the public interest that such conspiracies should be triable and punishable here, it is, I think, for the legislature so to determine. The comity of nations can hardly require the acceptance of the Crown's contentions in the present case, having regard to the non-recognition of conspiracy as a crime in Germany. Moreover, in the field of criminal law, the comity of nations can best be served by treaties of extradition.

I have reached the conclusion that the decision of the Court of Criminal Appeal that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here is correct and, from what I have already said, it necessarily follows that a conspiracy of the nature of that charged in count 3 as proved in evidence—which, in my view, was a conspiracy to attain a lawful object by unlawful means rather than to commit a crime—is not triable in this country, since the unlawful means and the ultimate object were both outside the jurisdiction. In so deciding I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad.

My Lords, for these reasons I would dismiss this appeal.

My Lords, my noble and learned friend, **LORD RADCLIFFE**, who is unable to be present today, has asked me to say that he concurs in the opinion that I have just delivered.

LORD SOMERVELL OF HARROW: My Lords, I agree that the appeal should be dismissed for the reasons given by my noble and learned friend, **LORD TUCKER**.

Appeal dismissed.

Solicitors: *Solicitor, Board of Trade* (for the Crown); *Stikeman & Co.* (for the respondent Owen); *Galbraith & Best* (for the respondent Seth-Smith).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

PRACTICE DIRECTION.

[**QUEEN'S BENCH DIVISION** (Lord Goddard, C.J.), February 1, 1957.]

Practice—Trial—Date—Postponing date of trial of non-jury actions.

LORD GODDARD, C.J.: Since the beginning of these sittings there has been an exceptionally large number of consent applications to postpone cases in the non-jury list due no doubt largely to the rapidity with which cases now come on for trial. This has led to a certain amount of confusion and indeed often to serious inconvenience since parties have found that, owing to the postponement of cases which would otherwise have been tried first, their own has unexpectedly come into the list for trial. In recent years a practice has grown up though not authorised by any rule whereby a postponement has been granted upon the filing of a properly stamped form of consent and an application to the judge in charge of the list has not been required. For the time being, at least, this practice must be discontinued and in future if postponement of a case which is in the week's list is desired, application must be made to the judge in charge of the list and good cause shown. As a further measure to meet the present situation, the number of cases which will be included in the week's list will be considerably reduced and will be limited to seventy for the coming week.

TRAYFOOT v. LOCK.

[COURT OF APPEAL (Denning, Romer and Parker, L.JJ.), January 11, 1957.]

Rent Restriction—Death of tenant—Member of tenant's family—Default of agreement—Distinction between submission and agreement—Whether wishes of deceased tenant relevant circumstances to be considered in deciding who should be statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5 c. 17), s. 12 (1) (g).

A statutory tenant died on Dec. 20, 1955. He did not leave a widow. At his death four members of his family were living in the house with him, as they had been for many years. They were his son (aged forty-one), his step-daughter (aged fifty-five), her husband and an uncle (aged eighty-five). The deceased, before his death, had sent to the landlord's agent a document stating his wish that on his death the tenancy should pass to his son. On Jan. 4, 1956, the agent told the deceased's son and the step-daughter's husband that he (the agent) was giving the tenancy to the son as next of kin, and indorsed a note of the son's succession to the statutory tenancy on the rent-book, which he handed to the son. Thereafter the son paid the rent, and gave the step-daughter a rent-book showing a rent payable by her to him for her accommodation in the house. The step-daughter allowed this rent in her accounts with the son. On Apr. 20, 1956, the son brought an action against the step-daughter for possession. She claimed that she was the member of the deceased's family who should be "decided in default of agreement" by the county court to be tenant under s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920*. The matter was referred under s. 89 of the County Courts Act, 1934, by consent to the registrar as arbitrator, and he found that the step-daughter had not agreed to the son's succeeding to the tenancy, he rejected the document expressing the deceased's wishes, and he awarded that the step-daughter should succeed to the deceased's tenancy. On appeal by the son,

Held: (i) it was open to the registrar to find that the step-daughter had merely submitted to the agent's decision that the son should succeed to the statutory tenancy and had not agreed to his being tenant, but

(ii) the award ought to be set aside since the wishes of the deceased were one of the circumstances which should have been considered when deciding which member of the family ought to succeed to the tenancy, and the document expressing the deceased's wishes should not have been rejected from consideration.

Williams v. Wallis & Cox ([1914] 2 K.B. 478) applied.

Appeal allowed.

[As to the succession to the rights of a deceased statutory tenant, see 20 HALSBURY'S LAWS (2nd Edn.) 335, para. 401; and for cases on the subject, see 31 DIGEST (Repl.) 663-666, 7635-7649.

As to setting aside the award of an arbitrator for the exclusion of material evidence, see 2 HALSBURY'S LAWS (3rd Edn.) 58, para. 126; and for cases on the subject, see 2 DIGEST 451, 452, 990-995.

For the County Courts Act, 1934, s. 89, see 5 HALSBURY'S STATUTES (2nd Edn.) 71.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g), see 13 HALSBURY'S STATUTES (2nd Edn.) 999.]

* Section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Housing Repairs and Rents Act, 1954, s. 42, provides: "(g) The expression . . . 'tenant' includes the widow of a tenant . . . who was residing with him at the time of his death, or, where a tenant . . . leaves no such widow . . . such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

Case referred to:

- (1) *Williams v. Wallis & Cox*, [1914] 2 K.B. 478; 83 L.J.K.B. 1296; 110 L.T. 999; 78 J.P. 337; 2 Digest 48, 260.

Appeal.

This was an appeal by the plaintiff against the decision of His Honour JUDGE HODGSON, sitting at Wandsworth County Court on Sept. 17, 1956, refusing to set aside the award in the defendant's favour made by the registrar on the reference of the action to the registrar as arbitrator, by consent of the parties, under the County Courts Act, 1934, s. 89. The facts appear in the judgment of DENNING, L.J.

R. A. Gatehouse for the plaintiff, the son.

W. D. M. Sumner for the defendant, the step-daughter.

DENNING, L.J.: The deceased was for over forty years the tenant of a house, 125, Lower Mortlake Road, Richmond, Surrey. He died on Dec. 20, 1955, at the age of eighty-one. He was a statutory tenant at that time. The question is, who is to succeed him in that tenancy? For many years there had lived with him in the house four people: First, his own son (by his first wife), Mr. William Percy Stephen Trayfoot, then aged forty-one. Second, his step-daughter, Mrs. Lock: she was the daughter of his second wife by her first husband. She was fifty-five years of age. Third, her husband, Mr. Lock. Fourth, an old uncle, of eighty-five.

The son and the step-daughter were both members of the tenant's family, residing with him at the date of his death: they were both qualified to succeed to the statutory tenancy: and the question between them is, who is to take the tenancy? That is to be decided by agreement between them, if that is possible: otherwise, by the court.

Before the deceased died, both the son and the step-daughter had been to the landlord's agent to see whether the landlord would take either of them on as tenant. The agent said that he would not; he was not going to give either of them a new contractual tenancy which might give rise to a new succession. So neither got anything during the deceased's lifetime; but after his death, on Jan. 4, 1956, the son and the step-daughter's husband went along to the agent to inquire about the tenancy. The agent at that time had got before him a document, which had been prepared by a solicitor and signed by the deceased about six months before his death, which was in these terms (addressed to the agent):

"I, the undersigned Percy Trayfoot, of 125, Lower Mortlake Road, Richmond, Surrey, hereby request you to permit me to assign my tenancy of 125, Lower Mortlake Road to my son William Percy Stephen Trayfoot, who lives at this address. In the event of my death it is my wish that the tenancy should pass to him."

That was dated June 11, 1955, and signed by the deceased. It showed that it was the deceased's wish that the son should take over the tenancy. In addition, the deceased had made a will, properly witnessed, giving his household furniture, goods, etc., entirely to the son. At the interview on Jan. 4, 1956, the agent told the son and the step-daughter's husband that he was giving the tenancy to the son as next of kin. The step-daughter's husband did not protest. He said nothing. Thereupon the agent wrote on the top of the rent book

"Mr. W. P. S. Trayfoot succeeded to the statutory tenancy of the late Mr. P. Trayfoot, who died on Dec. 20, 1955",

and handed the book over to the son. The son went back to the house and thereafter paid the rent himself to the landlord's agent. The son gave the step-daughter another rent book from himself to her and entered in it 10s. a week, charging her that amount in account for her accommodation in the house.

A About three or four months later* the son, wanting to marry, brought an action in the county court for possession, seeking to turn the step-daughter out. It was referred by the judge, by consent of the parties, to the registrar as an arbitrator under s. 89† of the County Courts Act, 1934. The registrar heard the evidence and gave a careful award in which he came to the conclusion that there was no agreement between the son and step-daughter as to the tenancy. It was therefore for the court to decide who should succeed to it. He found it a nicely balanced matter, but decided that the step-daughter ought to have the tenancy.

B The son applied to the county court judge to set aside that award because (he said) it was erroneous in point of law on two grounds. One ground was that the registrar misdirected himself on the question whether there was an agreement or not. The other ground was that the registrar had excluded the document of June 11, 1955, which the deceased had signed and in which he said it was his wish that the tenancy should pass to the son. The county court judge refused to set the award aside, and there is an appeal to this court.

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On the first matter, I find it difficult to say that the registrar misdirected himself in law. He had regard to the fact that the step-daughter's husband had not protested when the agent awarded the tenancy to the son: he also took into account the fact that the step-daughter accepted responsibility for 10s. a week towards the rent: "But" (he said) "in my opinion there never was any agreement". His finding, I think, comes to this: the step-daughter did not know the legal position at all: the agent had said that the son was entitled to the tenancy, being the next of kin: and the step-daughter and her husband had submitted to that position. They did not really agree to it but they took the agent's word for it. I should have thought that if there had been a long period of acquiescence the registrar ought to have inferred an agreement, but such a short time elapsed here that it cannot be said that the registrar necessarily misdirected himself in law in regard to this matter.

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The second point is, I think, a difficult one. The document of June 11, 1955, which the deceased signed, was, I think, a very relevant matter for the registrar to consider. When the court has to consider which member of a family ought to have a tenancy under this section, it must consider all the circumstances of the case. For instance, in this case the court must give proper weight to the fact that the son is the blood relation and that the step-daughter is not. On the other hand, in her favour there is the meritorious fact that the step-daughter had "kept house" for the household for many years. Those factors on either side leave the matter very evenly balanced. In those circumstances the decisive factor seems to me to be the deceased tenant's wishes. Such wishes may not always be an overriding consideration, but they may in some cases, and this is one. The deceased had lived in the house for all these years. It was his tenancy. He had by his will given all the furniture to his son. He would presumably want the tenancy of the house also to go to the son. It was suggested that the document of June 11, 1955, was not admissible in evidence: but I think that it was. The only way of finding out the deceased's wishes in a case of this kind is by admitting oral evidence or documentary evidence of his intention as declared by him in his lifetime. The registrar said about the document:

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"If I were satisfied that the document signed by the deceased in June, 1955 expressed the deceased's free desire, it would be a matter that I think I ought to consider, although I am by no means sure about it. But I am far from satisfied that it represented a freely expressed desire or that it was not signed under the suggestion, perhaps pressure, of the son";

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and for that reason he seems to have rejected it. There is nothing in the material before us to suggest it was not the freely expressed desire of the deceased. We

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* The particulars of claim were dated Apr. 20, 1956; the interview with the agent had taken place on Jan. 4, 1956.

† Section 89 empowers the county court judge, with the consent of the parties to any proceedings, to refer the proceedings to such arbitrator as he thinks just and reasonable.

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were told by counsel in the case that there was no suggestion made by either lawyers or parties in the court below that this was not a free expression of the deceased's desire. If it had been challenged in the court below, it would have been inquired into then, but it was not. I can find no justification here for the registrar's surmise that this was not a "freely expressed desire" or was signed under a suggestion or pressure by the son.

In those circumstances, it seems to me that the learned registrar has wrongly rejected this document. He has technically included it so as to look at it, but then in the next breath he has excluded it, because he said he would not pay any attention to it. In effect, he has excluded material evidence; and in accordance with the case to which we were referred, *Williams v. Wallis & Cox* (1) ([1914] 2 K.B. 478, per ATKIN, J., at p. 485) that is a ground for setting aside the award of an arbitrator.

Although the registrar gave a very careful award, he has, on this point, I fear, fallen into error. I think that this court should set aside the award (as the County Courts Act, 1934, empowers us to do), and revoke the reference.

ROMER, L.J.: I agree. I wondered a little myself for a while whether the observations which the learned registrar made in his judgment (to which my Lord has referred), with regard to the document which the deceased signed six months before his death, were accurately set out in the copy of the registrar's judgment that we have, because there is no word in the evidence suggesting that that document was procured "under the suggestion, perhaps pressure, of the son", or that it in any way failed to represent the "freely expressed desire" of the deceased. I wondered whether for that reason the learned registrar might have had some other meaning in mind when he made those observations. We are, however, told that this was a written and reserved judgment, so that we can only conclude that it means what it says. Reading it in that way, I entirely agree with what my Lord has said: that the effect of the registrar's judgment was to exclude this document wholly as a relevant consideration for the purpose for which it was put in. I therefore feel that there is no alternative to our sending this matter back to be dealt with in the way which my Lord has indicated, much as I think it is a pity that it should have to go back.

I agree with the order that my Lord has suggested.

PARKER, L.J.: I have reluctantly come to the same conclusion, and for the reasons given by my Lords; accordingly, there is nothing that I desire to add.

Appeal allowed. Order set aside and reference revoked. Remitted to the county court judge. Any necessary application made to the registrar under s. 12 (1) (g) of Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to be referred by him to the county court judge.

Solicitors: *S. M. Gibson*, Richmond, Surrey (for the plaintiff son); *M. A. E. Cresswell* (for the defendant step-daughter).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

A

Re TAXATION OF COSTS. Re A SOLICITOR.

[COURT OF APPEAL (Singleton and Jenkins, L.J.J.), November 22, 23, December 19, 1956.]

B

Land Registration—Costs—Transfer of registered land on sale—Scale fee—Not all work done to which scale fee applied—Whether scale fee chargeable—Solicitors' Remuneration (Registered Land) Order, 1925 (S.R. & O. 1926 No. 2), art. 1 (D) (i), art. 1 (H), and Schedule (as substituted by the Solicitors' Remuneration (Registered Land) Order, 1953 (S.I. 1953 No. 118)).

C

After entering into a contract to sell land registered with possessory title, a vendor changed his solicitors. The contract contained imperfections and the new solicitors had a good deal of work to do in connection with it. The new solicitors completed the transfer of the land, and in their bill of costs to the vendor charged the scale fee prescribed by the Solicitors' Remuneration (Registered Land) Order, 1925, art. 1 (D) (i)* and Schedule, together with item charges for work not within the scale. The taxing master disallowed the scale fee on the ground that not all the work which the fee was described in art. 1 (H) as covering had been done by the new solicitors.

D

On appeal against the taxing master's disallowance of the scale fee,

Held: the new solicitors were entitled to the scale fee because they did the main part or substantially the whole of the work set out in art. 1 (H).

Per JENKINS, L.J.: the principle stated in *Re Lacey & Son* ((1883), 25 Ch.D. 301), applies to remuneration in respect of registered land as it does to remuneration with respect to unregistered land (see p. 430, letter F, post).

E

Appeal allowed.

F

[**Editorial Note.** This decision should be compared with *Re No. 10 The Terrace, Hampton Wick* ([1957] 1 All E.R. 87), which was decided only a few days before the present case. JENKINS, L.J., in the present case, and VAISEY, J., in the former case, both refer to the same difference in wording in the remuneration orders, viz., that the remuneration by scale for transfer of registered land on sale "covers" certain work and that the scale fee under the Solicitors' Remuneration Order, 1883, on sales is expressed to be "for" certain work (cf. [1957] 1 All E.R. at p. 89, letter D, and p. 430, letter H, to p. 431, letter A, post). JENKINS, L.J., relies on the words "if any" which are to be found in the comparable passages in both orders, and on the judgment of FRY, L.J., in *Re Lacey & Son* ((1883), 25 Ch.D. at p. 311) as supporting the view that the scale fee can be charged although not every item of the work mentioned in art. 1 (H) of the Order of 1925 has been done (see particularly p. 431, letter G, post).

G

As to costs on transfer of registered land, see 31 HALSBURY'S LAWS (2nd Edn.) 153, para. 193.

H

For the Solicitors' Remuneration (Registered Land) Order, 1925, as amended, and for the Solicitors' Remuneration (Registered Land) Order, 1953, see 20 HALSBURY'S STATUTORY INSTRUMENTS 205, 210.]

Case referred to:

(1) *Re Lacey & Son*, (1883), 25 Ch.D. 301; 53 L.J.Ch. 287; 49 L.T. 755; 42 Digest 195, 2130.

I

Appeal.

This was an appeal from an order of PEARSON, J., made on Oct. 4, 1956, dismissing the solicitors' appeal against the disallowance by Master HOOD of the charge of the scale fee in their bill of costs for a transfer of registered land. Leave to appeal had been given by PEARSON, J., when he made the order. The facts appear in the judgment of SINGLETON, L.J.

* Set out at pp. 428, 429, post. No title excluded from the effect of registration had to be investigated so that the remuneration was that prescribed by art. 1 (D) (i); see *ibid.*, art. 1 (D) (ii).

Leonard Halpern for the appellants solicitors.

The respondent client did not appear and was not represented.

SINGLETON, L.J.: This appeal arises on a solicitors' bill of costs and on the first item in the bill. The solicitors, Messrs. Lesser, Fairbank & Co., became solicitors for Mr. Marshall, who was the vendor of some property. They acted for him for some months. He had had a solicitor before he went to them. After he had entered into a contract to sell the property in question, No. 20, Old Compton Street, W.1, at the price of £7,500, he changed his solicitors, and the present solicitors, Messrs. Lesser, Fairbank & Co., acted for him thereafter. The earlier solicitor had prepared the contract and drawn up conditions of sale. The conditions of sale were not in order, so that the present solicitors, with whose bill we are concerned, had some work to do in connection with the contract. The property was registered land. It was transferred or conveyed to the purchaser, and ultimately on Feb. 10, 1956, the solicitors sent in a bill, the total amount of which, including disbursements, was £145 5s. 4d. The first item on the bill is contained in five or six lines, though the bill itself takes up many pages. The item is:

"To our professional charges relating to deducing title on your sale of the freehold site No. 20, Old Compton Street, London, W.1, at the price of £7,500—registered land—as per scale, £53 2s. 6d."

£53 2s. 6d. is the scale fee in respect of a sale of registered land at a price of £7,500. The next item, which is entirely apart from the £53 2s. 6d. item, begins

"Our professional charges and disbursements of and relating to redemption of mortgage and all matters not covered by scale charge, namely . . ."

and on p. 13 of the bill there appears the figure of £73 10s.; that is, in matters connected with redemption of the mortgage. There are other items and disbursements, bringing the total amount up to £145 5s. 4d.

The only question before the court arises on the first item, that which is charged as a scale fee, £53 2s. 6d. When it was considered by the taxing master he himself took the objection that a scale fee was not payable. He considered the other items amounting to something over £70. Objections were made, and the master's answer is this: He said in the first place that the objections were not correctly stated by the solicitors. He added:

"The subject-matter of objection 2* disclosed the fact that the contract for sale of the property in question had been prepared and completed by another firm of solicitors and that such solicitors had been paid for their services in that respect. It transpires that the sale was completed on the basis of such contract and that the respondent solicitors who had taken the matter over from the former solicitors prepared no further contract. These facts show quite clearly that a scale fee has not been earned."

I cannot agree with the sentence "These facts show quite clearly that a scale fee has not been earned". I am not satisfied that they do show that.

A scale fee is claimed under the provisions of the Solicitors' Remuneration (Registered Land) Order, 1925, art. 1 of which reads:

"The remuneration of solicitors in conveyancing and other non-contentious business under the Land Registration Act, 1925, shall be regulated as follows: . . . (D) For every completed transfer on sale, or charge or mortgage of registered land, or transfer for value of a registered charge, or sub-charge or sub-mortgage of a registered charge or mortgage or transfer for value thereof

* The subject-matter of objection 2 was the items in respect of which the £73 10s. referred to at letter E above, was charged.

whether or not any easement right or privilege is reserved or the surface or the mines and minerals or any part thereof excepted, (i) Where the land is registered with absolute or good leasehold title, the remuneration* shall be that prescribed in the Schedule hereto."

That prescribed in the Schedule is, for the transfer of property of the amount of £7,500, the amount claimed in the first item, £53 2s. 6d. Article 1 (H) of the order, which was referred to by the learned taxing master, reads:

"The remuneration prescribed by the Schedule hereto covers (in addition to all searches in, attendances at, correspondence with the registry, and other matters involved in, incidental to or arising out of the registration) the preparation or perusal (as the case may be) of the contract, or conditions of sale, if any, the perusal of any lease, or other deed mentioned on the register, and all other work incidental to or consequential on the transaction, including all matters which in the case of sales, purchases, charges, mortgages, sub-charges, and sub-mortgages, and transfer of charges or sub-charges, or mortgages of unregistered land are covered by the remuneration prescribed by the Remuneration Order, 1882, Sch. 1, Part 1."

The view taken by the taxing master was that, as the solicitors had not prepared the contract or conditions of sale, they were not entitled to the scale charge, and PEARSON, J., dismissed the appeal against the taxing master's order. I do not think that that, so stated, is right in every case. There may be occasions on which the parties themselves arrive at a contract, but the property is transferred within (D) of art. 1 of the order, and the solicitors would still be entitled to the scale charge. In this particular case, though they did not prepare the contract, they had to consider its terms and the terms of the conditions of sale. Indeed, they had to undertake a certain amount of correspondence and additional work because the conditions of sale were not in order. It cannot be said that they did nothing in regard to the contract. It appears to me that, on the strict reading of art. 1 of the Solicitors' Remuneration (Registered Land) Order, 1925, the solicitors did the main part of the work mentioned in the order which entitles them to the scale charge. Whether they come within that is a question of law. I take the view that they do and that consequently they are entitled to the scale charge.

[HIS LORDSHIP then considered the items other than the scale fee and continued:] On the sole question before this court, whether or not the solicitors are entitled to the scale fee on the first item on this bill, it seems to me that the appeal should be allowed, though I point out that the way in which the charge is framed is not precisely in accordance with the wording of the Order of 1925.

JENKINS, L.J.: I agree that this appeal must be allowed. The sole question with which this court is concerned is whether the solicitors are entitled, on the facts of the case, to be remunerated by reference to the scale charge set out in the Schedule to the Solicitors' Remuneration (Registered Land) Order, 1925, as amended. That question turns on the true construction of the order. The solicitors say that under art. 1 (D) of the order they are entitled, for every completed transfer on sale of property of the kind here in question (namely, registered land, registered with a possessory title, and with no title excluded from the effect of registration to be investigated), to the scale of remuneration set out in the Schedule. The matters which that remuneration is to cover are set out in para. (H) of art. 1 of the order, which provides:

"The remuneration prescribed by the Schedule hereto covers (in addition to all searches in, attendances at, correspondence with the registry, and other matters involved in, incidental to or arising out of the registration)

* The remuneration is the same where land is registered with possessory title and no title excluded from the effect of registration is investigated (Solicitors' Remuneration (Registered Land) Order, 1925, art. 1 (D) (ii)).

the preparation or perusal (as the case may be) of the contract, or conditions of sale, if any, the perusal of any lease, or other deed mentioned on the register and all other work incidental to or consequential on the transaction . . . ”,

and so on. In this case the client, Mr. Marshall, had in fact employed other solicitors to sell, amongst other properties, the property 20, Old Compton Street, by auction. Before the auction the property was in fact sold by private treaty, and the contract was completed and signed with the assistance of the solicitor originally employed. That was on June 8, 1955. On June 10 Mr. Marshall took the business away from the solicitor originally employed and handed it over to the solicitors who are the present applicants. The argument against the solicitors' contention is simply this, that as they did not act in the preparation and completion of the contract, they did not carry out the whole of the transaction, and therefore they should not be remunerated by means of the scale, but should have what is known as Sch. 2 remuneration, which derives from the General Order made under the Solicitors Remuneration Act, 1881, and brought into force on Jan. 1, 1883, as subsequently amended*; that is to say, should be paid by reference to the work done.

In my view, that contention cannot stand, having regard to the language of the Order of 1925. It will be noted that para. (H) of art. 1 says that the remuneration prescribed by the Schedule “covers” certain matters. Then, amongst the matters covered, it goes on to include “the preparation or perusal (as the case may be) of the contract, or conditions of sale, if any”. It seems to me that this language is impossible to reconcile with the theory that the scale charge can only be earned by a solicitor who prepares or peruses the contract. The words “if any” are, I think, fatal to that contention, and I think the expression “covers” points in the same direction. The fact that there is no contract, or that the contract has been prepared by somebody else, does not in my view, generally speaking, suffice in itself to render the scale fee inappropriate. I do not, however, wish it to be thought that we are deciding that in every case any solicitor who takes any part in the business leading up to the completed transfer of registered land must necessarily be entitled to the whole of the scale charge. I think that the principle stated in *Re Lacey & Son* (1) ((1883), 25 Ch.D. 301), applies to remuneration in respect of registered land as it does to remuneration with respect to unregistered land. In that case the court had to deal with the General Order under the Solicitors Remuneration Act, 1881, as originally framed, which provided for a scale fee, in language not materially different from that used in the Solicitors' Remuneration General Order as at present in force,

“for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)†.”

It will be observed that this language describes the remuneration as being “for” doing certain things, and that may be distinguished from the expression “The remuneration prescribed by the Schedule hereto covers”, which is the expression used in the Solicitors' Remuneration (Registered Land) Order, 1925. But having noted that difference, one does find at the conclusion of the description of the matters for which the scale remuneration was payable under the

* A new Sch. 2 was substituted by S.I. 1953 No. 117; see 20 HALSBURY'S STATUTORY INSTRUMENTS 203, for the text.

† The words quoted are from the scale set out in Part 1 of Sch. 1 to the Solicitors' Remuneration Order, 1883, as originally made; cf., 20 HALSBURY'S STATUTORY INSTRUMENTS 199.

A earlier order the words "including preparation of contract or conditions of sale, if any". Broadly speaking, then, the provision for scale remuneration in the order before the court in *Re Lacey & Son* (1) was similar to the provision for scale remuneration with which we are now concerned.

COTTON, L.J., after criticising certain charges in the bill before the court, said this (25 Ch.D. at p. 309).

B

"In my opinion the rules do not authorise the charging the percentage there mentioned, unless the work there mentioned as being the work for which it is chargeable has in substance been done."

Then LINDLEY, L.J., after dealing with a different matter on which the case in fact turned, said (at p. 310):

C

"This is all that it is necessary to decide; but a question of general importance has been argued on which we think it right to give our opinion. The bill is framed on the supposition that the new rules apply, and that supposition, I think, is right; but it is also framed on the supposition that Sch. 1 applies, and that, in my opinion, is wrong. I think that the 30s. per cent. can only be charged in the case provided for, viz., where substantially the whole of the work mentioned, i.e., deducing the title and perusing and completing the conveyance, is done. The rules cannot, in my opinion, be construed as authorising the solicitor to charge the percentage where he does nothing but peruse and complete the conveyance."

D

E

Then FRY, L.J., said (25 Ch.D. at p. 311):

F

"The clause of Sch. 1 which bears on the present case mentions four things—deducing the title, perusing the conveyance, completing the conveyance, and preparing contract or conditions of sale. It is not necessary in order to enable the solicitor to make the charge, that a contract or conditions should be prepared, the Schedule saying that the work for which the charge is made includes the preparation of the contract or conditions, 'if any;' but in my opinion the charge cannot be made unless the other three things are done. Here an important part of the business specified was not done. I think, therefore, that Sch. 1 is not applicable . . ."

G

That case does show that to earn the scale charge the solicitor must do substantially all the work which the charge is intended to cover. It, I think, also affords some support to the effect I have attributed in the present case to the use of the words "if any". That appears from the judgment of FRY, L.J. In the present case there can, I think, be no doubt that the solicitors did do substantially the whole of the work to which the scale charge related. They did not actually prepare or see to the completion of the contract; but, as my Lord has pointed out, the contract did contain imperfections which involved the solicitors in a good deal of work. It appears that the services of the previous solicitor in and about the preparation and completion of the contract were assessed at only £5 15s.

H

I

For the reasons which I have endeavoured to state, I agree with my Lord that the appeal should be allowed; but, in fairness to the taxing master, I may point out that the argument which has succeeded in this court was not in fact taken, or was not clearly taken, in the objections raised by the solicitors to the taxation. That appears, I think, from their reasons for objections. They are referred to in those reasons as the respondent, the applicant for the taxation being the client:

"The respondent contends that on the strict interpretation of art. 1 (H) of the Solicitors' Remuneration (Registered Land) Order, 1925, the scale charge prescribed in the Schedule to that order is applicable in this

case because there was necessarily a 'perusal' of the contract and conditions of sale as a preliminary to the performance of the remaining work referred to in the said art. 1 (H)."

So the solicitors were there seeking to say that they had, within the meaning of para. (H), perused the contract. The taxing master answered that objection, as I think, quite effectively. He said:

"It transpires that the sale was completed on the basis of such contract [that is, the contract previously prepared before the solicitor was employed] and that the respondent solicitors who had taken the matter over from the former solicitor prepared no further contract. These facts show quite clearly that a scale fee has not been earned. The work to be covered by a scale fee in these circumstances is set out in art. 1 (H) and (J) of the Solicitors' Remuneration (Registered Land) Order, 1925, and 1953. In such art. 1 (H) the words 'as the case may be' obviously mean 'according to whether acting for vendor or purchaser'."

In that view of the meaning of "as the case may be", the taxing master was right and, although the solicitors had a good point as regards the application of the scale fee, they sought to support it on the wrong ground, for it is reasonably plain that there was no perusal of the contract by them within the meaning of para. (H). The perusal there referred to is surely perusal by the purchaser's solicitor, preparation being by the vendor's solicitor, and "as the case may be" meaning "as may be appropriate having regard to the party for whom the solicitor is acting". The real issue may well have been obscured by the mistaken way, as I think it to have been, in which the solicitors sought to support the contention, in itself well founded, that the work here did fall within the work to be remunerated by means of the scale fee.

Accordingly, I agree that this appeal should be allowed.

Appeal allowed; bill remitted to the taxing master with a direction that the solicitors are entitled to the scale fee of £53 2s. 6d. in respect of the first item.

Solicitors: *Lesser, Fairbank & Co.* (for the appellants solicitors).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

A

ARMSTRONG v. CLARK.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, JJ.),
January 30, 1957.]

Street Traffic—Driving while under the influence of a drug—Over-action of insulin properly taken by a diabetic—Whether insulin a “drug”—Road Traffic Act, 1930 (20 & 21 Geo. 5 c. 43), s. 15 (1).

B

A diabetic, who had injected himself with his usual and prescribed dose of insulin and then had consumed a regulated meal, drove his car some hours later on a public road while in a coma caused by the over-action of the insulin. He was charged under s. 15 (1)* of the Road Traffic Act, 1930, with driving a motor vehicle while under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle. The charge having been dismissed by the justices on the ground that the motorist was not under the influence of a drug within the sub-section, the prosecutor appealed.

C

Held: the offence under s. 15 (1) of the Road Traffic Act, 1930, was established because insulin was a drug for the purposes of the sub-section; and the case would be remitted to the justices accordingly.

D

Per LORD GODDARD, C.J.: drink [in s. 15 (1)] means, I think, alcoholic drink (see p. 435, letter G, post) . . . drug means . . . something given to cure or alleviate or assist an ailing body (see p. 435, letter B, post).

Appeal allowed.

E

[**Editorial Note.** Section 15 (1) of the Road Traffic Act, 1930, has been amended by s. 9 (6) of the Road Traffic Act, 1956, by deleting the reference to being in charge of a motor vehicle. Section 9 of the Act of 1956 establishes an offence which replaces that under s. 15 (1) of the Act of 1930 in relation to being in charge of a motor vehicle when under the influence of drink or a drug. Presumably the present decision will apply equally to the meaning of the word “drug” in s. 9 (1) of the Act of 1956. Section 9 of the Act of 1956 was brought into force on Nov. 1, 1956, by the Road Traffic Act, 1956 (Commencement No. 1) Order, 1956 (S.I. 1956 No. 1491).

F

As to the offence of driving while under the influence of drink or a drug, see 31 HALSBURY'S LAWS (2nd Edn.) 674, para. 993.

For the Road Traffic Act, 1930, s. 15 (1), see 24 HALSBURY'S STATUTES (2nd Edn.) 589.]

G

Case referred to:

(1) *Thomson v. Knights*, [1947] 1 All E.R. 112; [1947] K.B. 336; [1947] L.J.R. 445; 176 L.T. 367; 111 J.P. 43; 2nd Digest Supp.

Case Stated.

This was a Case Stated by the justices for the County of Chester in respect of their adjudication as a magistrates' court sitting at Wilmslow. On Aug. 28, 1956, three informations were preferred by the appellant against the respondent that he on Aug. 13, 1956, at Over Alderley unlawfully did drive a motor car on a road called Macclesfield Road (i) when under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle contrary to s. 15 (1) of the Road Traffic Act, 1930, (ii) without due care and attention contrary to s. 12 of that Act and (iii) without reasonable consideration for other persons using the road contrary to s. 12 of that Act.

I

The following facts were found: (a) that the respondent was a registered pharmaceutical chemist and had suffered from diabetes for the past twelve years; (b) that at or about 6.10 p.m. on Aug. 13, 1956, the respondent returned from his place of employment to his residence and after taking by injection his usual and prescribed quantity of eighteen units of soluble insulin B.D. and consuming a regulated meal, he drove in his motor car to a cinema at Wilmslow, a distance

* The relevant terms of s. 15 (1) are printed at p. 435, letter D, post.

of approximately two miles arriving at 6.40 p.m.; (c) that at or about 9.0 p.m. on the same day the respondent, who was unaccompanied, commenced to leave the cinema and remembers no more than that he walked or was walking down the steps at the entrance of the cinema; (d) that he did in fact get into his motor car which he then drove from Wilmslow to Alderley Edge and then along a road known as Macclesfield Road and that at a point approximately four miles from the cinema his car left the roadway, went through the nearside hedge into an adjoining field, travelling a distance of some two hundred yards until it stopped in gear; (e) that the respondent was discovered by the landowner at or about 10.15 p.m. on the same night sitting rigidly at the wheel of his motor car but in a semi-comatose state; (f) that the respondent was taken to the Macclesfield General Infirmary and examined at 11.35 p.m. by the resident surgical officer; (g) that the respondent had not sustained any apparent injury and was at the time of his examination in a hypoglycaemic coma due to the over-action of the insulin injection which he had taken earlier; (h) that according to the medical evidence (i) insulin was a hormone normally secreted by the pancreas and in the case of a diabetic the pancreas failed to manufacture insulin, which had therefore to be extracted from the pancreas of sheep or cattle and thereafter injected into the patient, and that, as taken by a diabetic, insulin was not a drug and without such injections the respondent would not live, and (ii) a diabetic suffering from a hypoglycaemic attack might, in its initial stages and prior to the onset of total unconsciousness, act as an automaton and with complete amnesia of his actions and surroundings.

The appellant contended that the respondent, whilst driving the motor car after leaving the cinema was under the influence of a drug, namely, insulin, to such an extent as to be incapable of having proper control over his vehicle, and was also guilty of driving without due care and attention or without reasonable consideration for other road users. The respondent contended that on the medical evidence his taking of insulin was not the taking of a drug but the replacement of an essential hormone which his body mechanism was unable to secrete and of which it was therefore totally deficient; that he was not under the influence of a drug within the meaning of s. 15 (1) of the Road Traffic Act, 1930, and that being totally unaware that he was driving a motor car he could not be guilty of the offence of driving without due care and attention or without reasonable consideration for other road users. The justices were of opinion that the respondent's submissions were well founded and dismissed the informations. The questions for the opinion of the High Court were (a) whether the taking of insulin by the respondent was in the circumstances which occurred such as would make him liable to be found guilty of an offence under s. 15 (1) of the Road Traffic Act, 1930, and (b) whether the respondent committed such offence or an offence contrary to s. 12 of the Road Traffic Act, 1930.

R. J. Parker and F. P. Neill for the prosecutor, the appellant.

S. G. Howard, Q.C., and J. W. Da Cunha, for the motorist, the respondent.

LORD GODDARD, C.J.: In spite of the argument of counsel for the respondent which, as we should expect, was put in the most attractive form, in my opinion this is a very clear case.

The respondent was charged before the justices, first of all, with being under the influence of a drug to such an extent as to be incapable of having proper control of the vehicle contrary to s. 15 (1) of the Road Traffic Act, 1930.

Unfortunately the respondent is a diabetic. We know that modern science has not only found the cause of diabetes but has found a remedy—not a remedy which cures but one which enables a diabetic to continue his ordinary avocations. It supplies the deficiency which causes the condition, so that with the assistance of insulin the diabetic can live an ordinary normal life. The respondent is himself a pharmaceutical chemist, and so ought to know about the action of these things, but I am not laying any stress on that. [His Lordship referred

A to the Case Stated, reading paras. (c), (d) and (g) which are set out at p. 434, letters A to C, ante. His LORDSHIP continued:] What is found is that his condition was due to an injection of insulin. He perfectly properly takes insulin because it has been prescribed for him: unfortunately it may have this effect on a person.

B The only question which the justices ask this court is whether the taking of insulin by the respondent was, in the circumstances which occurred, to be regarded as taking a drug which would make him liable to be found guilty of an offence under s. 15 (1). In my opinion, for the purposes of this Act, it is a drug. Many things which are not drugs can be taken by a person, but a drug means what I might for convenience call a medicant or medicine, something given to cure or alleviate or assist an ailing body. That is one definition. The definitions C which are given in the OXFORD DICTIONARY are very comprehensive, but I do not think that the ordinary person would have any doubt that a person taking insulin is taking what, in ordinary parlance, would be called a drug in the sense of a medicine.

The statute is perfectly clear. Section 15 (1)* says:

D "Any person who when driving or attempting to drive, or when in charge of, a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable . . ."

E to a penalty. The penalty, I need hardly say, is entirely at the discretion of the bench. In *Thomson v. Knights* (1) ([1947] 1 All E.R. 112) I was discussing a self-induced state of incapacity, and I was distinguishing a case where the state of incapacity is caused by something that the man does from the case where the state is caused by something that he does not do, such as a drug or heart attack or some illness. I went on to say, however, and I adhere to the view that I expressed, that the offence was being in charge of the car when in this particular state of incapacity, providing the incapacity is caused by drink or F a drug.

I do not think that it is necessary to consider the ingenious point counsel for the respondent took whether a non-alcoholic beverage is drink within the meaning of the Act. If it were necessary to do so, I should be inclined to apply the dictum of MARTIN, B., which is on record, where the bailiff was sworn to keep the jury without meat or drink, or any light but candlelight, and a G juryman asked if he might have a glass of water. MARTIN, B., said:

"Well, it is certainly not meat and I should not call it drink. He can have it."

I think that drink means alcoholic drink.

H It is impossible to say that this motorist was not under the influence of a drug, and therefore I think that the case must go back with a direction that insulin is a drug for the purposes of this section. The offence has been committed, but I am not inclined, and my brothers think the same, to send back the other two informations, one which charges him with driving without due care and attention, and the third for driving without reasonable consideration for other persons using the road. It is only fair to him to say that he did drive off the road. At any rate, it is not necessary to send those back because one I does not want to prosecute a man twice for the same circumstances. If he was driving without due care and attention it was because he was under the influence of a drug. This case must go back with a direction that the justices may take into account a great many things, but they must remember, and everyone must remember, that this section was designed for the protection of the public, and if people happen to be in a condition of health that renders them subject to going into a coma, or forces them to take remedies which may

* As to the subsequent amendment of the sub-section see p. 433, letter E, ante.

send them into a coma, the answer is that they must not drive because they are a danger to the rest of Her Majesty's subjects. It is enough to say that we send this case back to the justices, answering their question* by saying that the taking of insulin in such circumstances as occurred would make him liable to be found guilty of the offence, and that he did commit the offence under s. 15 (1) of the Act; but we do not send back the other summonses under s. 12.

CASSELS, J.: I agree. I am of the view that s. 15 (1) of the Road Traffic Act, 1930, was particularly worded in the way in which it appears, namely,

"Any person who when driving or attempting to drive, or when in charge of [but this has now been modified†], a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable . . ."

and then follow the consequences.

I would define the word "drug" as being a substance used as a medicine. The mischief, against which this section seeks to provide, is that of going on to a road with a dangerous thing like a motor vehicle and being under the influence of a drug to such an extent as to be incapable of having proper control of that vehicle. The statute makes that an offence. It is little consolation to anybody who should unfortunately be injured by a person driving when under the influence of a drug, for him to be told that the driver was under the influence of a drug and therefore it was not his fault. The question may well arise in some future case, and will then have to be decided, whether a person was negligent if he drove whilst under the influence of a drug. This drug is applied by injection. The insulin is injected into the system, and any one of us who has been in the army knows very well that after inoculation against certain diseases one certainly does not feel in a condition to have charge of a motor vehicle.

In my opinion this case should go back to the justices in the manner suggested by my Lord. I agree with the course proposed.

LYNSKEY, J.: I agree. Section 15 (1) of the Road Traffic Act, 1930, was passed for the purpose of protecting the public using the roadways. In my view, the prosecution have to prove two things in order to succeed: First they have to prove that the person accused was either driving or attempting to drive or in charge of a motor vehicle on a road or public place. Secondly, they have to prove that he was under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle. Having proved those two things, in my view the prosecution have proved the case for which the section provides. I say that because it is quite clear that Parliament, in passing this particular section, was very concerned about persons driving on the public roads in a state of being either under the influence of drugs or drink; because sub-s. (2) of the same section makes it compulsory on the justices who convict of this particular offence to disqualify the person from driving for the next twelve months, unless there are special circumstances. I think the section was intended to keep off the roads, so far as it could, people attempting to take control, or having control, while not having the power to do so through drink or drugs. I am satisfied that on the ordinary definition insulin would be treated as, and is, a drug. In those circumstances, I agree with what my brothers have said.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Hugh Carswell*, Chester (for the prosecutor, the appellant); *Charles Russell & Co.*, agents for *Skelton & Co.*, Manchester (for the motorist, the respondent).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

* The question is set out at p. 434, letter G, ante.

† As to the amendment of s. 15 (1) see p. 433, letter E, ante.

A MORGAN v. CARMARTHEN CORPORATION.

[CHANCERY DIVISION (Danckwerts, J.), January 15, 1957.]

Costs—Taxation—Solicitor and client—Standard to be adopted—Contempt of court—Motion for committal or attachment—Applicants' costs of motion.

B The applicants moved to commit the respondents, who were the editor and a reporter of a newspaper and a third person, the plaintiff in an action in which the applicants were defendants, for contempt in writing, publishing or procuring to be published an article in the newspaper. On the hearing of the motion the respondents apologised, and no order was made except that the respondents should pay the applicants' costs of the motion as between solicitor and client. The applicants paid the fees of their leading counsel and junior counsel on the motion. The leading and junior counsel had been retained by the applicants in the action in which they were defendants, and in which the motion had been brought. On taxation of the costs of the motion as between the applicants and the respondents the taxing master disallowed two-thirds of the brief fees of the applicants' leading and junior counsel on the grounds that the order for taxation entitled the applicants to what was in substance a party and party taxation but on more generous lines, and that the fees allowed were adequate having regard to R.S.C., Ord. 65, r. 27 (29).

D **Held:** the full brief fees of leading and junior counsel would be allowed in the costs of the applicants because the order for costs, being made on a motion to commit for contempt, was of a punitive nature, and the intention of the order was that the applicants should be indemnified for the costs of the motion.

E Dictum of BUCKLEY, L.J., in *Giles v. Randall* ([1915] 1 K.B. at p. 295) considered and not applied.

[**Editorial Note.** This case provides a further illustration of the difficulty that results from using the description "as between solicitor and client" to import different measures of generosity on taxation of costs (compare, for a further instance, *Re Adelphi Hotel, Ltd.*, [1953] 2 All E.R. 498 at p. 501, letter D). A clear distinction may be drawn between taxation as between a solicitor and his own client on the one hand and taxation between different parties to litigation on the other hand. In the latter instance, however, there are at any rate two possible variants, viz., (i) where a party to litigation is to receive indemnity for his costs and (ii) where the costs are to be borne by a fund (e.g., a trust fund) rather than to be paid by a party. The recommendation made by the EVERSHED COMMITTEE in their final report (July, 1953; Cmd. 8878, paras. 720, 721) was that the term "solicitor and client" costs should be replaced by "full action" costs.

G As to costs between solicitor and client, see 26 HALSBURY'S LAWS (2nd Edn.) 101, para. 190, and 31 HALSBURY'S LAWS (2nd Edn.) 212, para. 236.

H As to brief fees, see 3 HALSBURY'S LAWS (3rd Edn.) 80, para. 129.

For R.S.C., Ord. 65, r. 27 (29), see the ANNUAL PRACTICE, 1957, 1550.]

Cases referred to:

- (1) *Giles v. Randall*, [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; Digest (Practice) 936, 4756.
- I (2) *Goodwin v. Storrar*, [1947] 1 All E.R. 203; [1947] K.B. 457; [1947] L.J.R. 1013; 2nd Digest Supp.
- (3) *Reed v. Gray*, [1952] 1 All E.R. 241; [1952] Ch. 337; 3rd Digest Supp.

Summons for review of taxation.

By a writ dated Mar. 28, 1955, the plaintiff, Keble Morgan, commenced an action against Carmarthen Corporation to establish his right to compete with others on market days in a market owned by the corporation. This action had not yet been heard. The corporation (referred to hereinafter as "the applicants") by notice of motion, dated Feb. 27, 1956, in the action applied for the

committal to prison of, or for leave to issue writs of attachment against, a reporter of the "Daily Sketch", the editor of the "Daily Sketch" and the plaintiff (referred to hereinafter as "the respondents"), for their respective contempts of the court in writing, publishing and procuring to be published in the "Daily Sketch" of Feb. 22, 1956, an article or item of news. The motion was heard before VAISEY, J., on Mar. 2, 1956, and, the respondents by their counsel apologising and expressing their regret for the writing, publishing and procuring to be published of the article or item of news, no order was made on the motion except that the respondents should pay the applicants' costs of the motion, such costs to be taxed by the taxing master as between solicitor and client.

The leading counsel and junior counsel retained by the applicants in the action had appeared for them on the motion. On taxation, the taxing master had reduced the fee of leading counsel and the appropriate fee of junior counsel to one-third of the sum marked on their briefs. The fees had been paid by the applicants. The objections to the taxation taken by the applicants were (among others) that, in an action of importance to the defendants, a serious criminal charge had been made and established; that, although the respondents had apologised, they had all argued strenuously and persistently by leading counsel that there had been no contempt; that it was clearly proper for the applicants to brief leading counsel and, in view of the retainer, they were in etiquette bound to brief leading counsel and junior counsel retained in the action; that the object of obtaining solicitor and client costs was, if not to give a complete indemnity, at least to provide for payment of costs on a more generous scale than as between party and party; that, on the finding of the master, the applicants, who had been the victims of a criminal contempt of court, would be substantial losers by having taken steps to obtain justice; that the proceedings for contempt had a public character in that they were necessary to uphold justice; and that, for these reasons, the amount allowed for leading counsel and the proportionate fee for junior counsel were too low. The taxing master having overruled these objections*, the applicants applied for the taxation of costs to be reviewed and for the objections to be allowed.

Nigel Warren for the applicants (the defendants in the action).

H. P. J. Milmo for the respondent, Keble Morgan (the plaintiff in the action).

DANCKWERTS, J.: This is an application to review taxation by the taxing master. I am not concerned with the merits of the action, which relates to a market owned by the applicants, Carmarthen Corporation, and has not yet come to trial. The question before me is whether the taxing master was right in reducing the fees of leading counsel and junior counsel, respectively, appearing on behalf of the applicants on a motion to commit or for leave to issue writs of attachment against the plaintiff in the action, the editor of the "Daily Sketch" and a reporter of the "Daily Sketch", to one-third of the figures marked on their briefs, which fees had in fact been paid by the applicants. Each counsel had been retained by the applicants in the action prior to the motion. VAISEY, J., heard the motion, and, although it was contended on behalf of the respondents that no contempt had been committed, it is plain that the learned judge rejected this contention and was of opinion that the respondents had been guilty of contempt, and he ordered them to pay the applicants' costs as between solicitor and client. The present application by the applicants is to review the taxation which has been made of those costs.

The taxing master's answers to the objection taken by the corporation on the taxation were as follows:

"The order made on this interlocutory motion was for payment by the respondents of the applicants' costs of the motion as between solicitor and

* The master's answers to these objections are printed *supra*, and at p. 439, letter A.

A client, which is the strictest of three bases of solicitor and client taxations. The order entitles the applicants in effect to party and party costs, but on more generous lines. On this basis, after careful consideration and giving due weight to the importance of the case, and applying the standard laid down in R.S.C., Ord. 65, r. 27 (29), I am of opinion that one hundred guineas is a fair and adequate fee for leading counsel on this motion with junior
B counsel's fee in proportion. I accordingly overrule these objections."

No doubt, the master, in framing his answers, had in mind *Giles v. Randall* (1) ([1915] 1 K.B. 290), the headnote of which refers to R.S.C., Ord. 65, r. 27 (29), which reads:

C "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other
D unusual expenses."

In *Giles v. Randall* (1) BUCKLEY, L.J., said ([1915] 1 K.B. at p. 295):

E "There are three modes of taxation as between solicitor and client. The first is where a client is taxing his own solicitor's bill of costs, commonly called taxation as between solicitor and own client. The second is where the costs are to be paid out of a common fund in which the client and others are interested. This case does not come within either of those two classes. The third is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest. The present case falls within this last mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the defendant. A practice
F has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is too firmly established for this court to interfere with it, though it may be a matter proper to be considered by the Rule
G Committee. I have no doubt that litigants who stipulate for and by agreement are to receive costs as between solicitor and client often intend to get an indemnity in respect of costs."

My comment on that paragraph is that, if that be the law, what a deplorable state the law has got into. There are three different interpretations of the same
H words "solicitor and client", apparently, and it seems that, at any rate in cases which fall within what is described as the third class in that division, the successful litigant, instead of getting back what he has had to spend for the purpose of procuring the result, is to get nothing more than party and party costs, with some slight allowance of a minor nature.

The question is whether that third class does, in fact, apply in the present case.
I It is apparent that the review of BUCKLEY, L.J., is not entirely exhaustive, for in *Goodwin v. Storrar* (2) ([1947] 1 All E.R. 203) DENNING, J., reached the conclusion that, for the purposes of an action by a person claiming damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, 1846, there was a fourth interpretation to be given to the words "as between solicitor and client" for the purpose of taxation of costs, and he gave what he considered to be the natural, ordinary meaning to the words, that is, an inquiry as to the costs which the client ought properly to pay to his own solicitor as distinct from "taxation between party and party". It is true that

that case before DENNING, J., concerned R.S.C., Ord. 22, r. 14, which directed how the costs were to be paid, and R.S.C., Ord. 65, r. 27 (29), had no application. In *Reed v. Gray* (3) ([1952] 1 All E.R. 241) ROXBURGH, J., distinguished *Goodwin v. Storrar* (2), although he introduced some qualification on the severity of a strict application of taxation between solicitor and client according to the third rule of the enumeration of BUCKLEY, L.J., by saying that the taxing master ought to be as generous as he could.

When I come to consider whether in the present case the court is restricted by the limiting description by BUCKLEY, L.J., in *Giles v. Randall* (1), I find that even within the limits described by BUCKLEY, L.J., there are three different scales apparently delineated by the words "as between solicitor and client", and it may be that I have a class of case which does not come within the classes mentioned by BUCKLEY, L.J., at all, so that the words "as between solicitor and client" may have a different meaning from the meaning attributed to these words in the particular order in the case before the Court of Appeal in *Giles v. Randall* (1).

What is the nature of the present case? It is an application against persons who have been guilty of contempt of court for their committal or attachment, and it is well established by a number of cases to which I have been referred that such a case is in the nature of a criminal information. It is the kind of application of which one has considerable experience in this Division, and it has been my experience that costs are not awarded against a respondent to such an application unless the court is of the opinion that the respondent has been guilty of contempt and thus deserving of punishment, although it may be that he was not deserving of extreme punishment, such as committal to prison. When costs are awarded against such a respondent as between solicitor and client, it is, as counsel for the applicants contended, because of the fact that the court desires to show, first, its disapproval of the conduct of the respondent, and secondly, that the application by the applicant is justified.

It seems to me that an award of costs as between solicitor and client against the respondent in these circumstances is of a punitive nature, and, that being so, it seems to me that the case has nothing whatever to do with the third class of case mentioned by BUCKLEY, L.J., in *Giles v. Randall* (1). It is a case in which a penalty has been imposed on the guilty respondent. In my opinion, it is intended that the successful applicant should receive costs substantially on an indemnity basis. It, therefore, seems to me that, in the present case, the taxing master has gone wrong in principle. So far as I am aware, there has been no decision interpreting an order as to costs in a contempt case either one way or the other. It seems to me that, in accordance with the practice of the court in this Division, and the intention of an order for payment of costs as between solicitor and client, the applicants should be exonerated from the expenses which they have incurred in having to apply for the committal or attachment of the respondents. The order must be reviewed, and I direct that the costs of the applicants should include the full fees of leading counsel and his junior on the motion before the court.

Order accordingly.

Solicitors: *Boxall & Boxall* (for the applicants); *Sweepstone, Walsh & Son* and *Rhys Roberts & Co.*, agents for *W. Davies & Jenkins*, Llanelly (for the respondent).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A WOOTTON v. CENTRAL LAND BOARD.

[COURT OF APPEAL (Lord Evershed, M.R., Denning and Romer, L.JJ.), January 14, 15, 1957.]

Costs — Lands Tribunal — Discretion — Judicial exercise — Determination of development value by Central Land Board—Appeal to Lands Tribunal—Successful party overstating case—Deprived of costs—Hearing fees—Lands Tribunal Act, 1949 (12, 13 & 14 Geo. 6 c. 42), s. 3 (5), (6)—Lands Tribunal Rules, 1949 (S.I. 1949 No. 2263), r. 52.

The Central Land Board determined the development value of freehold land for the purposes of the Town and Country Planning Act, 1947, s. 58, as being £44,500. The landowner appealed to the Lands Tribunal against the determination, claiming that the development value was £217,517. The tribunal found that the board had made a wrong assumption in reaching its figure, and accepted the landowner's method of arriving at the unrestricted value. The tribunal also found that the landowner, in reaching his figure for the development value, had failed to take sufficient account of delays and risks which would occur in the carrying out of the projected development and was wrong in assuming an early execution of his plan for development. After making such adjustments as the tribunal thought necessary in the landowner's valuation, the tribunal held that the development value was £102,500. Having regard to the mistaken assumptions made both by the landowner and the board, the tribunal made no order as to costs. On appeal by the landowner against the order as to costs, counsel for the parties assenting to the making of such fractional award as seemed just in consequence of the decision of the appeal,

Held: the tribunal had ignored the facts that the application to it was in the nature of an appeal and that the claim put forward by the landowner was right in principle, and accordingly had seriously misdirected itself in relying on the erroneous estimates made by both sides as justifying the making of no order as to costs; the tribunal's order as to costs would be discharged and the Central Land Board would be ordered to pay one half of the hearing fee and of the landowner's other taxed costs of the proceedings.

Dictum of LORD GODDARD, C.J., in *Lewis v. Haverfordwest Rural District Council* ([1953] 2 All E.R. at p. 1599) considered.

Le Witt v. Cannon Brookes ([1956] 3 All E.R. 676) distinguished.

Per LORD EVERSLED, M.R.: it is desirable that the Lands Tribunal should deal specifically with the hearing fee and say by whom or in what proportion it should be paid, thereby getting rid of any possible question which one or other party might raise as to the vires of r. 52 of the Lands Tribunal Rules, 1949 (see p. 449, letter D, post; cf., p. 445, letters C to E, post).

Appeal allowed.

[For the Lands Tribunal Act, 1949, s. 3 (5), (6), see 28 HALSBURY'S STATUTES (2nd Edn.) 322.

For the Lands Tribunal Rules, 1949, r. 52, see 12 HALSBURY'S STATUTORY INSTRUMENTS 176.]

Cases referred to:

- (1) *Campbell (Donald) & Co., Ltd. v. Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1093; 137 L.T. 656; 36 Digest (Repl.) 366, 42.
- (2) *Lewis v. Haverfordwest Rural District Council*, [1953] 2 All E.R. 1599; 3rd Digest Supp.
- (3) *Pitkin v. Sanders & Forster, Ltd.*, (1923), 128 L.T. 789; 16 B.W.C.C. 5; 34 Digest 482, 3980.
- (4) *Ritter v. Godfrey*, [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; Digest (Practice) 854, 4002.
- (5) *Le Witt v. Cannon Brookes*, [1956] 3 All E.R. 676.
- (6) *Gold v. Brighton Corpn.*, [1956] 3 All E.R. 442,

Case Stated.

This was a Case Stated by the Lands Tribunal (CECIL H. BAILEY, Esq.), for the decision of the Court of Appeal pursuant to the Lands Tribunal Act, 1949, s. 3 (4).

The appellant, Stanley Thomas Wootton, appealed to the Lands Tribunal against the determination of the Central Land Board of development value for the purposes of s. 58 of the Town and Country Planning Act, 1947, dated May 17, 1954, by which that value of the freehold interest of the appellant in certain land on July 1, 1948, was determined to be £44,500 being the difference between £52,000, the unrestricted value, and £7,500, the restricted value. The appellant claimed that the unrestricted value of the land was £225,017 which, after deducting the agreed restricted value of £7,500, left an amount of £217,517 as the development value. The grounds of appeal were (inter alia) that on July 1, 1948, the appellant was in possession of a planning consent for the development of a garden city project known as the Walton Downs Garden City. This project was prepared by an eminent town planning expert, Mr. Z. Zaidel, and was known as "the Zaidel Plan". The planning consent was granted by Banstead Urban District Council on Oct. 22, 1938. There was a fundamental difference in the approach of the valuers called before the tribunal. The valuers who gave evidence on behalf of the appellant based their valuations on the Zaidel plan, calculating the unrestricted value from the residual value remaining to the owner of the land after the costs of laying out and dividing into plots had been deducted from the final amount estimated to be received from the sale of the plots and after allowing a profit to the developer. The district valuer called on behalf of the Central Land Board rejected the Zaidel plan as a basis from which the unrestricted value should be calculated and based his valuation on certain net figures per foot frontage for land fronting existing roads and certain net figures for the back land. The tribunal found on Feb. 6, 1956, that the Central Land Board was wrong in assuming that the Zaidel plan would never be carried out and accepted the appellant's method of arriving at the unrestricted value. It further found that the appellant's valuation was open to some criticism in detail principally because he had not taken sufficient account of the delays and risks which would occur in the execution of the plan, and that the appellant was wrong in assuming an early execution of this plan. After making such adjustments as were found necessary in the appellant's valuation the tribunal held that the appellant's claim for a development value of £217,517 should be reduced to £102,500 (i.e., by fifty-three per cent.). The tribunal accordingly directed that the appeal be allowed and that the determination of the Central Land Board be altered by substituting a development value of £102,500 for the development value of £44,500 determined by the board. The hearing of the case occupied five days. In considering the question of costs the tribunal decided in exercise of its discretion that having regard to the mistaken assumptions made both by the appellant and by the Central Land Board there should be no order awarding costs to either side. The appellant now appealed to the Court of Appeal on the question of costs only.

R. D. Stewart-Brown for the appellant.

E. H. Blain for the Central Land Board, the respondent.

LORD EVERSHERD, M.R.: This appeal on a Case Stated by the Lands Tribunal is unusual since the question raised as a question of law for this court relates exclusively to the matter of costs. The short facts leading up to the Case Stated are these: the appellant, Mr. Wootton, owns and at all relevant dates owned a substantial area of land not very far from Tattenham Corner on Epsom Downs, and it appears that in 1938 he obtained planning consent for the development of this piece of land as a garden city. The project for such development is associated with the name of a planning expert, a Mr. Zaidel, and I refer to his name because in the course of the case the method of valuation

A put forward on Mr. Wootton's behalf was also associated with Mr. Zaidel's name.

The matter first came before the Central Land Board for the ascertainment of the development value of this piece of land for the purposes of the Town and Country Planning Act, 1947, s. 58. It will be borne in mind that the scheme of that Act has since been superseded; but it remains necessary in such a case as the present that the development value of the land should be ascertained, since that value when ascertained is, to put it no higher, relevant on any future refusal of planning authority for Mr. Wootton or on the compulsory acquisition of any part of his land. The claim for development value which Mr. Wootton put forward throughout the proceedings was a claim not far short of a quarter of a million pounds. The Central Land Board which determined the development value pursuant to the Act of 1947 and the Claims for Depreciation of Land Values Regulations, 1948 (as amended), made thereunder, assessed the development value at a very much less figure, viz., £44,500. Mr. Wootton was dissatisfied with that assessment, and accordingly, in pursuance of his statutory right so to do, he became an applicant before the Lands Tribunal for the determination by that tribunal of the true figure. I shall come back presently to make some references to the statutory provisions to which I have very briefly alluded; but, to complete the narrative, the Lands Tribunal was of opinion that the true development value of the land lay somewhere between the two figures, the quarter of a million or thereabouts propounded by Mr. Wootton and the £44,500 determined by the Central Land Board. The Lands Tribunal assessed the value at £102,500, and, as a matter of arithmetic, it appears that that figure represents a reduction by fifty-three per cent. of the figure for which Mr. Wootton had contended.

The judgment giving that conclusion (which is dated Feb. 6, 1956) concluded with the eight words: "There will be no order as to costs". Thereupon Mr. Wootton requested that a Case should be stated for this court on that last matter. Before I refer to the Case Stated, I will go back to make my references to the statutes and the relevant rules. I need not take time by referring, except very briefly, to the Claims for Depreciation of Land Values Regulations, 1948, made under the Town and Country Planning Act, 1947, s. 60; it suffices to say that under that Act and the rules, cases in which a party, a claimant, is dissatisfied with the determination of the Central Land Board were to be taken to the arbitrament of an arbitrator. Regulation 13 of the Regulations of 1948 is perhaps worth some reference. By para. (1) it is provided that if (inter alia) the claimant disputes the development value as determined by the board, then the dispute shall be referred to and settled by an arbitrator appointed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919. Paragraph (4) states that the arbitrator shall by his award either confirm the development value as determined by the board under para. (5) of the previous regulation, or direct the board to alter the development value, and so on. There is finally in para. (7) a provision that it is competent for the claimant and the board to agree a figure at any time before final determination by the arbitrator. Those provisions were substantially altered or superseded as a matter of procedure by the Lands Tribunal Act, 1949, and the Lands Tribunal Rules, 1949, made thereunder; but I have referred to the paragraphs, and particularly to reg. 13 (4), because they indicate that the proceedings where a claimant disputes a development value fixed by the Central Land Board may fairly, I think, be described, as counsel for the appellant described it, as an "appeal" to another body having the right, as pointed out in the paragraph, either of affirming the development value or of altering it.

I come now to the Lands Tribunal Act, 1949. Section 1 of that Act constituted the Lands Tribunal, and provided, by sub-s. (3) (d) that there should be referred to and determined by the Lands Tribunal

"any dispute arising in relation to the determination of the development

values of interests in land by the Central Land Board or other authority prescribed under s. 60 of the Town and Country Planning Act, 1947.” A

I pass to s. 3, which deals with procedure, appeals, costs and the like. Section 3 (4) is as follows:

“A decision of the Lands Tribunal shall be final: Provided that any person aggrieved by the decision as being erroneous in point of law may, within such time as may be limited by rules of court, require the tribunal to state and sign a case for the decision of the court and, where the decision of the Lands Tribunal is given on a review by way of appeal of the previous decision of another person, that person if dissatisfied with the decision of the Lands Tribunal shall be treated for this purpose as a person aggrieved thereby.” B

It was under the terms of that proviso that the Case Stated on this matter of costs was put forward, and it is, of course, essential to the appellant's case that the point which arises should be a point of law. The appellant must satisfy us that the decision as to costs which I have already stated, was erroneous in point of law. Section 3 (5) and (6) provide so far as relevant: C

“(5) Subject to the following provisions of this section the Lands Tribunal may order that the costs of any proceedings before it incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid . . .” D

“(6) Subject to the provisions of this Act, rules may be made for regulating proceedings before the Lands Tribunal and, subject to the approval of the Treasury, the fees chargeable in respect of those proceedings, and may in particular—(a) make provision—(i) as to the form in which any decision of the tribunal is to be given . . . (ii) as to the time within which any proceedings before the tribunal are to be instituted; (iii) as to the evidence which may be required or admitted in any such proceedings.” E

It was under the powers of sub-s. (6) that the rules known as the Lands Tribunal Rules, 1949, were promulgated. Rule 42 provides, under the heading “Costs”:

“(1) Except in cases to which the provisions of sub-s. (1), sub-s. (2) or sub-s. (3) of s. 5 of the Act of 1919 apply, the costs of and incidental to any proceedings shall be in the discretion of the tribunal.” F

Section 5 (1), (2) and (3) of the Act of 1919 do not affect this case. Rule 52 is in these terms: G

“The fees specified in Sch. 3 to these rules shall be payable to the registrar . . . by means of stamps . . . The hearing fee shall, unless otherwise directed by the tribunal, be payable by the appellant or party by whom the proceedings were instituted (without prejudice to his right to recover the amount of the fee from any other party by virtue of any order as to costs) on receipt of notification from the registrar.” H

Schedule 3* contains a list of fees. Some of them are of a relatively trifling character; for example, on a notice of appeal against a determination†, a fee payable by means of an impressed stamp of 20s. The hearing fees in cases of this sort are indeed heavy. In the present case, since the hearing fee depends on the amount of the award, the hearing fee is in the region of £500; and, as will be apparent from r. 52 the rulemaker intended that the hearing fee should be paid by the appellant (in this case) or the claimant without prejudice to any order which the tribunal might make in regard to it. I

* The Schedule has been amended by the Lands Tribunal (Amendment) Rules, 1951 and 1955 (S.I. 1951 No. 2004; S.I. 1955 No. 54).

† Other than a determination by the Commissioners of Inland Revenue under the Finance (1909-10) Act, 1910.

A I have taken a little time making reference to these rules for this reason: the effect of the simple order "No costs either side" was, quoad the hearing fee, that the whole of it was paid by the appellant. I have felt, I confess, a little doubt in my mind whether really the Lands Tribunal so intended. After all, this was not like the stamp duty on a document: it was substantially a fee payable for the services of the tribunal, and we were informed that the fixing of fees on the scale on which they have been fixed was with the no doubt laudable object of making the Lands Tribunal self-sufficient in respect of finance. Still, when the matter is examined, as I shall have to examine it later, it remains to me a little surprising that, consistently with the order which the Lands Tribunal made, the appellant had to pay the whole of this very substantial hearing fee. The matter goes somewhat further: if that is the result, then it depends on the circumstance that the rules made under the Act have put the obligation to pay that fee, in the absence of some order to the contrary, on the applicant or claimant; and though in the circumstances of this case and of the conclusion which I have reached it is unnecessary for me to express a final view about it, it is to my mind at least open to question and may at some time have to be decided, whether it was *intra vires* the rule-making authority's powers to make rules not merely regulating the fees, that is to say, fixing their amount, but also deciding on whom the burden of the fees should be made to fall. I read the first paragraph of r. 42 of the rules saying that the costs of the proceedings should be in the discretion of the tribunal. I am disposed to think that that rule adds nothing in fact to the terms of s. 3 (5) of the Act which I have already read; but if it did add anything to it, then again the question might arise: by what power was the rule-making authority invested with the right to say that the costs should be in the discretion of the tribunal? And the passages that I have read from sub-s. (6) lend at any rate some force to the argument that a power to regulate proceedings and regulate fees does not comprehend a power to say who pays the fees when so regulated. Except for the hearing which this matter has on the more general question, I do not need to take further time now on it.

I return to the Case Stated. It might, I think, be of assistance if I followed counsel for the board in making this reference to the determination of Feb. 6, 1956. To make what I am about to read plain, I will state that the case of the appellant for the very large figure which he claimed, was supported by two expert valuers, and they proceeded as a matter of principle on the basis of what I have already called the Zaidel plan, i.e., they proceeded on the footing that it should be ascertained on the basis of that plan when put into execution what in the end the landowner would make out of it, allowance being made for his costs in lay-out and also for the circumstance that buyers of the plots in the planned garden city would themselves not become buyers in a purely altruistic spirit. On the other hand, the valuer for the Central Land Board had contended that the Zaidel plan had nothing to do with it and should be left entirely out of consideration. He said that the value should be arrived at by taking a figure of so much per foot frontage on the roads. This was the concluding part of the judgment of the Lands Tribunal:

I "For these reasons, I accept Mr. Hanscomb's method of arriving at the unrestricted value as supported by Mr. Oliver, Mr. Wootton's valuer. I find, however, that Mr. Hanscomb's valuation is open to some criticism in detail, principally in that he has not taken sufficient account of the probable delays and risks which on July 1, 1948, a purchaser would contemplate in offering a price. I have gone all through Mr. Hanscomb's calculations and I have made such adjustments as I find necessary, in the light of the evidence adduced at the hearing, and I have come to the conclusion that the proper unrestricted value in this case is"

and then he gives the figure I have already mentioned of £102,500.

In the Case Stated the Lands Tribunal first of all sets out the narrative which has already been sufficiently covered by my judgment, and proceeds as follows in para. 7: A

"(a) I found that the Central Land Board was wrong in assuming that the Zaidel plan would never be carried out and I accepted the appellant's method of arriving at the unrestricted value. (b) I found that the appellant's valuation was open to some criticism in detail principally because he had not taken sufficient account of the delays and risk which would occur in the execution of the plan, and that the appellant was wrong in assuming, as he did, an early execution of this plan. (c) After making such adjustments as I found necessary in the appellant's valuation, I found that the appellant's claim for a development value of £217,517 should be reduced to £102,500 (that is by fifty-three per cent.). (d) I accordingly directed that the appeal be allowed and that the determination of the Central Land Board be altered by substituting a development value of £102,500 for the development value of £44,500 determined by the board." B
C

I emphasise in reading the language of the Lands Tribunal the words used and, as I think, not improperly used in view of reg. 13 of the Regulations of 1948: "I directed that the appeal be allowed". The Case Stated continues: D

"(8) The hearing of the case occupied five days. (9) In considering the question of costs in the exercise of my discretion I decided that having regard to the mistaken assumptions made both by the appellant and by the Central Land Board there should be no order awarding costs to either side." E

The question for the opinion of this court "is whether I came to a right decision in law in making no order awarding costs to either side".

It is a common place in cases which come before this court relating to the exercise of a discretion, and more particularly relating to the exercise of a discretion in regard to costs, that this court is very slow indeed to interfere with such exercise. Put in another way, it can be asserted that there is no question of law which this court is competent to determine relating to the exercise of a discretion unless it is shown clearly that, in the exercise of the discretion, the tribunal appealed from has in some material and substantial respect wrongly or unjudicially exercised the discretion, either by some wrong, some erroneous, direction of itself as a foundation for the exercise, or (I think sometimes it may be said) where the result arrived at is one producing in the opinion of this court a manifest injustice; and the question in this case is whether counsel for the appellant can bring himself within such a formulation of this court's powers. I have come to the conclusion, not without some hesitation, that the answer to that question is in the affirmative. I think here that the tribunal failed to exercise judicially the discretion vested in the tribunal, with the result that it is incumbent on this court now to review and amend the tribunal's conclusion. I should not wish to make any rash attempt at laying down in any kind of precise language the limits of such a discretion as is here vested in the Lands Tribunal or to set out in any kind of table or category the sort of things which a tribunal can take into account in exercising the discretion; but I would like to make two general observations. First, s. 3 of the Lands Tribunal Act, 1949, shows that this question of the award of costs is in truth one for the discretion of the tribunal, but is not otherwise subject to any special or particular limitations. Where a case relating to the award of costs comes to this court from the High Court, then the powers of this court are even more strictly limited by the terms of the Judicature Act, 1925. So much was made plain by the House of Lords in *Donald Campbell & Co., Ltd. v. Pollak* (1) ([1927] A.C. 732), where the House (see particularly the speech of Viscount Cave, L.C., at p. 809) set out the relevant provisions of the Judicature Acts then in force, including s. 49 of the Act of 1873, which provided that no order made by the High Court F
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A of Justice or any judge thereof as to costs only which by law are left to the discretion of the court shall be subject to any appeal except by the leave of the court or judge making the order. There is no such provision affecting this award. That is not to say that the general principles affecting interference by the Court of Appeal with discretionary powers are thereby made looser or wider. This case, however, I think is like the case of any other discretionary power

B exercised by a court—e.g., a discretionary power to grant or not to grant an injunction. To that extent, an appeal in the form of a Case Stated as to the power of awarding costs in s. 3 (5) may be somewhat more open than an appeal as to costs from the High Court; but I should not wish to put it at all higher than that.

C The second point is this: it will be recalled that the presence of the Lands Tribunal as a reviewing authority is due to the fact that the original arbitrator, the arbitrator originally specified under the Act of 1947, was superseded by the Lands Tribunal as a result of the legislation of 1949; but historically the inference, I think, of the idea of arbitration may fairly be said to persist, and counsel for the appellant, in the course of his opening, referred to the language which had fallen from LORD GODDARD, C.J., in *Lewis v. Haverfordwest Rural District*

D *Council* (2) ([1953] 2 All E.R. 1599). That was a case of arbitration which arose under the Public Health Act, 1936. The arbitrator, having made a certain award, proceeded then to say that each party should bear its own costs. LORD GODDARD, C.J., who referred to several cases, including that of *Donald Campbell & Co., Ltd. v. Pollak* (1), said (*ibid.*, at p. 1599):

E “In this case the arbitrator was asked why he made this order as to costs, and he answered: ‘I had several reasons for awarding that each party should bear its own costs, and one of those was that I had no evidence that during the long time between the event and the date of the arbitration any serious effort had been made by either party to settle the question’.”

LORD GODDARD, C.J., also said (at p. 1600):

F “I do not think it is a judicial exercise of discretion to say that because neither party did anything, the successful party will not be awarded the costs.”

Then, after referring to *Donald Campbell & Co., Ltd. v. Pollak* (1), he continued (*ibid.*):

G “In a matter of this sort, making an offer would be regarded in the same way as a payment into court. If they had made an offer to pay a sum approximating to the amount which the applicant recovered, that would have been an excellent reason for refusing costs to the applicant. It might even be a reason for ordering the applicant to pay the respondent’s costs . . .”

But he had also earlier said (*ibid.*, at p. 1599):

H “It is a curious circumstance that lay arbitrators always seem to think parties should pay their own costs.”

I There was some argument here on the question: Was not the Central Land Board in a rather special position? It was said, and said forcibly, by counsel for the board: It is all very well, but the Central Land Board, which has to determine this matter of value, cannot then make some higher offer which would seem to indicate that its determination had not been genuinely and sincerely come to. Nor can it protect itself in the same way as an ordinary litigant can by making payments into court. That, I think, is a matter of some weight. The Central Land Board, which has a responsible position not at all like that of a private individual, is in a situation different from that of the Haverfordwest Council in the case last cited. On the other hand, I have already drawn attention more than once to the circumstance that the nature of the application to the Lands Tribunal is that of an appeal and, for better or worse, it must, I think, properly so be judged. I am bound to say that when I read the

Lands Tribunal's reasons for making no award as to costs, I am left with an ineffaceable impression that the tribunal did what LORD GODDARD, C.J., says one finds time and again lay arbitrators do, that is, acted on the kind of basis that here were two parties who had come before the tribunal; each had put forward figures; both had made mistakes; and therefore the fair thing was to make no order at all as to costs. I think that that was a wrong approach. I cannot read para. 9 of the Case without asking myself the question: what was the relevance, bearing in mind that this proceeding was in the nature of an appeal, of the circumstance that there had been mistaken assumptions by the Central Land Board? It looks as though, indeed, the tribunal had entertained the notion that the Central Land Board might have come and said: "We are entitled in the circumstance to all the costs because £102,000 is nearer £44,000 than it is to £217,000". That is surely wrong. It would, of course, be quite competent, proper and relevant to the exercise of the discretion for a court or a tribunal to say: True, the applicant has achieved an upsetting and discharge of the figure which had been awarded against him, but he very much overstated his case, time and costs were occasioned unnecessarily by the inflated nature of his claim and therefore, in the exercise of our discretion, he must be deprived partly or even wholly of his costs. If that had been the basis of the jurisdiction it might well be that this court would have to say: "Well, it seems a rather hard and severe exercise of the discretion, but still the ground was a valid one for its exercise and for the way in which it was exercised, and we cannot interfere".

That last sentence brings me to a reference to another case which I think is helpful and which counsel for the board mentioned, viz., *Pitkin v. Sanders & Forster, Ltd.* (3) ((1923), 128 L.T. 789). I shall not read the facts or the headnote, but it is significant because the case was one in this court when LORD STERNDALÉ was presiding as Master of the Rolls. He had himself used certain language in an earlier case of *Ritter v. Godfrey* (4) ([1920] 2 K.B. 47) to which LORD GODDARD, C.J., referred in *Lewis v. Haverfordwest Rural District Council* (2). The House of Lords in *Donald Campbell & Co., Ltd. v. Pollak* (1) had overruled the Court of Appeal's conclusion in *Ritter v. Godfrey* (4), but had confirmed LORD STERNDALÉ, M.R.'s own expressions in his judgment in that case, but in this case LORD STERNDALÉ, M.R., expanded the language he used in *Ritter v. Godfrey* (4) and the expanded language, I think, is useful and most instructive for the present question. He said (128 L.T. at p. 790):

"In this case, therefore, we have to see if the judge had any grounds for the exercise which he made of his discretion; and if there were any grounds on which he could exercise his discretion in the way in which he did, we cannot interfere."

It is in reliance on that passage that I said a moment ago that if the Lands Tribunal had here said that there was expenditure of costs unnecessarily occasioned by the inflated nature of the appellant's claim and that it would take that into account against him in the exercise of its discretion by depriving him of his costs, then it might well be that we could not interfere; but, as I read the case, that is not at all the way in which the tribunal has instructed itself as to discretion. The tribunal has omitted two vital facts: first, as was earlier said, that this was in the nature of an appeal; and, secondly—perhaps even more important—that on the really vital question which it had to decide, the matter of principle, Mr. Wootton's view was the right one and the Central Land Board's view was the wrong one. In light of that, the tribunal, surely, seriously mis-directed itself in saying that here were two parties both of whom had made erroneous estimates and that both would be deprived of costs. The right approach, I venture to think, was this: "Mr. Wootton, the appellant [for such was the nature of his role before the Lands Tribunal] put forward a claim on the right principle; the Central Land Board opposed it on a wrong principle; I,

A therefore, reject the Central Land Board's evidence more or less altogether; but, since Mr. Wootton has overstated his case on the figures, should I, in the exercise of my discretion as to the costs to which prima facie in justice Mr. Wootton would lay claim, exercise my discretion to some extent or even wholly against him for that reason?" Because the tribunal put it, as I think, wrongly, I cannot resist the conclusion that it posed the problem to itself wrongly and fell into the error on which LORD GODDARD, C.J., animadverted in the *Haverfordwest* case (2). Nor is that all. I come back to the hearing fee. If the justice of the case required that neither party should recover any costs against the other, then surely it is unjust, surely it is wrong, that in the result the appellant should pay the whole of the hearing fee of £500. At the very least it should have been equally borne between them. I have already referred to the rule and expressed a doubt as to its validity. As a matter of administrative convenience I think it highly sensible that one party should be directed to pay the fee in the first instance; but he should, I would have supposed, be treated as paying it on behalf of the contestants and the question of the ultimate liability should rest with, and be dealt with by, the Lands Tribunal in accordance with the language of the section itself. As I have referred to this matter, I venture to express the view that in these cases it would be, to say the least, prudent and desirable that the Lands Tribunal should deal specifically with the hearing fee and say by whom or in what proportion it should be paid, thereby getting rid of any possible question which one or other party might raise as to the vires of r. 52 of the Lands Tribunal Rules, 1949. As I have said, I think that to leave the appellant saddled with the exclusive burden of paying the whole hearing fee was wrong and was unjust, and I doubt whether it was consistent with the order which the Lands Tribunal in terms made.

The last matter to which I would like briefly to refer is this: counsel for the board referred us to *Le Witt v. Cannon Brookes* (5) ([1956] 3 All E.R. 676) and *Gold v. Brighton Corpn.* (6) ([1956] 3 All E.R. 442) under the landlord and tenant legislation in this court presided over by DENNING, L.J., and suggested that those cases provided a fair analogy for application in the present case. Those were cases where a landlord had agreed to grant a tenancy or had been bound to grant a tenancy and the issue between landlord and tenant related to term only: the amount of the rent, the existence of repairing and other covenants, and so forth; and in each case, according to the statute, those questions were referred to the arbitrament of the county court judge. The landlord, as frequently happens in these cases, suggested a rent of "X", the tenant suggested a rent of "Y"; the figure at which the county court judge arrived was a figure somewhere between "X" and "Y", and the county court judge thought that in the circumstances neither party should get any costs. DENNING, L.J., pointed out in *Le Witt v. Cannon Brookes* (5) that in such cases the proper approach was to consider whether what had been put forward on one side and on the other was reasonable, to seek a balance of reasonableness between the rival contentions; and if it was thought, as it had been in those cases, that there was about an equal degree of reasonableness or unreasonableness on both sides, then a fair result would be no award as to costs. I am not saying that those cases govern a case like the present where the appellant was in the position of an appellant against the Central Land Board's finding against him, and, pursuant to his statutory right, took the Central Land Board before the Lands Tribunal and there challenged the validity of the award or determination, and successfully did so; but, assuming an analogy between the two, the difference in the present case seems to me to lie in this, that on the main question of principle, the tribunal held that it was the appellant who was right and the Central Land Board which was wrong; and what is referred to as some criticism of detail which was applicable to the appellant's case does not seem to me to amount to a matter of anything like sufficient gravity to justify the conclusion as to costs which the Lands Tribunal reached.

There remains therefore only: what order should this court now make? I asked both counsel, with a view perhaps to saving further expenditure of costs in detailed taxations, whether they would oppose this court making a fractional award, as sometimes is done, as to costs, and they both assented to our doing so. Bearing that in mind and after consultation with my brethren, I have come to the conclusion that a just order would be to direct that the Central Land Board pay one half of the costs of the appellant; and that will mean, inter alia, that they will pay one half of the hearing fee. In giving the direction of one half I have tried to do justice to the view which the Lands Tribunal obviously did take, that a not negligible part of the five-day hearing was taken by the circumstance that the detailed figures put forward on Mr. Wootton's behalf had to be subjected to close inquiry and review and in the end had to be reduced by not less than fifty-three per cent.

For the reasons which I have stated, I think that the answer to the question posed is in the negative, that the order as to costs should be discharged and that there should in lieu be an order on the Central Land Board to pay one half of the hearing fee and one half of the appellant's other taxed costs of the proceedings. I think also that the appellant is entitled to his costs in this court.

DENNING, L.J.: I entirely agree. I would only say a word on the landlord and tenant cases, because I think they show the fallacy into which the Lands Tribunal have fallen. In *Le Witt v. Cannon Brookes* (5) ([1956] 3 All E.R. 676), a landlord and tenant had agreed that there should be a new lease, and the only question was what was a fair rent for that new lease. They could not agree on it and it was referred to the court, as an authority of first instance, to decide what the fair rent was. In that case neither side was right or wrong; there was no claim to be enforced or resisted; neither side was truly in a position of plaintiff or defendant, or appellant or respondent. So when a middle figure was chosen, each side had to bear his own costs. I think the Lands Tribunal must have considered the present case as a case of that kind, a case of valuation by the tribunal deciding as a valuer two rival figures, where one side put forward too high a figure, and the other too low a figure. But it is no such case. The Central Land Board, as my Lord has observed, were an authority of first instance themselves. If you look at reg. 12 of the Claims for Depreciation of Land Values Regulations, 1948, the board themselves have to inquire into the matter in a judicial manner. They hear objections and decide on the value themselves as an authority of first instance. Thereon the landowner, in this case Mr. Wootton, appeals to the Lands Tribunal from their decision, saying they are wrong. At that point the Central Land Board come in as a party, as a respondent, so to speak, to resist his appeal. So when it gets to the Lands Tribunal it is a matter of right or wrong: it is a matter of appellant and respondent. The appellant succeeded in establishing that the Central Land Board were wrong. He had to come to the tribunal to get his rights established, and he ought in the ordinary way to recover his costs of coming to the tribunal for the purpose, except in so far as he has increased the costs by putting forward too high a claim. It seems to me the tribunal exercised their discretion in a wrong manner, which is an error in point of law, and the appeal should be allowed accordingly in the terms my Lord has suggested.

ROMER, L.J.: I agree fully with the judgments which my brethren have delivered and there is nothing I can usefully add.

Appeal allowed. Order that the Central Land Board should pay one half of the hearing fees and one half of the costs of the appellant before the Lands Tribunal to be taxed, failing agreement, by the Registrar of the Tribunal and further the appellant's costs of appeal.

Solicitors: *W. H. Chitty & Fryzer* (for the appellant); *Treasury Solicitor* (for the Central Land Board).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ROSS v. REGINAM.

[PRIVY COUNCIL (Viscount Simonds, Lord Oaksey, Lord Cohen and Lord Keith of Avonholm), December 5, 6, 10, 11, 1956, January 15, 1957.]

Privy Council—Eastern Africa—Jurisdiction of Court of Appeal for Eastern Africa to order new trial in criminal case—Eastern African Court of Appeal Order in Council, 1950 (S.I. 1950 No. 1968), s. 16 (1), s. 18 (1)—Eastern African Court of Appeal Rules, 1954 (Kenya Proclamations, Rules and Regulations, 1954, No. 33), r. 41.

By the Eastern African Court of Appeal Order in Council, 1950, s. 16 (1), that court has jurisdiction to hear and determine appeals from judgments of courts of Kenya, among other territories, and, for all purposes of and incidental to the hearing and determination of appeals, has the power, authority and jurisdiction vested in the court from which the appeal is brought. By s. 18 (1) of the order, power is conferred to make Rules of Court "for regulating the practice and procedure . . . in appeals" to the Court of Appeal for Eastern Africa. Neither s. 16 nor s. 18, however, expressly mention jurisdiction to order a re-trial. In exercise of the power conferred by s. 18 the Eastern African Court of Appeal Rules, 1954, were made. Rule 41 of these rules empowers the Court of Appeal, inter alia, to order a re-trial. The Supreme Court of Kenya, by s. 354 of the Kenya Criminal Procedure Code, has power, in an appeal from a conviction, to order a new trial.

The appellant was convicted in the Supreme Court of Kenya of offences against the Kenya Income Tax and Excess Profits Tax Ordinances. On appeal to the Court of Appeal for Eastern Africa, that court quashed the convictions but ordered that he be re-tried. On appeal to the Judicial Committee against the order for re-trial on the grounds that (i) the Court of Appeal for Eastern Africa had no jurisdiction to order a new trial in a criminal case, and (ii) if it had such jurisdiction, it was improperly exercised in the present case,

Held: the appeal must be dismissed because

(i) the Court of Appeal for Eastern Africa had jurisdiction to order a new trial in a criminal case, since (a) under s. 16 (1) of the Eastern African Court of Appeal Order in Council, 1950, it had the same power, on appeal to it, of ordering a re-trial as had the Supreme Court of Kenya from which the appeal lay (see p. 454, letter G, post), and (b) the words "practice and procedure" in s. 18 (1) of the Eastern African Court of Appeal Order in Council, 1950, must be given the wider meaning which would bring r. 41 of the Eastern African Court of Appeal Rules, 1954, within their scope, since the history of the jurisdiction of the Court of Appeal for Eastern Africa and its predecessors showed that it had been the consistent policy of the legislative authority to give the court power to order a re-trial both in civil and criminal cases (see p. 456, letter F, post), and

(ii) the jurisdiction to order re-trial had not been exercised on wrong principles.

Per CURIAM: though there is high authority for saying that a right of appeal is itself to be regarded not as a matter of practice or procedure but as a substantive right, yet when the right of appeal has been granted, there seems little or no difficulty in regarding the power to order a new trial as part of the practice and procedure of the court (see p. 455, letter F, post).

Appeal dismissed.

[**Editorial Note.** The Eastern African Court of Appeal Order in Council, 1950, has been amended by the Eastern African Court of Appeal Order in Council, 1953 (S.I. 1953 No. 1202), but the amendment does not apply to s. 16 or s. 18 of the 1950 Order in Council.]

Cases referred to:

- (1) *Poyser v. Minors*, (1881), 7 Q.B.D. 329; 50 L.J.Q.B. 555; 45 L.T. 33; 46 J.P. 84; 13 Digest 505, 562.
- (2) *Colonial Sugar Refining Co. v. Irving*, [1905] A.C. 369; 74 L.J.P.C. 77; 92 L.T. 738; 16 Digest 108, 77.
- (3) *Neuman v. Klausner*, [1922] 1 K.B. 228; 91 L.J.K.B. 125; 126 L.T. 288; 34 Digest 535, 85.

Appeal.

Appeal by special leave by Alfred Granville Ross from an order of the Court of Appeal for Eastern Africa, dated Nov. 17, 1955, quashing the appellant's convictions before the Supreme Court of Kenya on July 14, 1955, of offences against the Kenya Income Tax and Excess Profits Tax Ordinances, and ordering that he be re-tried. The appeal was against that part of the order ordering a re-trial.

J. G. Foster, Q.C., and *M. Littman* for the appellant.

B. J. M. MacKenna, Q.C., *J. G. Le Quesne* and *D. C. Kennedy* for the Crown.

VISCOUNT SIMONDS: On July 14, 1955, the appellant was convicted in the Supreme Court of Kenya of offences against the Income Tax and Excess Profits Tax Ordinances of Kenya. He appealed to the Court of Appeal for Eastern Africa and that court, on Nov. 17, 1955, quashed the convictions but ordered him to be re-tried. From so much of this order as ordered him to be re-tried the appellant has by special leave appealed to Her Majesty in Council. Two questions arise for decision, the first one of general importance, whether the Court of Appeal for Eastern Africa has jurisdiction to order a new trial in a criminal case, the second whether, if the court has such jurisdiction, it was so improperly exercised in this case as to justify their Lordships in advising Her Majesty that the order should be set aside.

Their Lordships will first deal with the question of jurisdiction. They regret that, as the point was not taken until the matter reached their Lordships' Board, they have not the benefit of the opinion of the Court of Appeal for Eastern Africa on it, but, as the jurisdiction has been exercised without challenge for more than fifty years during the whole of the existence of the present court and its predecessors, they are glad to be able to come to the clear conclusion that there is no valid ground for questioning it. The present court was established by the Eastern African Court of Appeal Order in Council, 1950*, which, after reciting (inter alia) that it was desirable that the Eastern African Court of Appeal Orders in Council, 1921 to 1947, should be revoked and replaced by a new order, ordered as follows:

"3. The Territories to which this order applies are Aden, Kenya, Seychelles, Somaliland, Tanganyika, Uganda and Zanzibar.

"4. His Majesty's Court of Appeal for Eastern Africa (which was constituted under the Eastern African Court of Appeal Orders in Council, 1921 to 1947) shall continue to be a Court of Appeal for the courts of Aden, Kenya, Tanganyika, Uganda and Zanzibar, and in addition shall be, and is hereby constituted as, a Court of Appeal for the courts of Seychelles and Somaliland. The court shall be a Superior Court of Record.

"16.—(1) The court shall have jurisdiction to hear and determine such appeals from judgments of courts of the Territories (including reserved questions of law and Cases Stated) and to exercise such powers and authorities as may be prescribed by or under any law for the time being in force in any of the Territories respectively, subject to the provisions of this order or of any such law; and, subject as aforesaid, for all purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, the court shall have the power, authority and jurisdiction vested in the court from which the appeal

* S.I. 1950 No. 1968.

A is brought. (2) The process of the court shall run throughout the Territories and any judgment of the court shall be executed and enforced in like manner as if it were an original judgment of the court from which the appeal is brought. (3) In the hearing of any appeal the law to be applied shall be the law applicable to the case in the court from which the appeal is brought.

B " 18.—(1) Subject to the provisions of this order, the President and any two other judges of the court selected by the President, may make Rules of Court for regulating the practice and procedure (including that in any court from which appeals are brought) in appeals to the court, whether before or after final judgment in the court, including the right of audience in the court and the legal representation of persons concerned, the duties of the officers of the court, the costs of, and fees in respect of, proceedings therein and any matters relating to the matters aforesaid. (2) Rules of Court shall not take effect until they are approved by a Secretary of State, and when so approved shall have effect as if contained in this order: Provided that, if it shall be certified in any rules that it is necessary that they should take effect before such approval can be obtained, such rules may be made to take effect accordingly; in which case such rules may be disallowed by a Secretary of State (without prejudice to any thing lawfully done thereunder) but shall continue to have effect unless and until they shall be so disallowed and such disallowance shall be published by the court. (3) Except so far as they shall be amended, added to or revoked by Rules of Court made under this order, all Rules of Court made under the Eastern African Court of Appeal Orders in Council, 1921 to 1947, and in force at the commencement of this order, shall remain in force, and for the purposes of this order shall be deemed to have been made under this order but shall be applied with any adaptations, modifications or additions which the court or judge may consider necessary or just in consequence of the provisions of this order."

E Under and by virtue of the authority contained in s. 18 of the Order in Council, Rules of Court* were duly made by the President and judges of the court and approved by the Secretary of State on June 29, 1954.

F Part III of these rules is entitled "First Appeals in Criminal Matters" and contains the following rules:

G " 24. This part of these rules shall apply only to appeals from a superior court acting in its original jurisdiction in criminal cases and to matters related thereto . . .

" 25. In any case not provided for by this part of these rules the practice and procedure for the time being of the Court of Criminal Appeal in England shall be followed as nearly as may be.

H " 41.—(1) At the hearing of an appeal the court shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the court may thereupon confirm, reverse or vary the decision of the trial court, or may order a re-trial or may remit the matter with the opinion of the court thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the trial court might have exercised: Provided that the court may, notwithstanding that it is of opinion that the point or points raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. (2) At the hearing of an appeal the court may, if it thinks that a different sentence should have been passed, and whether or not an appeal has been brought against sentence, quash the sentence passed by the trial court and pass such other sentence warranted in law (whether more or less severe) in substitution

* The Eastern African Court of Appeal Rules, 1954 (Kenya Proclamation, Rules and Regulations, 1954, No. 33).

therefor as it thinks ought to have been passed. (3) The court shall in no case make any order as to payment of costs of any appeal governed by the provisions of this part of these rules to or by the appellant or respondent."

It may be noted that the appellate jurisdiction vested in the court related to both criminal and civil matters, and a similar power of ordering a re-trial in civil matters is conferred by r. 76.

The relevant sections of the Order in Council and the relevant rules having been stated, it is convenient to refer to the submissions of the appellant. The argument of learned counsel on his behalf assumed that, apart from the power conferred by r. 41, the court had no jurisdiction to order a re-trial in criminal matters. He contended that the only power to make Rules of Court under s. 18 of the Order in Council is for the purpose of "regulating the practice and procedure . . . in appeals to the court", that the conferring of a power to direct a re-trial in a criminal case is not a matter of practice and procedure, that r. 41, so far as it purports to confer a power to order a new trial, is *ultra vires*, and that, so far as it is *ultra vires*, the provision of s. 18 (2) of the Order in Council must be disregarded.

On behalf of the Crown the primary assumption of the appellant was challenged, and it was urged not only that r. 41 was *intra vires* and was in any case unimpeachable by virtue of s. 18 (2) of the Order in Council, but also that s. 16 of the Order in Council by itself gave the necessary jurisdiction. This contention was founded in the first place on the bare words "jurisdiction to hear and determine such appeals" which, it was said, empowered the court to make any order which might appear to it necessary for doing justice in the appeal, including in a proper case an order for a re-trial. In the second place, the last words of s. 16 (1) were called in aid: the court was thereby given the power, authority and jurisdiction vested in the court from which the appeal was brought. The Supreme Court of Kenya, from which the instant appeal was brought, had, under s. 354 of the Criminal Procedure Code of Kenya*, power in an appeal from a conviction to reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, or commit him for trial; a similar power, authority and jurisdiction thus vested in the Court of Appeal for Eastern Africa empowers that court to order a re-trial in an appeal from a conviction.

So far as the present appeal is concerned, the argument last stated appears to their Lordships to be conclusive. Section 354 of the Criminal Procedure Code of Kenya has been referred to. Section 378 of the same Code provides for an appeal to the Court of Appeal for Eastern Africa by a person convicted on a trial held by the Supreme Court of Kenya. It appears to be a logical and consistent scheme that the same power of ordering a re-trial should be given to the ultimate Court of Appeal as to the court from which the appeal is brought. That is what the last words of s. 16 (1) of the Order in Council provide.

It does not, however, seem to their Lordships that it would be satisfactory to base their decision solely on this ground. The jurisdiction of the court to order a re-trial has been generally challenged, and it may be that the laws of other territories from whose courts an appeal may be brought to the Court of Appeal for Eastern Africa are not strictly comparable with those of Kenya. On this matter their Lordships have no sufficient information. It is desirable, therefore, to examine the validity of the plea that r. 41 is *ultra vires*, in that it is not a rule for regulating "practice and procedure" to which the rule-making power is confined. On this point their Lordships are able to reach a decision without discussing the effect of s. 18 (2) of the Order in Council.

The meaning of the words "practice and procedure" in s. 18 (1) of the Order in Council is not to be ascertained either by treating them as if the Order in Council of 1950 was the first Order in Council for these Territories in which they

* Laws of Kenya, Revised 1948, c. 27.

A appeared, or by reference to those words in the Imperial Statute which set up the Court of Criminal Appeal in England. On the contrary, they have behind them a history of half a century. In 1902, by the Eastern African Protectorates (Court of Appeal) Order in Council, 1902*, a court was constituted, which was the first predecessor of the court whose order is now under appeal. It was called His Britannic Majesty's Court of Appeal for Eastern Africa and it was, by art. 8 (1),
 B empowered to make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction. Such rules were made and approved by the Secretary of State. They included r. 22 which was in these terms:

“ If upon the hearing of an appeal it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the Court of Appeal to
 C order that the verdict and judgment shall be set aside and that a new trial shall be had.”

Two things deserve notice, first, that these rules were made by the court itself, a matter regarded as having considerable importance in *Poyser v. Minors* (1) ((1881), 7 Q.B.D. 329), and, secondly, that already before the establishment of the Court of Criminal Appeal in England the power to order a re-trial in criminal
 D cases on an appeal by a convicted person was in the protectorate or colony regarded as a matter of procedure. Nor was there in this view a departure from any universal principle. For, though it might be regarded as fundamental that a man should not be put in peril twice on the same charge, yet a substantial inroad had been made on this doctrine by the fact that it had long been the law of England that, in cases of misdemeanour, the Court of King's Bench had, in
 E certain circumstances, jurisdiction on motion by the convicted person to quash the verdict and order a new trial. Some further inroad was also made by procedure under writ of error, venire de novo or Case Stated to the Court of Crown Cases Reserved. Therefore, though there is high authority for saying that a right of appeal is itself to be regarded not as a matter of practice or procedure but as a substantive right (see, e.g., *Colonial Sugar Refining Co. v. Irving* (2) ([1905]
 F A.C. 369 at p. 372), *Newman v. Klausner* (3) ([1922] 1 K.B. 228 at p. 231)), yet, when the right of appeal has been granted, there seems little or no difficulty in regarding the power to order a new trial as part of the practice and procedure of the court. It was clearly so regarded by the rule-making authority under the Order in Council of 1902. But the matter does not rest there. The Order in Council of 1902 was superseded by the Eastern African Protectorates (Court of
 G Appeal) Order in Council, 1909†, which established a new Court of Appeal for Eastern Africa. Its jurisdiction was substantially that of its predecessor, and it was provided by art. 9 (1) of the order that three members of the court, one of whom should be the senior member, might make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction. In pursuance of this power Rules of Court were once more made which provided, by
 H r. 29, that, in a criminal appeal, the court should have power (inter alia) in an appeal from a conviction to reverse the finding and sentence and acquit or discharge the accused or order the accused to be re-tried. It may be mentioned for a reason that will later appear that r. 28 provided that, in a civil appeal, the court should have power (inter alia) to order that a decree should be set aside
 I and a new trial be had. Thus matters stood for a number of years during which, as their Lordships were informed, the power to order a new trial on an appeal by an accused person was exercised by the court without challenge. In 1921, by the Eastern African Court of Appeal Order in Council of that year‡, the court was again reconstituted, and its jurisdiction was conferred in language which,

* S.R. & O. 1902 No. 664.

† S.R. & O. 1909 No. 198.

‡ S.R. & O. 1921 No. 1210.

since it differed from that of the earlier orders, may be quoted verbatim. By the latter part of art. 2 of the order it was provided that: A

"The said court in the exercise of its appellate jurisdiction shall have power to determine any question and to pass any decree judgment or order the determining or passing of which may appear necessary to the said court for the purpose of doing justice in the cause or matter before it."

The width of these words explains what follows. The same rule-making power was conferred by the order and Rules of Court were duly made, but they contained no such express power to order a new trial as had been provided in civil appeals by the former r. 28, and in criminal appeals by the former r. 29. In their Lordships' opinion, there can be no doubt that they were omitted because they were unnecessary in view of the wide words of the order. It is certain that, both in civil and criminal appeals, the power to order re-trial continued to be exercised without challenge. B C

The Order in Council of 1921 was, in its turn, superseded by that of 1950, the relevant provisions of which have already been cited. As will have been seen, there are material changes in the language of the section conferring jurisdiction. The wide words D

"decree judgment or order the determining or passing of which may appear necessary to the said court for the purpose of doing justice in the cause or matter before it"

have gone; their place is in some measure taken by the final words in the new s. 16 (1), to which attention has already been called. The rule-making power in substantially the same terms is conferred on the same body. It has been set out in full in an earlier part of this judgment, and it has already been noted that r. 41 renews the power to order a re-trial which had been contained in the earlier rules but omitted from those made under the Order in Council of 1921. E

The history of the jurisdiction of the court, the enactments establishing it, and the rules regulating its procedure, have been set out at some length. This has been done in order that it may become abundantly clear that, whatever interpretation might be put on the words "practice and procedure" in isolation, it has been the consistent policy of the legislative authority, whether by the force of the enacting provisions alone, or by their force aided by Rules of Court made by the judges, to give to the court power to order a re-trial both in civil and criminal cases. Their Lordships entertain no doubt that, in appeals from the courts of those territories to which the Order in Council applies, there are very good reasons why such a power should be given, and it appears to them that it is not only open to them but incumbent on them to give to the words in their context the wider meaning which would bring r. 41 within their scope. For this reason, therefore, as well as that on which the respondent relied under the last words of s. 16 (1) of the Order in Council, their Lordships are of opinion that the court had jurisdiction to make the order from which this appeal is brought. It is unnecessary to refer to that part of the argument for the Crown which rested solely on the words "hear and determine". F G H

The only other question can be briefly dealt with. The order for a new trial having been competently made will not be set aside on an appeal to Her Majesty in Council unless the case can be brought within the principles which have been too often stated to need repetition. Their Lordships have given careful consideration to the arguments of learned counsel who urged that the power to order a new trial, admittedly a discretionary jurisdiction, had been exercised on wrong principles. The gravamen of his plea was that the purpose, or at least the result, of a re-trial was, or would be, to enable the prosecution to fill a gap in the evidence which had been due to its own default. He was far from satisfying their Lordships on this point and, as in their opinion the appeal ought to be dismissed and they have humbly so advised Her Majesty so that the appellant will in due course I

A be re-tried, they think it undesirable to say anything which may in any way prejudice his trial. As already stated, their Lordships have accordingly advised Her Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.* (for the appellant); *Charles Russell & Co.* (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

CARRINGTON v. JOHN SUMMERS & SONS, LTD.

C [CHESTER ASSIZES (Streatfeild, J.), November 7, 8, 9, 1956.]

Factory—Lifting machine—Travelling crane—Crane working overhead but running along ground—Whether “overhead travelling crane”—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 24 (7).

D The plaintiff was employed by the defendants to act as a crane attendant at their steelworks. While so acting at the working of a travelling crane lifting scrap metal at a dump, he slipped on a piece of scrap and sustained severe injury, his foot being caught in a narrow gap between the under side of a wheelbox of the crane and the ground, the level of which at that point had become raised. The crane was a “Goliath crane” and was used to lift scrap iron and transfer it to and from a dump that was a hundred yards long and fifty feet wide and was sunk in the ground, the crane travelling on wheels along single rails on sleepers laid at ground level longitudinally along the sides of the dump. The crane consisted of a large transverse girder, about ninety-four feet long, at some thirty feet from the ground, and on this girder travelled the crab containing the drums or winches of the crane. The transverse girder was supported on either side by legs, at the base of which on the side near to the plaintiff when the accident occurred was the wheelbox. In an action by the plaintiff for damages for personal injury on the ground, among other grounds, that the crane was an “overhead travelling crane” within s. 24 (7) of the Factories Act, 1937, and that the defendants had failed to take the measures required by that enactment for the protection of persons working near the wheeltracks of such a crane,

F
G **Held:** the defendants were not in breach of s. 24 (7) of the Factories Act, 1937, because an “overhead travelling crane” within that sub-section was a crane which travelled overhead, and, therefore, the sub-section did not apply to the defendants’ crane which ran on rails at ground level although part of the structure, the crab, travelled on the girder overhead.

H Per CURIAM: the existence of s. 24 of the Factories Act, 1937, does not prevent s. 14 of the Act applying [to a crane in appropriate circumstances] (see p. 459, letter H, post).

[For the Factories Act, 1937, s. 24, see 9 HALSBURY’S STATUTES (2nd Edn.) 1016.]

Action.

I The plaintiff, William John Carrington, claimed damages from the defendants, John Summers & Sons, Ltd., for negligence and breaches of their statutory duty under s. 5 (1), s. 14 (1) and s. 24 (7) of the Factories Act, 1937. The case is reported only in regard to the claim based on s. 24 (7) of the Act.

The plaintiff was in the employment of the defendants and worked as a crane attendant. It was his duty to walk alongside a Goliath crane, which moved at about walking pace over and along a dump of scrap metal, to uncouple trucks that were used to contain the scrap metal which the crane lifted, to superintend the movement of the trucks and to give information to the crane-driver who was aloft in the cab of the crane. On Dec. 1, 1954, he met with an accident when

at this work. On that occasion the work was being done during the hours of darkness, but the crane carried electric lights which were found to have given adequate light. Shortly before the accident happened some scrap metal had been spilled and this had to be cleared. The plaintiff was walking on the walkway beside the crane, as it moved towards the place where the scrap metal had been spilled. Knowing that the crane was about to stop he crossed over from the walkway to get his shunter's pole, which was on the wheelbox of the crane. He slipped on a piece of scrap metal, and his left foot shot out in front of him. At the same moment the crane, having very slightly overshot its mark, reversed and moved back a distance of about a foot. The plaintiff's left foot was caught in a gap between the underside of the side pieces of the wheelbox of the crane. He sustained injuries which resulted in the loss of his foot. A B

The following description of the crane and the dump at which it worked is taken from the judgment. The Goliath crane was a huge structure used by the defendants in connection with their stock of scrap iron or other metal which was to be fed into their furnaces. The scrap dump consisted of a sunken place, some six or eight feet deep, which had been dug out of the ground. It was about a hundred yards long and about fifty feet wide. Into that sump or shallow pit scrap metal was deposited which accumulated in the course of time into something like a young mountain of scrap. From that store supplies were borne to be fed into the furnaces. On either side of that pit or sump was a wall which projected some few inches above the ground level and which, on the sump side, was about eight feet deep. C D

The crane which was used for bringing the scrap to and from the dump consisted, first, of a very large transverse girder which allowed a traverse of something like ninety-four feet from side to side. On that girder travelled the crab containing the drums or winches on which the crane itself worked, and from the crab a large circular magnet was suspended which was lowered from the crab by means of the drum to the scrap that was to be raised. An electric current was then switched on which attached the scrap metal to the magnet. The girder of the crane spanned the scrap dump at a height of some thirty feet from the ground, and it was perched in that position, at points some fifty feet apart, by two pairs of legs made of girder steel and spreadeagled out so that at the bottom end these legs were just over twenty-nine feet apart. The feet of these legs were joined together with what was called the wheelbox, which consisted of two side members and was roofed in on top and which carried an ordinary flanged wheel at each end. From the driver's cabin, which was perched up aloft somewhere near the girder, there were driving rods on both sides and these came down to pinions which worked the wheels. Those tandem wheels on the sides of this structure ran on a single rail which was mounted on a line of sleepers running longitudinally along a wall on each side of the scrap dump. The result was that the entire structure could be moved along the length of the dump by means of the gearing operating on the wheels of the crane; and also the crab could be made to traverse across the girder and the magnet could be lowered or raised. By reason of the ninety-four foot traverse and the two pairs of legs being fifty feet apart there was an overhang of some twenty-four feet outside the legs, because the crab had to travel outside the limits of the dump in order to pick up loads from trucks at the side so that the loads could be brought in and deposited on the dump itself. Thus there was at each end a twenty-four foot overhang on the girder. E F G H I

On one side of the dump there was a set of railway lines which bifurcated by means of points near the scene of the accident. One line ran straight along close to the dump, leaving a walkway of some four feet two inches between the wall, on which were the sleepers holding the single rail of the crane, and the ends of the sleepers on the railway line side. That was the line on which trucks or bogies were brought containing scrap which had to be raised by means of the

A crane and deposited on the dump. The other line which ran parallel to it held the trucks into which pig iron was deposited from a machine. The machine was a structure where pig iron was fed by a conveyor to spouts through which it was deposited in trucks standing on this line alone. In that process, which was immediately adjacent to the scrap dump, it was necessary that water should be used for cooling purposes and, drainage arrangements having been found not wholly satisfactory, the defendants had filled in the ground with cinders. These gradually became consolidated to such an extent that for a distance of something like twenty yards the ground was raised, so that the longitudinal line of sleepers became submerged in the ground, and, indeed, even part of the chair of the rail on top of the sleepers was in places below the new ground level. The new ground level resulted in a space of only three and three-quarter inches between the top of the chair on which the rail was mounted and the under side of the side member of the wheelbox. Formerly the wheelbox had been truly boxed in at sides, top and bottom, and, rivetted on to its bottom edge, was a piece of angle iron. Some months previously, however, a section of the angle iron, about nine feet long and three inches wide, had been removed for alterations or repairs and the under plate for that nine feet had also been removed and was never replaced. As a result there was a projection (formed by the remainder of the angle iron) sticking out some three inches from the bottom side of the wheelbox and, in the nine-foot section from which the angle iron had been removed, there was a hole into the hollow of the interior of the wheelbox. The result was a gap in which a man's foot might be caught. It was in this gap that the plaintiff's foot had been caught in the course of the accident, and his foot had been turned over by the movement of the huge structure of the crane.

N. G. L. Richards, Q.C., and R. E. G. Howe for the plaintiff.

H. V. Lloyd-Jones, Q.C., and W. L. Mars-Jones for the defendants.

STREATFEILD, J., having described the crane, the dump and the accident, continued: The question was raised by counsel for the defendants whether s. 14 of the Factories Act, 1937, applied to the crane in view of the existence of s. 24, on which reliance was also placed by the plaintiff. Counsel submitted that on a comparison of the wording of s. 10 of the Factory and Workshop Act, 1901, and s. 12, s. 13, s. 14, and s. 24, of the Factories Act, 1937, s. 24 laid down a complete set of rules applicable to cranes and other lifting machines and, therefore, superseded, so far as cranes and lifting machines were concerned, the general provisions with regard to the fencing of dangerous machinery that are laid down in s. 14. I cannot accept that contention. Section 14 applies in general to the fencing of dangerous parts of machinery. Section 24 deals specially with cranes and lifting machines, but deals with them from the point of view of their construction, their rails in so far as they are travelling cranes, the loads which they are to carry, their inspection, and in the case of overhead travelling cranes, their method of operation, and that is all. Neither in the authorities nor in s. 24 itself, comparing it with s. 10 of the Act of 1901 or otherwise, can I find any justification for the submission that s. 24 of the Act of 1937 cannot exist side by side with s. 14, and I do not think that the existence of s. 24 prevents the operation of s. 14 if s. 14 is otherwise appropriate. [HIS LORDSHIP then considered the question whether the defendants were in breach of s. 14 (1) of the Factories Act, 1937, and held that they were not. HIS LORDSHIP continued:] The next allegation in the statement of claim is that there was a breach of s. 24 (7) of the Factories Act, 1937, because this crane was an "overhead travelling crane". Section 24 (7) reads:

"If any person is employed or working on or near the wheel-track of an overhead travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken by warning the driver

of the crane or otherwise to ensure that the crane does not approach within twenty feet of that place."

It was submitted that this crane was an "overhead travelling crane" because it was an overhead crane which travelled, and it was contended that, so long as it was an overhead crane and travelled, it did not matter where it travelled, whether it travelled on an overhead gantry rail or on the ground. Counsel for the plaintiff also advanced the somewhat ingenious contention that, although the rail of the crane was on a level with, or only slightly above, the feet of the men who were walking along the walkway and along the railway lines, the rail was over the heads of those workers who sometimes had to go down six or eight feet into the sump of the dump; and that, therefore, although it might not be "overhead" from the point of view of the people on ground level, it was "overhead" for the people on the lower level in the sump.

As I told counsel, that rather reminded me of an argument on the provision which requires a handrail to be provided on a working platform if a man is liable to fall more than six feet. It was argued in one case which I remember that, where a man fell only four feet from such a platform, that he was entitled to a remedy because his head when he was standing up fell more than six feet, whereas, had he been lying on the platform and rolled off, he would not have been protected.

I do not think that, in legislating for a structure of this sort, one can say that, from the point of view of one person, it is an overhead travelling crane, and, from the point of view of another person, it is not. It either is or is not an overhead travelling crane for everyone. I do not attach importance to the fact that very occasionally people may work with their heads below the level of the road, as that happens only when the defendants are short of scrap stock whereas normally there is something like a mountain of scrap in the dump, and I do not think that that would make this crane an overhead travelling crane.

The question is: What is an overhead travelling crane? I would be inclined to accept, if I had to decide the point, which I do not think that I have to do, that Mr. Martin, a witness who was called for the plaintiff, hit on a very useful definition of an "overhead crane"—without the word "travelling". He defined an "overhead crane" as one where the lifting mechanism is mounted at a height greater than that to which the load can be raised. In other words, if the drum or winch which winds the load is situated above and the hook is suspended below it, so that, in any event, the load cannot be raised up above the height of the winch, that is a useful definition of an "overhead crane", and it would rule out what is called a "tower crane", with which one is familiar in docks, where a jib crane is situated often very high up and with long legs which run on rails on the sides of the dock. The winch of a tower crane is below the head of the jib and, therefore, it is not an "overhead crane" although it is very much over one's head if one is standing on the ground.

If there were in law such a thing as an "overhead crane", I would be prepared to accept Mr. Martin's attempted definition of it, but s. 24 nowhere refers to an "overhead crane". What it does refer to is interesting. In sub-s. (1) the word is the all embracing one, "a lifting machine". Section 24 (1) reads:

"All parts and working gear whether fixed or movable, including the anchoring and fixing appliances, of every lifting machine shall be of good construction, sound material, adequate strength and free from patent defect, and shall be properly maintained."

That sub-section deals with any device for lifting, and covers what Mr. Martin calls an "overhead crane" and also a jib crane, a mobile crane, and any other crane. It deals with a "lifting machine".

Section 24 (2) merely provides for the examination of the same kind of machine. Then in s. 24 (3) there is a different phrase: "All rails on which a travelling crane

A moves . . .”—not a “travelling overhead crane” or an “overhead travelling crane”, but merely “a travelling crane”. The sub-section reads:

“All rails on which a travelling crane moves . . . shall be of proper size and adequate strength and have an even running surface; and any such rails . . . shall be properly laid . . .”

B Obviously, therefore, a “travelling crane” is any crane which moves on rails. The term would clearly apply to a jib crane mounted on top of a tower on the dock side because that moves on rails. It would not apply, obviously, to a mobile crane which is mounted on pneumatic tyres and is capable of being steered by a crane man, because a “travelling crane” is clearly a crane which travels on rails. Section 24 (3) says nothing about “overhead” or otherwise: all it says
C is that the rails shall be of proper size, adequate strength, have an even running surface and shall be properly laid.

Section 24 (4) and s. 24 (5) contain provisions dealing with the safe working loads of “lifting machines”—again, the same general term—and in s. 24 (4) there is a particular reference to a “jib crane”, namely, to the kind of indicator which it should have. Section 24 (5) contains a provision that no “lifting
D machine” shall be loaded beyond the safe working load and s. 24 (6) provides that “No lifting machine shall be taken into use . . . unless it has been tested . . .” So far, therefore, s. 24 refers only to “lifting machines” and to a “travelling crane”, that is to say, any crane that travels on rails.

Then, for the first time, in s. 24 (7) there comes the phrase “overhead travelling crane”. There is no definition of that phrase, and I have to do my best to
E construe it. It was submitted by the plaintiff that it meant an overhead crane which travelled—whether up aloft or down below did not matter, so long as it was an overhead crane and travelled. On the other hand, it was contended by the defendants that an overhead travelling crane was a crane which travelled overhead.

In construing those words, as it seems to me, I must take the words in their
F natural meaning and in the order in which they appear. Section 24 (7) does not say “an overhead crane which travels” and there is no reference to an “overhead crane” anywhere else in the section. The phrase used is “an overhead travelling crane”, and it seems to me that on the ordinary principles of construction the word “overhead” qualifies the word which follows immediately afterwards, namely, the word “travelling”, rather than the word “crane”. If I
G were to construe the phrase as the plaintiff invites me to do, I should be jumping over the word “travelling” in the place where it is in the phrase and putting it in again afterwards: I should say that it was “an overhead crane travelling” and not “an overhead travelling crane”. In my judgment, therefore, an overhead travelling crane, within the meaning of s. 24 (7) is a crane which travels
H overhead.

Obviously, an example of that is that which was given in CHAMBERS’ TECHNICAL DICTIONARY, to which my attention was drawn, and which refers to the obvious case of an overhead crane, such as one gets in power stations and factories, which travels on a gantry rail situated some distance up above, built up on stanchions, and it is simply a girder which spans from one side to the other
I and runs on rails well above everything else. That is an overhead travelling crane, and I cannot apply that same criterion to one which, although it may work overhead, in fact runs along the ground.

I am confirmed in that view by the obvious intention of the legislature in s. 24 (7). The sub-section is dealing with the protection of men who are required to work in a place from which ordinarily there is difficulty in escaping in case of emergency. Where a man is working on or near the track of an overhead travelling crane, whether he is up a ladder or on a staging which is erected there, he has

small opportunity of escape because he is working in a position where the crane may strike him, and it seems to me that it is obviously necessary in the case of men required to work in such a place that there shall be a statutory regulation that the crane must not be brought within twenty feet of where he is working. On the other hand, if the crane is running along the ground and is in full view of the workmen, there is no difficulty in people stepping out of the way: they can do it on the ground where they are standing. Therefore, there is obviously not the same need for protection against a crane which runs along the ground, where there is ample space to get away, as there is in the case of a man working on a raised-up gantry rail.

In my view, that is the intention of the legislature. I have gone into the matter with some particularity because it was strenuously argued by counsel on both sides, but I am unable to accept the view that s. 24 (7) of the Factories Act, 1937, applies to this Goliath crane which runs along the ground.

[HIS LORDSHIP then dealt with the issue of negligence and held that the defendants were liable to the plaintiff in damages for negligence at common law, in that, instead of putting in proper drainage, they permitted the level of the walkway to be built up, at or about the point where the accident occurred, to a level which was only a few inches below the base of the wheelbox and girder, thus removing the protection which the depth of the sleeper elsewhere afforded to anyone walking along the walkway. HIS LORDSHIP further held that there was no contributory negligence on the part of the plaintiff, and he assessed the general damages to which the plaintiff was entitled at £3,500 which with a sum of £720 special damage, made a total of £4,220.]

Judgment for the defendants on the issues of breach of statutory duty. Judgment for the plaintiff on the issue of negligence.

Solicitors: *Russell Jones & Walker* (for the plaintiff); *Laces & Co.*, Liverpool (for the defendants).

[Reported by SEYS LLEWELLYN, ESQ., *Barrister-at-Law.*]

Re FLOWER'S SETTLEMENT TRUSTS. FLOWER AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Ormerod, L.JJ.), January 24, 25, 1957.]

Settlement—Acceleration—Invalidity of primary trust—Resulting trust to settlor or acceleration of secondary trust.

By a settlement dated Apr. 13, 1936, made between the settlor of the one part and his wife and three children as trustees of the other part, it was provided that the trustees should stand possessed of the trust funds during the life of the settlor to use, apply and pay the residue "for the charitable and benevolent purposes as follows:—In each year during the life of the settlor to pay and apply the income of the trust funds for such charitable and benevolent purposes as the trustees may from time to time direct with power within the statutory limits to accumulate any income not so paid or applied and to pay and apply such accumulations for the like purposes as those for which the income of the trust funds were applicable". It was expressly declared that the said trust was not confined to purposes charitable in law, and that the payments might be by way of gift or loan "with power for the trustees to enter into contracts for the payment of subscriptions or gifts for any term of years but determinable on the death of the settlor". It was provided that no payment was to be made which would benefit the settlor or any of the trustees. After the death of the settlor the trustees were to hold the trust funds "(i) Upon trust to pay the net annual income thereof

A to the [settlor's wife] for her life and (ii) On the death of the survivor of them the settlor and [his wife] to hold the capital . . . and . . . income . . . for [the settlor's three children] in equal shares". On Jan. 15, 1946, the settlor's wife died, and on Nov. 22, 1950, the settlor died. It was common ground that the discretionary trust during the settlor's life was void for uncertainty. For the purposes of ascertaining whether estate duty was payable in connection with the death of the settlor in respect of the trust funds, it became necessary to decide whether the result of the invalidity of the discretionary trust was to accelerate the interests expressed to take effect after the death of the settlor (in which case the trust funds did not pass on the settlor's death), or to give rise to a resulting trust in favour of the settlor (in which case the trust funds passed on his death).

C **Held:** the interests of those beneficially entitled after the death of the settlor were not accelerated because the character of the disposition made by the settlement showed that the settlor's intention was that during his life neither he nor his wife nor his children should have any beneficial interest in the trust fund; therefore there was a resulting trust in favour of the settlor and the fund passed on his death for the purposes of s. 1 of the Finance Act, 1894.

D *Lainson v. Lainson* ((1854), 5 De G.M. & G. 754) and *Re Hodge* ([1943] 2 All E.R. 304) considered.

Semble: the principle of the cases decided on the 'doctrine of acceleration is applicable to settlements inter vivos; but it may be more difficult in the case of a settlement than in the case of a will to collect the intention necessary to bring the doctrine of acceleration into play (see p. 465, letter I, post).

Appeal dismissed.

E [As to acceleration of subsequent interests, see 34 HALSBURY'S LAWS (2nd Edn.) 132, 133, para. 171; and for cases on the subject, see 44 DIGEST 428-432, 2575-2596.]

F Cases referred to:

(1) *Lainson v. Lainson*, (1854), 5 De G.M. & G. 754; 24 L.J.Ch. 46; 24 L.T.O.S. 85; 43 E.R. 1063; 44 Digest 429, 2580.

(2) *Re Hodge, Midland Bank Executor & Trustee Co., Ltd. v. Morrison*, [1943] 2 All E.R. 304; [1943] Ch. 300; 112 L.J.Ch. 241; 169 L.T. 155; 2nd Digest Supp.

G **Appeal.**

This was an appeal by the trustees of a settlement dated Apr. 13, 1936, from an order dated May 29, 1956, of UPJOHN, J. UPJOHN, J., took the view that the invalidity (on the ground of uncertainty) of a primary discretionary trust in the settlement gave rise to a resulting trust to the settlor during his life. In consequence there was a passing of the trust funds in connection with the death of the settlor and estate duty was exigible under the Finance Act, 1894, s. 1. On behalf of the trustees it was argued that the invalidity of the discretionary trust caused the interests limited to take effect after the death of the settlor to be accelerated, and in consequence there was no change in the beneficial interests on the settlor's death.

I *Geoffrey Cross, Q.C.*, and *G. L. Dawson* for the trustees.
J. Pennycuik, Q.C., and *E. Blanshard Stamp* for the Crown.

LORD EVERSHERD, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: This is an appeal from a judgment of UPJOHN, J., dated May 29, 1956, in a case concerning the alleged liability to estate duty on the death of Sir Archibald Dennis Flower of a fund comprised in a settlement made by him. The learned judge held that there was a passing of this fund so as to attract

estate duty on the death of Sir Archibald, and from that judgment the trustees of the settlement (who are also beneficiaries under the settlement) now appeal to this court.

The settlement was dated Apr. 13, 1936, and was made between Sir Archibald thereafter called "the settlor" of the one part, and Sir Archibald and his wife Dame Florence Flower and his three children Fordham Flower, John Keane Flower and Evadne Longsdon, who are the present plaintiffs, of the other part, the parties of the second part being joined as trustees of the settlement. Omitting formal parts the settlement was in these terms so far as material:

"2. The trustees shall out of the income of the trust funds pay and discharge the costs and expenses of and incidental to the preparation and completion of these presents and the vesting of the said shares and subject thereto shall stand possessed of the trust funds during the life of the settlor to use apply and pay the income of the trust funds for the charitable and benevolent purposes as follows:—In each year during the life of the settlor to pay and apply the income of the trust funds for such charitable and benevolent purposes as the trustees may from time to time direct with power within the statutory limits to accumulate any income not so paid or applied and to pay and apply such accumulations for the like purposes as those for which the income of the trust funds were applicable. Provided always and it is agreed and declared that the objects of the above trust are not confined to purposes which according to law may be held to be charitable purposes but shall include purposes of a benevolent and/or public character for the benefit of institutions and individual persons and for subscriptions and gifts to objects whether of a national political or local character and that such advances and payments may be either by way of absolute gift or by way of loan and either with or without security and either with or without payment of any interest with power for the trustees to enter into contracts for the payment of subscriptions or gifts for any term of years but determinable on the death of the settlor. Provided always that no such application or payment shall be made which shall directly or indirectly benefit the settlor or any of the trustees.

"3. After the death of the settlor the trustees shall hold the trust funds:—(i) Upon trust to pay the net annual income thereof to the said Florence Flower for her life and (ii) On the death of the survivor of them the settlor and the said Florence Flower to hold the capital of the trust funds and any undistributed income thereof in trust for the said Fordham Flower John Keane Flower and Evadne Longsdon in equal shares."

The only other provision to which I need refer is contained in para. 1 of a series of provisions introduced by the words: "It is hereby agreed and declared as follows". That provision, which may have some bearing on the reference to undistributed income in the earlier cl. (3) (ii) is in these terms:

"(1) There shall be no apportionments at the date hereof or at the date of the death of the said Florence Flower as between capital and income of dividends interest or other income but all such dividends interest or other income paid or received after the date hereof or after the date of the death of the said Florence Flower as the case may be whether wholly or partially accruing before the date hereof or the date of the death of the said Florence Flower as the case may be shall be regarded and distributed as if wholly arising or accruing after the date hereof or after the death of the said Florence Flower as the case may be."

The wife, Dame Florence Flower, died on Jan. 15, 1946, and the settlor died on Nov. 22, 1950. The fund comprised in the settlement consisted of four thousand ordinary shares of £1 each in Flower & Sons, Ltd. We were told that the capital value of these shares was £22,000, and there have been accumulations amounting to some £10,000 which have for the most part been distributed. The fund is

A thus a substantial one in itself, but the question of duty is made of even greater importance to the parties because if there was a passing of this fund on the death of Sir Archibald, it would fall to be aggregated with the rest of his very substantial estate.

B It will have been observed that the trust declared during the life of the settlor comprised a discretionary power given to the trustees to apply the income of the fund to an extremely wide and varied range of objects not confined to charitable purposes nor even to benevolent purposes, for the first proviso to cl. 2 expressly provided

C "that the objects of the above trust are not confined to purposes which according to law may be held to be charitable purposes but shall include purposes of a benevolent and/or public character . . ."

The potential objects cover a very wide field.

D It is common ground that the discretionary trust declared to take effect during the life of the settlor in these extremely wide terms was and is void for uncertainty, so that no effective disposition was made of the income of the fund during the settlor's life. In that state of affairs it is contended by counsel for the trustees that on the principle recognised in a long line of cases, the result of the invalidity of the trusts declared during the settlor's lifetime was to bring about an acceleration of the interests of the persons taking in remainder. The effect of that, as I understand it, would be that forthwith on the execution of the settlement Dame Florence Flower, the widow, became tenant for life in possession of the fund with remainder to the three children in equal shares. If that were so, it is common ground that no estate duty could be exigible on the death of Sir Archibald under the provisions of s. 1 of the Finance Act, 1894, or otherwise. On the other hand it is contended on the part of the Crown that the invalidity of the trusts declared in respect of the income during the settlor's life brought about a resulting trust in favour of the settlor and consequently that at the time of his death he had a beneficial interest in possession for the period of his life in the fund. If that argument is well founded it is common ground that estate duty must have been exigible on his death by virtue of a passing under s. 1 of the Act of 1894.

E Counsel for the trustees referred us to several of the numerous cases bearing on this topic. The principle, I think, is well settled, at all events in relation to wills, that where there is a gift to some person for life, and a vested gift in remainder expressed to take effect on the death of the first taker, the gift in remainder is construed as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest, with the result that if the gift to the first taker fails—as, for example, because he witnessed the will—or if the gift to the first taker does not take effect because it is disclaimed, then the person entitled in remainder will take immediately on the failure or determination of the prior interest, and will not be kept waiting until the death of the first taker. It has long been settled that this principle applies not only to realty (in respect of which I think it was first introduced) but equally in respect of personalty; and although all the authorities to which we have been referred have been concerned with wills, counsel for the trustees submits—and I do not think that counsel for the Crown disputes—that there is no reason for applying any different rule to a settlement inter vivos. As to that I would say that I am disposed to agree that the principle must be broadly the same; but I cannot help feeling that it may well be more difficult, in the case of a settlement, to collect the intention necessary to bring the doctrine of acceleration into play. Of the authorities I need refer only to *Lainson v. Lainson* (1) ((1854), 5 De G.M. & G. 754) and secondly to *Re Hodge, Midland Bank Executor & Trustee Co., Ltd. v. Morrison* (2) ([1943] 2 All E.R. 304). In *Lainson v. Lainson* (1) the first paragraph of the headnote is in these terms:

"The words 'from and immediately after his decease' following a limitation for life, in general point out the order of limitation merely. Where

therefore a testator revoked a limitation for life, which was followed by those words introducing subsequent limitations: Held that the remainders were accelerated."

TURNER, L.J., said (5 De G.M. & G. at p. 756):

"The question in this case is, not whether an intention is to be collected in favour of the testator's son and heir (who requires no intention in his favour); but whether there is an intention in favour of the grandson. The question may be considered in two points of view; first, as regards the will; secondly, as regards the codicil. By the will, the estate is given upon trust for the testator's son for life; and, from and immediately after his decease, upon trust for his first and other sons in tail. These words may have one of two imports, either that the grandson was to take nothing till after the death of his father, or else merely to show the order of the limitations, through which the estate was to pass. I take the cases cited to establish the proposition that, *prima facie*, these words are to be understood as denoting the order of succession of the limitations. Is there then anything in the will to lead to a different conclusion? I can see nothing."

It is to be observed that TURNER, L.J., said that *prima facie* these words are to be understood as denoting the order of succession of the limitations. But earlier in the passage I have quoted he said:

"The question in this case is, not whether an intention is to be collected in favour of the testator's son and heir (who requires no intention in his favour); but whether there is an intention in favour of the grandson."

By that I think he meant that the testator must be taken *prima facie* to have intended the heir to take any interest not effectively disposed of, so that the question was whether that intention was displaced by this particular provision. Counsel for the Crown submits that similarly in the case of a settlement, *prima facie* anything not disposed of by the express terms of the settlement reverts to the settlor under a resulting trust, so that where acceleration is alleged the question is whether an intention to produce acceleration in lieu of a resulting trust is manifested by the language of the instrument.

Re Hodge (2) was a decision of SIMONDS, J., and the headnote reads:

"A testatrix by her will directed that annuities should be paid to two annuitants subject to a life interest in the residuary income, the first payments to be made three months after the death of the tenant for life. The tenant for life having disclaimed his life interest: Held, that the annuities were accelerated so as to take effect as from the death of the testatrix."

SIMONDS, J., in his judgment said ([1943] 2 All E.R. at p. 305):

"The principle of acceleration was first established in regard to remainders in real estate, and probably the origin is to be found in the technicalities of real property law. However that may be, the principle became extended to interests in personalty, and, although counsel have not been called upon to find any case where acceleration has been applied except in the case of what may be called a residuary interest, I see no reason why . . . it should not be applied in the case of any interest whether a partial interest such as an annuity or a residuary interest. The principle is exactly the same . . . the postponement of a particular interest is merely in order that a prior interest may be enjoyed. If that prior interest is determined, whether by the death of a prior beneficiary or for any other reason, the reason for postponement goes and there is no reason, therefore, why there should not be acceleration. Accordingly, when I find here that the annuity is expressed to be subject to the life interest . . . and [that the tenant for life] disclaims his life interest, I come to the conclusion that the annuity is to be accelerated, for it is just as

A if it were said 'subject to the interests of [the tenant for life] which may be determined either by his death or for some other reason'."

B The question then is whether, having regard to that principle, the intention necessary to produce acceleration in the present case is to be collected from the terms of the settlement. The learned judge was of opinion that no such intention could be collected from the language used with any sufficient degree of certainty. He took the view that in these circumstances his proper course was to follow the literal meaning of the language used; and taking that course he found that there was no ground for holding that the interests in remainder were accelerated so as to take effect during the lifetime of the settlor. In my view the learned judge was clearly right. The point is a short one which does not admit of much elaboration in argument; but in my opinion there is no sufficient reason here for holding that the interests in remainder were accelerated. On the contrary, it seems to me that when the settlement is examined such indications as there are point in the other direction. One may observe, first, that the trustees, in whom the purported discretionary power of distributing income was vested, were in fact the settlor himself, his wife and the three children. One begins, therefore, with this that what the settlor had immediately in view was a trust operating during his life under which the income of the fund could be applied for a wide variety of purposes excluding any benefit for himself and his wife and children at the joint discretion of those persons in their capacity as trustees; and he made by conferring on the trustees—that is to say, himself and his family—these discretionary powers of disposal.

E Next I would observe that the trusts in this document are declared in two separate and distinct branches. First, by para. 2 it is provided that the trustees shall stand possessed of the trust funds during the life of the settlor "to use apply and pay the income" thereof, and so forth; and secondly in para. 3: "After the death of the settlor the trustees shall hold the trust funds" on trusts stated. It is not a case where the trusts during the life of the settlor and after his death are expressed in a continuous series without a break. On the contrary, the two sets of trusts are declared quite separately, which does to some extent suggest that they are to be regarded as independent of each other.

F Next it is to be observed that to bring the doctrine of acceleration into operation something must be found here equivalent to the gift of a vested remainder to a person expressed to take effect on the death of the first taker. Here it seems to me that the argument on behalf of the trustees really meets with insuperable difficulties. This is not a case in which a fund is given to A for life, and from and after the death of A to B, that being the simplest example of a proper case for the application of the doctrine. It is a disposition of the fund during the life of the settlor for objects which do not include the settlor. Therefore it is not possible to bring the doctrine into play by treating the trusts in remainder as taking effect on the death of the settlor, or the earlier failure or determination of his interest, because the settlor in truth had no beneficial interest at all. It would be necessary to recast the language used so as to make the gift a gift limited to take effect on the death of the settlor, or the prior failure or determination of the trusts limited to take effect during his lifetime. That seems to me to involve an extension of the doctrine which to my mind would be wholly unwarranted.

I Next one finds references to the death of the settlor which, I think, make it reasonably plain that the event referred to is the death of the settlor in the literal sense, and nothing else. For example, one finds towards the end of the first proviso to para. 2 the words

"with power for the trustees to enter into contracts for the payment of subscriptions or gifts for any term of years but determinable on the death of the settlor."

That, I would say, means the actual death of the settlor. Then one has in para. 3 the words: "After the death of the settlor" introducing the trusts in remainder, and that, I should have thought, was in contra-distinction to the separate fasciculus of trusts declared by para. 2 during the life of the settlor. Then again in sub-para. (ii) of para. 3 one finds: "On the death of the survivor of them the settlor and the said Florence Flower". That, I should have thought, again must be the actual death of the longest liver of the two of them.

These considerations lead me to the conclusion that the learned judge was right in holding that there was no acceleration in this case. The language of the settlement, read literally, seems to me to be wholly consistent with that view. There is here no evidence of intention, such as might be looked at by way of surrounding circumstances, to spell an intention that an acceleration should take place in events such as those that have happened, out of the language used. If the surrounding circumstances are looked at, it seems to me in the highest degree improbable that the settlor (if the matter had been brought to his notice) would have intended acceleration to take place in favour of the persons interested in remainder so as to give the income of the entire fund immediately to his wife with remainder of the capital and income to his children. It appears to me to be plain from the character of the disposition made that the settlor's intention was that during his life neither he nor his wife nor his children should have any beneficial interest in the fund, but the fund was to be subject to a discretionary power jointly exercisable by him and them as trustees to apply the fund for, broadly speaking, charitable and benevolent purposes such as a man in the position of Sir Archibald Flower would ordinarily feel himself and his family under a moral duty to support. The fund was to be held at the discretion of the trustees for the application of the income during his life for purposes such as those, with no idea whatever in his mind of giving his wife or his children any beneficial interest until after his death. It seems to me that it would have been an extraordinary departure from anything that the settlor could have intended for his wife to come into immediate possession of the income of the trust fund.

As I said earlier the point is a short one. For the reasons I have endeavoured to express I think that the submission of counsel for the trustees fails, and I conclude by saying this. As I have already mentioned, counsel referred us to a number of cases, but was not able to find an authority in which it has been held or even argued that acceleration could take place in the case of a settlement inter vivos in the form of the settlement now under consideration. It appears to me that it would be a large and unwarrantable extension of the doctrine so to apply it in the present case.

For these reasons in my view the learned judge came to a right conclusion, and I would dismiss the appeal.

ORMEROD, L.J.: I agree, and I have nothing to add.

LORD EVERSHERD, M.R.: I also agree with the reasons which **JENKINS, L.J.**, has given, and with the judgment of **UPJOHN, J.**

Appeal dismissed.

Solicitors: *Stanley & Co.*, agents for *R. Evans Parr & Co.*, Birmingham (for the trustees); *Solicitor of Inland Revenue.*

[Reported by **F. GUTTMAN, Esq.**, Barrister-at-Law.]

A Re GOUK (*deceased*). ALLEN v. ALLEN AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), December 19, 1956.]

Will—Gift of residue to A. and “thereafter to her issue”—Whether A. takes absolutely.

B By her will a testatrix, after giving pecuniary legacies, gave “all the remainder of which I am possessed to my sister [F.E.A.] . . . and thereafter to her issue”.

Held: F.E.A. took an absolute interest in the residuary estate.*Byng v. Lord Strafford* ((1843), 5 Beav. 558) and *Re Percy* ((1883), 24 Ch.D. 616) followed.C [Editorial Note. In *Re Percy* ((1883), 24 Ch.D. 616) the testamentary gift was: “I give to my wife . . . £10,000, afterwards to go to the understated residuary legatee E.” It is submitted in JARMAN ON WILLS (8th Edn.), Vol. 1, p. 481, that the obvious intention of the testator in that case was to give his wife only a life interest. BACON, V.-C., held, however, that there was an absolute gift to the wife. In the present case DANCKWERTS, J., follows the decision of BACON, V.-C., and *Re Percy* was also followed in *Hyndman v. Hyndman* ([1895] 1 I.R.D 179).

As to the quantity of the interest given, see 34 HALSBURY’S LAWS (2nd Edn.) 327-329, para. 377, particularly p. 329, text and notes (l), (m); and for cases on the subject, see 44 DIGEST 915-921, 7736-7781.]

Cases referred to:

- E (1) *Byng v. Strafford (Lord)*, (1843), 5 Beav. 558; 12 L.J.Ch. 169; 49 E.R. 694; *affd.* H.L. sub nom. *Hoare v. Byng*, (1844), 10 Cl. & Fin. 508; 8 E.R. 835; 44 Digest 914, 7723.
- (2) *Re Percy. Percy v. Percy*, (1883), 24 Ch.D. 616; 53 L.J.Ch. 143; 49 L.T. 554; 44 Digest 920, 7779.
- (3) *Lowe v. Thomas*, (1854), 5 De G.M. & G. 315; 23 L.J.Ch. 616; 23 L.T.O.S. 238; 43 E.R. 891; 44 Digest 720, 5699.

F Adjourned summons.

The originating summons was issued by the sole executor and trustee of the will of Edith Mary Gouk, deceased, for the determination of the question whether on the true construction of her will (a) the first defendant, Florence Elizabeth Allen, was absolutely entitled to the residuary estate of the testatrix or (b) the said Florence Elizabeth Allen was entitled only to a life interest in the residuary estate and subject thereto the residuary estate was held on trust for her children and remoter issue, or (c) on what other trusts the residuary estate should be held by the plaintiff. The defendants, other than the said Florence Elizabeth Allen, were three defendants claiming to be beneficially interested in the capital of the residuary estate of the testatrix. The second defendant was the daughter of the first defendant and the other two defendants were grandchildren of the first defendant.

Maurice Berkeley for the plaintiff.*Charles Sparrow* for the first defendant, Florence Elizabeth Allen.*L. H. L. Cohen* for the second, third and fourth defendants, a child and grandchildren of the first defendant.

I DANCKWERTS, J.: The testatrix made her will on a will form on Nov. 28, 1953, and she died on Apr. 17, 1956. The language of the will is that of the testatrix, no doubt without any legal assistance. She gave and bequeathed unto her niece, Miss Doris Allen, and to her nephew, Leslie Greenwood Allen, £250 each, and then she proceeded as follows:

“and all the remainder of which I am possessed to my sister, Mrs. Florence Elizabeth Allen, also of No. 6 Highgrove Way, Ruislip, Middlesex, and thereafter to her issue.”

The initial gift plainly is an absolute gift to the sister. The question is: What is the effect of the gift beginning with the words "and thereafter"? There is no reference to death, though perhaps many people might think that it must mean "after the death of the sister"; but there are two authorities not actually on the words "and thereafter" but on the word "afterwards", which seems to me a word which is really indistinguishable in meaning from "thereafter", and I think I should follow those cases rather than the other series of cases* to which counsel for the issue of the first defendant has called my attention which all contain a reference to the death of the person who was held to be a life tenant. I propose, therefore, to apply *Byng v. Lord Strafford* (1) ((1843), 5 Beav. 558) and *Re Percy, Percy v. Percy* (2) ((1883), 24 Ch.D. 616), to the present case, and to hold that Mrs. Florence Elizabeth Allen takes the residuary estate absolutely. After all, as KNIGHT BRUCE, L.J., said in *Lowe v. Thomas* (3) ((1854), 5 De C.M. & G. 315 at p. 317):

"... the numerous class of persons who, in wills and otherwise, speak as if the office of language were to conceal their thoughts, have no right to complain of being taken to mean what their language expresses."

Declaration accordingly.

Solicitors: *Enever, Strong, Freeman & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

HOARE v. M. & W. GRAZEBROOK, LTD.

[BIRMINGHAM ASSIZES (Lynskey, J.), July 27, 1956.]

Factory—Dangerous machinery—Duty to fence—Component to be bored affixed to machine—Danger arising from machinery in use with component affixed—Vertical boring machine—Whether duty to fence component affixed to machine—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1).

The plaintiff was a machine operator employed by the defendants at their foundry. On Feb. 8, 1954, he was in charge of two machines, one of which was a vertical boring machine which consisted of a slotted table on which the job to be worked (which, on that day, was a steel axle-box) was clamped by means of an angle plate. The table was four feet nine inches in diameter and revolved, when it was in use, at some fourteen revolutions a minute in an anti-clockwise direction. The angle plate, which was some twenty-two inches long and fifteen inches high, was fixed towards the rim of the table and the job was attached to it by means of two arms. As the table revolved the angle plate also revolved, causing the job, or component, to rotate round a borer which moved slowly down to make a hole in the job. The borer took about an hour and a quarter to make one cut through the job, and during that time it travelled a distance of some nine inches. It was the practice (as the defendants should have known) for men to test whether borers such as this were working satisfactorily, in jobs into which they could not see, by putting a hand against the borer to see if there were any vibration. The plaintiff tested his machine in this way and while his hand was on the borer the angle plate came round and caught his elbow, and his hand slipped into the aperture which the borer had made, was caught in the nip between the borer and the job that was being bored and was badly mangled. The plaintiff claimed damages against the defendants for breaches of their

* The cases relied on were: *In the Estate of Lupton*, [1905] P. 321; *Re Adam's Trusts* (1865), 14 W.R. 18; *Sherratt v. Bentley* (1834), 2 My. & K. 149; *Re Russell* (1885), 52 L.T. 559; and other cases mentioned in note (g) in JARMAN ON WILLS (8th Edn.), Vol. 2, p. 1182.

A statutory duty under s. 14 (1)* of the Factories Act, 1937, on the ground that the angle iron and the borer in conjunction with the rotating job were dangerous pieces of machinery and should have been securely fenced.

Held: (i) the defendants were liable to the plaintiff in damages for breaches of their statutory duty under s. 14 (1) of the Factories Act, 1937, for the following reasons—

B (a) when the angle iron was affixed to the table of the machine and was rotating it was a dangerous part of the machinery and should have been fenced; and

C (b) the fact that, when the machine was in operation, a nip was created between the borer and the component which was being operated on made that part of the machine a “dangerous part” of the machinery, within s. 14 (1), and the nip should have been fenced; and

(c) these dangerous parts caused the accident, the originating cause being the rotating angle iron.

Nicholls v. Austin (Leyton), Ltd. ([1946] 2 All E.R. 92), *Bullock v. G. John Power (Agencies), Ltd.* ([1956] 1 All E.R. 498), and *Kilgollan v. William Cooke & Co., Ltd.* ([1956] 2 All E.R. 294) distinguished.

D *Lenthall v. Gimson & Co. (Leicester), Ltd.* (May 24, 1956), unreported, followed.

(ii) on the facts the plaintiff was guilty of contributory negligence and his liability was assessed at one quarter.

[**Editorial Note.** The importance of the decision in the present case is that it shows that a machine or part of a machine which of itself is not dangerous E may become dangerous machinery when the job is affixed to the machine and the machine is in use, the danger being created by the combined effect of the job and the machinery operating on it.

As to the statutory duty to fence dangerous machinery, see 14 HALSBURY'S LAWS (2nd Edn.) 594, para. 1130; and for cases on the subject, see 24 DIGEST 908-910, 65-76.

F For the Factories Act, 1937, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

- (1) *Bullock v. G. John Power (Agencies), Ltd.*, [1956] 1 All E.R. 498.
 (2) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493;
 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.
 (3) *Kilgollan v. William Cooke & Co., Ltd.*, [1956] 2 All E.R. 294.
 (4) *Lenthall v. Gimson & Co. (Leicester), Ltd.*, (May 24, 1956), unreported.

Action.

The plaintiff, Gilbert Edward Hoare, claimed damages against the defendants, M. & W. Grazebrook, Ltd., for personal injuries arising out of breaches by the H defendants of their statutory duty under s. 14 (1) of the Factories Act, 1937.

The facts appear in the judgment.

A. J. Flint for the plaintiff.

E. G. H. Beresford for the defendants.

I **LYNSKEY, J.:** In this case Gilbert Edward Hoare is claiming from his employers, M. & W. Grazebrook, Ltd., damages for personal injuries which he

* Section 14 (1) reads: “Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced:

“Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part.”

sustained on Feb. 8, 1954. The plaintiff was employed by the defendants as a machine operator and was operating a vertical boring machine. At the time of the accident he was engaged in boring a hole in a mild steel axle-box. He had been engaged on similar work with the defendants for some eleven years and on this particular machine for some eight years. He had worked it all that time without any real difficulty. A

On the day in question the plaintiff was employed in looking after two machines, one of which was either a milling or a boring machine, and the other of which was the machine about which he now complains, namely, the vertical boring machine. This machine consists of a slotted table on which the job to be worked has to be clamped or attached. The table is four feet nine inches in diameter and revolves, when working, at some fourteen revolutions per minute. On the day of the accident the job on which the plaintiff was working was a piece of steel, in which there was to be bored a hole some six inches in diameter and just over nine inches in depth, and for that purpose the job was fixed to the table by means of an angle plate, which was itself fixed to the table. The job was fixed to the angle plate by means of two arms running from the job to the angle plate. When the machine is in operation the table revolves and carries the job round with it, and, rotating with the job on the table, is the angle plate. The angle plate, which was some twenty-two inches in length and fifteen inches high, was fixed towards the rim of the table. For the purpose of making the bore, a borer, to which a tool is fixed, comes down from above. As the job rotates round the tool, the latter gradually bores the hole in it. The borer, as it works, moves down very slowly; it takes an hour and a quarter to make one cut right through the job and during that time the borer, carrying the tool, travels a distance of some nine inches or more. C D E

After the plaintiff had set the machine in operation and got the borer working, he went away to attend to the other machine which he had to look after. Having done that, he came back to the vertical boring machine. By that time the tool had worked down some two or three inches from the top of the job. The plaintiff then did something which, he said, he had been doing for some eight or more years, and which, according to an expert witness, practically every man in charge of a machine does. To make sure that the tool was working accurately, had not become blunted and was not marking the hole bored but was cutting it easily, he first got hold of the wheel which is at the top of the machine and put his left hand with its thumb and its knuckles against the borer making the hole. His object in doing that was to see if there was any vibration on the borer, because, if there was, he might have to stop the job and start all over again with a new tool or sharpen the tool. While he had his left hand in that position on the borer, the angle plate came round—it revolves in an anti-clockwise direction—and caught his left elbow. Either his elbow was knocked up or, instinctively, he tried to move it from what appeared to be a danger. As a result, his hand slipped down the borer into the aperture which the borer had made in the job and was caught and badly mangled. F G H

The case for the plaintiff was put in three ways. First it was submitted that the rotating table was itself dangerous, having regard to its diameter and to the fact that the worker had to work close to it, and ought to have been guarded to prevent danger. Secondly—and this is the more important allegation—it was submitted that whether the table ought or ought not to have been guarded, the angle iron should have been guarded, because, if it was usual for a workman to test the bore by putting his fingers on it over the angle iron or where the angle iron might pass as it rotated, there ought to be a guard of some sort, a rail or something like that, to prevent contact with it. It was not guarded, and the plaintiff says that if it had been guarded this accident would not have happened, because the operating cause of his hand going into this aperture was the contact made against or near his elbow by the rotating angle iron. Thirdly, it was I

A submitted that the borer, in conjunction with the rotating job, was a dangerous piece of machinery and ought to have been guarded. The plaintiff rests his claim solely on those breaches of statutory duty and the failure to maintain fencing of those parts if fencing had originally been provided.

The first point which I have to decide is whether the angle iron itself ought to have had some guard on it. That depends on the way in which the men employed on this type of work generally do their work and what evidence I accept. [His LORDSHIP referred to the evidence and found that it was the common practice over many years, and was the practice at this particular foundry, for the men to test whether their tools were working satisfactorily, in jobs into which they could not see, by using their hands to see if there was any vibration, that the plaintiff had been doing this for a number of years, and that the management should have known of this practice. His LORDSHIP continued:] If a man has to lean over a table which is nearly five feet in diameter and carries a rotating angle iron some fifteen inches high, it is quite clear that it is a dangerous part of the machinery. I am, therefore, satisfied that the rotating angle iron was a dangerous part of the machinery and ought to have been fenced, and that it was the originating cause of this accident, by knocking the plaintiff's hand for the moment out of control down the borer into the aperture.

The defendants contended that, even if that was a cause, it was not the real cause of the actual injury. The real cause of the actual injury, they said, was the rotating component which was being bored. Counsel for the defendants submitted that I was bound by authority to hold that, as the real cause of the accident was the rotating component and not the very slowly moving borer, there was no obligation to guard that part of the machine, because it was not covered by the Factories Act, 1937.

There have been a number of decisions about this and I have been referred to all of them. Of the three really important cases to which I was referred one was *Bullock v. G. John Power (Agencies), Ltd.* (1) ([1956] 1 All E.R. 498), before the Court of Appeal. In that case DENNING, L.J., referred to a passage in the speech of LORD UTHWATT in the House of Lords in *Nicholls v. Austin (Leyton), Ltd.* (2) ([1946] 2 All E.R. 92 at p. 99), and adopted it as being his view of what the law is. In that speech LORD UTHWATT was giving an expression of views which were not shared by some of the other Law Lords present at the time; although they did not dissent from him, they gave rather different reasons. In *Bullock v. G. John Power (Agencies), Ltd.* (1) and *Nicholls v. Austin (Leyton), Ltd.* (2), and also in *Kilgollan v. William Cooke & Co., Ltd.* (3) ([1956] 2 All E.R. 294), the facts, in each case, were that either wood or wire, having passed through the machine, was thrown out and caused the damage. In other words, in each of those three cases the cause of the trouble was the component itself, the job and not the machine.

It was submitted that those cases bound me to hold that, in effect, I must look at the machine independently from the work, the job or the component, and that, if the machine without the component in this particular part to which I am referred was not dangerous, then I could not hold that it was a dangerous part of the machine. It was also contended that if the danger was caused as a result of the component or job or article being in motion in the machine then as the Secretary of State had made no regulations under s. 14 (3) of the Act there was no obligation to fence the component or job or article. I do not accept that argument.

In *Lenthall v. Gimson & Co. (Leicester), Ltd.* (4) ((May 24, 1956), unreported), a similar case to this, FINNEMORE, J., at the Leicester Summer Assizes had before him the first two decisions which I have cited. In that case there was a moving table, which carried the component under a bridge on the machine. The bridge itself, when not in use, or when there was no component being worked on in the machine, was quite safe, but what made it dangerous was the fact that,

when the component was carried under the bridge, the two together created a nip, with the result that the bridge, which by itself was innocuous, was rendered dangerous because of the movement of the component.

One has to have regard to the purpose of the Factories Act, 1937, and that purpose is to protect operatives from danger. If danger does exist from the operation of the machine and if a part becomes dangerous from the operation of the machine, it seems to me that that is a "dangerous part" of the machinery, and the fact that it is not dangerous when no operation is taking place is quite irrelevant. What the Act of 1937 requires me to consider is whether, in fact, when the machine is in operation and being worked as it was designed to work, the part becomes a dangerous part of the machinery as a result of the operation; in other words, not whether the component is dangerous in itself, but whether the machine becomes dangerous as a result of the operation.

That being so, I respectfully agree with FINNEMORE, J., when, in dealing with *Leithall v. Gimson & Co. (Leicester), Ltd.* (4), he said:

"I think this case, although by no means free from difficulty is not that case [that is, not the case of the first two authorities to which I have referred] because it is not a case where, for example, the casting came free and struck the plaintiff or even toppled over and crushed him. What happened here was that the casting, which was bolted to the moving table, left a very small space indeed between itself and an essential part of the machine, namely, the cylinder . . . the pillar which supported the bridge, and caused the danger which injured the plaintiff. I think these are somewhat matters of first impression. At one time my first impression was inclined to be that this might be within the principle of *Bullock v. G. John Power (Agencies), Ltd.* (1), but, on reflection, I think it is not. When you have got a case of this sort where there are a moving table and a pillar or column and the work which is put on to the table creates what has been called a nip, a place where a man can be caught, then that would be a danger in the machine itself and not merely a danger from the workpiece with which the machine is dealing at the time. Therefore, in this case there would be a statutory duty on the part of the employers to do something about it, to guard it, if it can be guarded or to adopt another precaution such as having the bridge wider and the pillar further away, in which case I suppose no guard in the conventional sense would then be needed, because there would not be any danger."

With that I entirely agree. The previous decisions do not deal with this point, namely, whether a machine becomes dangerous in the operation which it is intended to perform, by reason of the component part creating a nip with a part of the machine which it is designed to come very close to. Does that make it a dangerous part of the machine? I think that it does. I agree with FINNEMORE, J., that it is not an easy case to decide, but I have no doubt about the matter. It is quite clear, having regard to the terms of the Factories Act, 1937, and to the fact that s. 16, which deals with the maintenance of fencing, requires that fencing shall be maintained when the machinery is "in motion or in use", except when it is necessarily exposed for examination, lubrication or adjustment. That looks to me as if the legislature were contemplating a piece of machinery which, although it was not in motion, might still be in use; and, if it might be in use and not in motion, there is only one inference which I can draw: that the Act is intended to apply, not merely to moving parts of the machinery, but to non-moving parts of machinery if they are dangerous or become dangerous in use. I think that that is this case. That being so, I think I am bound to hold that there has been a breach by the defendants of their statutory duty, both in their failure to fence the revolving angle plate and also in failing to fence this nip which is created between the boring bar itself and the component which is

A being operated on. The result is that, in my view, the plaintiff is entitled to succeed.

[His LORDSHIP found that the plaintiff was guilty of contributory negligence and assessed his liability at one quarter. His LORDSHIP assessed the damages at £2,072 17s., which included the special damages which were agreed at £72 17s., and gave judgment for the plaintiff for £1,554 12s. 9d.]

B *Judgment for the plaintiff.*

Solicitors: *W. H. Thompson* (for the plaintiff); *E. P. Rugg & Co.*, agents for *Buller, Jeffries & Kenshole*, Birmingham (for the defendants).

[*Reported by GWYNEDD LEWIS, Barrister-at-Law.*]

C R. v. HAVANT JUSTICES, *Ex parte* JACOBS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, JJ.), January 23, 30, 1957.]

D *Justices—Jurisdiction—Probation—Breach of probation order—Power to make fresh probation order for period of three years from date of fresh order—Effect of supervising court's decision on existing probation order—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 3 (1), s. 6 (3), Sch. 1, para. 3, proviso (a).*

E In December, 1955, the probationer, an infant then about nineteen years of age, was convicted of larceny and put on probation by a magistrates' court for two years. Having committed breaches of the order the probationer was brought on May 4, 1956, before a different magistrates' court, being the supervising court for the district in which she was then residing, and that court made a new probation order for three years from that date. On motion on behalf of the probationer for certiorari to quash the second probation order on the ground that in the circumstances the effect was that the probationer was put on probation for more than three years contrary to s. 3 (1)* of or para. 3, proviso (a), of Sch. 1* to the Criminal Justice Act, 1948,

F **Held:** (i) the probation order of May 4, 1956, was valid because (a) under s. 6 (3)† of the Act of 1948 the magistrates' court had power to deal with the probationer in any manner in which she could have been dealt with if she had just been convicted of the original offence, and this included power to put her on probation for three years from May 4, 1956, and (b) the new order did not amend the original order and thus did not infringe para. 3, proviso (a), of Sch. 1 to the Act of 1948.

G (ii) the original probation order became ineffective, although not formally discharged, on the order of May 4, 1956, being made.

[**Editorial Note.** The original offence was larceny and, as this was not an offence for which the sentence was fixed by law, the magistrates had power to make a probation order for any period between one and three years (see s. 3 (1) of the Criminal Justice Act, 1948). If, instead of making a new probation order, a court before whom a probationer is brought exercises the power conferred by s. 6 (3) of the Act of 1948 to impose a fine not exceeding £10 or, in a proper case, to make an attendance order, the original probation order is not rendered ineffective (cf., p. 477, letter H, post). If, however, as here, the court makes a new probation order, the words "or may" which, in s. 6 (3), immediately precede para. (a) of that sub-section, show that the power given by para. (a) to deal with the probationer in any manner in which he could have been dealt with if just convicted of the original offence is independent of the qualification "without prejudice to the continuance of the probation order" which applies to the alternative courses previously mentioned.

* The relevant terms of these are printed at p. 476, letter I, p. 477, letter B, post.

† The terms of s. 6 (3) (a) are set out at p. 477, letter D, post.

As to the powers of a court on conviction of a person of a further offence during a period of probation, see 10 HALSBURY'S LAWS (3rd Edn.) 504, para. 918; and for a case on the subject, see 14 DIGEST (Repl.) 573, 5738. A

For the Criminal Justice Act, 1948, s. 3 (1), s. 6 (3), Sch. 1, para. 3, proviso (a), see 28 HALSBURY'S STATUTES (2nd Edn.) 352, 356, 398.]

Motion for an order of certiorari.

This was a motion by the mother of Audrey Helena Baker, an infant, for an order of certiorari to bring up and quash an order of the justices for the County of Southampton sitting for the petty sessional division of Havant made on May 4, 1956, whereby the infant was required for three years to be under the supervision of a probation officer for the petty sessional division of Poole and requiring her to comply with the requirements set out in the order. The facts appear in the judgment. C

C. Ingram Poole and A. R. Tyrrell for the mother, the applicant.

D. A. Grant for the justices, the respondents.

Cur. adv. vult.

Jan. 30. LORD GODDARD, C.J., read the judgment of the court: The circumstances in which the probation order dated May 4, 1956, came to be made are these. On Dec. 8, 1955, the probationer, Audrey Helena Baker, then nineteen years of age or thereabouts, was convicted at the magistrates' court at Poole of the larceny of money and was put on probation for two years with the condition that she should reside at a hostel in North London. On Feb. 20, 1956, the probationer was brought before a metropolitan magistrate at the North London Magistrates' Court for a breach of this probation order, and, in addition to giving an absolute discharge for the breach, the magistrate amended the order by substituting residence at St. Barbara's Approved School in the County of Southampton for residence at the hostel in London. As a consequence of the amendment as to residence the magistrates' court at Havant became the supervising court for the purposes of the sections in the Criminal Justice Act, 1948*, dealing with probation orders, and the probationer, having committed a further breach of the order, was brought before the magistrates' court at Havant on May 4, 1956, and that court then made a new probation order for a period of three years. To complete the history, it seems that the probationer then committed a breach of the last-mentioned probation order and that on June 7, 1956, she was committed to quarter sessions under s. 20 (3) of the Criminal Justice Act, 1948, and there sentenced to Borstal training, and that she is at present detained in a Borstal Institution at Aylesbury. D E F G

The ground on which this motion was made was that the justices at Havant had no power to make the probation order of May 4, 1956, because, it was said, as the original probation order had never been discharged the effect of the new order would be that the probationer would be under probation for a period exceeding three years. We were informed that the question raised on this motion is one which has caused justices and their clerks some doubt, and that it has been the subject of discussion in legal journals; and accordingly, in dismissing the application at the close of the argument, we said that we would put our reasons for so doing in writing. We now proceed to give them. H

By s. 3 (1) of the Criminal Justice Act, 1948, it is provided:

"Where a court . . . before which a person is convicted of an offence . . . is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order . . . requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years." I

* The sections are ss. 3-12.

A By s. 5 (1) the provisions of Sch. 1 to the Act are to have effect in relation to the discharge and amendment of probation orders, and by the first paragraph of that Schedule it is provided:

"The court by which a probation order was made may, upon application made by the probation officer or by the probationer, discharge the order."

B That is the only specific provision in the Act with regard to the discharge of a probation order. Paragraph 2 of Sch. 1 contains provisions as to the amendment of an order and gives power to the supervising court to make amendments, but also contained in para. 3 is a proviso that:

C "(a) the court shall not amend a probation order by reducing the probation period, or by extending that period beyond the end of three years from the date of the original order."

Section 6 (1) provides that if during the term of probation the probationer has failed to comply with any of the requirements of the order he may be summoned to appear before the court, including (by virtue of s. 6 (2)) the supervising court. Section 6 (3) provides:

D "If it is proved to the satisfaction of the court . . . that the probationer has failed to comply with any of the requirements of the probation order, that court may without prejudice to the continuance of the probation order, impose on him a fine not exceeding £10 or, in a case to which s. 19 of this Act applies, make an order . . . requiring him to attend at an attendance centre, or may—(a) if the probation order was made by a court of summary jurisdiction, deal with the probationer, for the offence in respect of which
E the probation order was made, in any manner in which the court could deal with him if it had just convicted him of that offence."

The offence in respect of which the probation order was made was the larceny committed on Dec. 8, 1955; and it is quite clear that if the supervising court, that is to say, the Havant justices, had dealt with the probationer for that
F offence one of the manners in which they could have dealt with her on the conviction would have been to have made a probation order under s. 3 (1). Accordingly, in the opinion of the court, it follows that the justices at Havant were enabled by this section to make the probation order that they did. They could not discharge the original probation order. That could only be discharged
G by the court at Poole, the court that made the order, and only on the application of the probation officer or the probationer, and no such application was made by either.

Now it will be observed that s. 6 (3) enables the court, before whom a probationer is brought for failure to comply with the order, to impose a fine not exceeding £10 or to make an order requiring him to attend at an attendance centre without prejudice to the continuance of the probation order. That last
H provision as to the continuance of the probation order does not apply if the justices act under the provisions of para. (a), and decide to deal with him in any manner in which they could have dealt with him if they had just convicted him of that offence. They are not required, therefore, to have regard to the fact that a previous probation order is in existence, except in so far as they have to find whether there has been a breach of that order, and, in the opinion of the
I court, it follows that, once the supervising court intend to deal with the case otherwise than by imposing a fine of not more than £10 or making an attendance centre order, the effect is that the previous probation order can no longer have effect.

It is clear that for a breach of an order justices can sentence the probationer to prison. The probation order could have no effect during the sentence of imprisonment. It is also clear that the supervising court could send the probationer forward to quarter sessions, as was ultimately done in this case, with a view to a Borstal sentence, and, if the original court making the order was a

court of assize or of quarter sessions, it could itself sentence to imprisonment or Borstal. Having that power, if the court is of opinion that it is expedient to make a probation order instead of sending the offender to prison or to Borstal, we can see no reason why they should not make a probation order for not more than three years. It will be this order that will control the probationer and the former order, though not formally discharged, will be ineffective. The proviso to para. 3 of Sch. 1 does not really cause any difficulty, because that only prohibits a court, which is asked by the probation officer or by the probationer to amend an existing order, from extending the period of that order beyond the term of three years.

For these reasons we are of opinion that the justices had power to make the order that they did and that this application fails.

Motion dismissed.

Solicitors: *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole, Dorset (for the mother, the applicant); *Theodore Goddard & Co.*, agents for *G. Andrew Wheatley*, Winchester (for the justices, the respondents).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

LEVY (by her next friend) v. LEVY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 16, 1957.]

Divorce—Infant—Service—Notice of motion of appeal to Divisional Court against magistrates' court order—Service on infant respondent personally instead of on guardian ad litem—Infant legally aided—Whether good service—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 64 (3).

Justices—Husband and wife—Appeal—Infant respondent—Service on infant respondent instead of on guardian ad litem—Infant legally aided—Whether good service—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 64 (3).

The Matrimonial Causes Rules, 1950, r. 64 (1), provides that, inter alia, an infant may defend any cause to which the rules relate by his guardian ad litem and that except as otherwise provided by r. 64 no appointment of a guardian ad litem shall be necessary. By r. 64 (3): "Where in any cause to which these rules apply any document is required to be served and the person on whom service is to be effected is an infant, the document shall, unless otherwise directed, be served on the father or guardian of the infant . . . and service so effected shall be deemed good service on the infant."

The husband and the wife were infants. The wife, by her next friend, served on the husband notice of motion of appeal to the Divisional Court against an order of a magistrates' court. The husband's father applied for a civil aid certificate for the purpose of opposing the appeal and the certificate was granted to the husband "to defend (through his father and next friend) an appeal to the Divisional Court". On the question whether the notice of motion had been properly served,

Held: although r. 64 was mandatory, and applied to appeals to the Divisional Court from magistrates' courts (*Stanga v. Stanga*, [1954] 2 All E.R. 16 and *Gore-Booth v. Gore-Booth*, [1953] 2 All E.R. 1000 applied), yet in the particular circumstances of the present case the service on the husband would be deemed to have been good service.

Appeal allowed.

[As to service on an infant, see 12 HALSBURY'S LAWS (3rd Edn.) 325, para. 662, note (i); and for cases on the subject, see SUPPLEMENT to 27 DIGEST (Repl.), Nos. 3921a et seq.]

For the Matrimonial Causes Rules, 1950, r. 64 (3), see 10 HALSBURY'S STATUTORY INSTRUMENTS 226.]

A Cases referred to:

- (1) *Stanga v. Stanga*, [1954] 2 All E.R. 16; [1954] P. 10; 3rd Digest Supp.
- (2) *Gore-Booth v. Gore-Booth*, [1953] 2 All E.R. 1000; [1954] P. 1; 3rd Digest Supp.
- (3) *Ramsden v. Ramsden*, [1954] 2 All E.R. 623; 118 J.P. 430; 3rd Digest Supp.

B Appeal.

The wife, by her next friend, appealed against an order of the metropolitan magistrate sitting at the Thames Magistrates' Court dated July 2, 1956. The wife complained that the husband had deserted her, and having heard the case for the wife, the magistrate dismissed the complaint without calling on the husband to answer the complaint. The notice of motion of appeal was served on the husband personally instead of on his "father or guardian" as required by the Matrimonial Causes Rules, 1950, r. 64 (3), and the case is reported on this point.

J. Sarch for the wife.

A. F. Waley for the husband.

D LORD MERRIMAN, P.: COLLINGWOOD, J., is going to give the first judgment.

COLLINGWOOD, J.: The parties are both infants. At the date of the marriage, in January, 1955, the wife was a girl of seventeen, and the husband was only a year older. The wife appears by her next friend, her mother. The documents relating to the appeal were served not on the "father or guardian" of the husband, but on the husband himself. However, counsel for the husband urged this court to treat service on the husband himself as being good service under r. 64 (3) of the Matrimonial Causes Rules, 1950. In order that we might be more completely satisfied on the matter before acting on that request of learned counsel, we had the husband called into the box and sworn, and he said that he was served personally with these papers; he pointed out that he was legally aided in this matter and that the person who had applied for the certificate under the legal aid scheme was his father. When we looked at the civil aid certificate which was granted in response to that request, we found that it was granted to the husband as respondent in connection with the following proceedings "to defend (through his father and next friend David Levy) an appeal to the Divisional Court . . ." We emphasise that the decisions in *Stanga v. Stanga* (1) ([1954] 2 All E.R. 16) and *Gore-Booth v. Gore-Booth* (2) ([1953] 2 All E.R. 1000), both of which make it quite clear that the rules with regard to service in circumstances such as these are mandatory, apply equally to appeals to the Divisional Court. Having heard the evidence in the present case, however, we feel that we are justified in acquiescing in the request by the husband's counsel that this service should be deemed to have been proper service.

H [HIS LORDSHIP then dealt with the facts and referred to the judgment of LORD MERRIMAN, P., in *Ramsden v. Ramsden* (3) ([1954] 2 All E.R. 623) dealing with the danger of stopping a case without hearing the evidence on the other side. HIS LORDSHIP stated that, as it was not clear whether the magistrate ruled as a matter of law that the evidence could not amount to desertion or whether he was of the opinion that the wife's case had no substance in it, the case should be re-mitted for a re-trial.]

I LORD MERRIMAN, P.: I entirely agree with the judgment which has just been delivered, and do not wish to add anything.

Appeal allowed.

Solicitors: *W. G. R. Saunders* (for the wife); *Sampson & Co.* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

TULL'S PERSONAL REPRESENTATIVES v. SECRETARY OF STATE FOR AIR.

[COURT OF APPEAL (Denning, Romer and Sellers, L.JJ.), January 21, 22, 1957.]

Compulsory Purchase—Compensation—Assessment—Licensed premises—Licence in suspense—Whether freeholders' compensation should include difference between value of the current licence and value of the suspended licence—Defence Act, 1842 (5 & 6 Vict. c. 94), s. 19—Finance Act, 1946 (9 & 10 Geo. 6 c. 64), s. 12.

On Oct. 25, 1951, an acquiring authority gave notice to treat under the Defence Acts, 1842 to 1935 and other legislation, for the purchase absolutely of a licensed house then let to brewers on a lease, of which three and a half years remained unexpired, and which contained a stipulation that, at the end of the lease, the lessees were to do everything they could to give the reversioner, the freeholder, the benefit of the licence. In March, 1952, the acquiring authority took possession. The licence came into suspense (pursuant to s. 12 of the Finance Act, 1946*) and stood in the joint names of the freeholder and the lessees. The value of the freehold reversion to the house as a house which was adapted and suitable for use as licensed premises, but which was not in fact licensed, was £3,900, and its value as the reversion to a licensed house was £800 greater. The value of the licence as a current licence was therefore £800, but its value as a suspended licence was only £200. The Lands Tribunal having determined the amount of compensation to the freeholders at £4,500, the acquiring authority appealed on the ground that the tribunal were wrong in awarding more than £3,900.

Held: the award of £4,500 was right because the compensation to be computed was compensation for the loss sustained, which included the difference between the value of the reversion with a licence that was a current licence and its value with a suspended licence.

Belton v. London County Council ((1893), 68 L.T. 411) approved; *Fitzwilliam v. Inland Revenue Comrs.* ([1914] A.C. 753), and principles stated by SCOTT, L.J., in *Horn v. Sunderland Corpn.* ([1941] 1 All E.R. at pp. 495, 496) applied.

Appeal dismissed.

[**Editorial Note.** Power to acquire lands compulsorily is conferred by the Defence Act, 1842, s. 19. The power became vested in the Secretary of State for Air by virtue of the Air Force (Application of Enactments) (No. 1) Order, 1918 (S.R. & O. 1918 No. 538), as amended by the Defence (Barracks) Act, 1935, and the Air Navigation Act, 1936, s. 24 (2). Assessment of disputed compensation became referable to the Lands Tribunal by virtue of the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 1 (1), s. 7, and the Lands Tribunal Act, 1949, s. 1 (1) (b), (3) (a).

As to compensation for the compulsory acquisition of licensed premises, see 10 HALSBURY'S LAWS (3rd Edn.) 165, para. 287; and for cases on the subject, see 11 DIGEST (Repl.) 136, 193-197.

For the Defence Act, 1842, s. 19, see 22 HALSBURY'S STATUTES (2nd Edn.) 882; for the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 1, see 3 HALSBURY'S STATUTES (2nd Edn.) 975; for the Finance Act, 1946, s. 12, Sch. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 341, 343; and for the Licensing Act, 1953, s. 92-s. 96, see 33 HALSBURY'S STATUTES (2nd Edn.) 226-230.]

Cases referred to:

- (1) *Belton v. London County Council*, (1893), 62 L.J.Q.B. 222; 68 L.T. 411; 57 J.P. 185; 11 Digest (Repl.) 136, 197.

* Repealed; now superseded by the Licensing Act, 1953, s. 92; 33 HALSBURY'S STATUTES (2nd Edn.) 226.

- A (2) *Fitzwilliam v. Inland Revenue Comrs.*, [1914] A.C. 753; 83 L.J.K.B. 1076; 111 L.T. 385.
- (3) *Horn v. Sunderland Corpn.*, [1941] 1 All E.R. 480; [1941] 2 K.B. 26; 110 L.J.K.B. 353; 165 L.T. 298; 105 J.P. 223; 2nd Digest Supp.

Appeal.

B The acquiring authority appealed against the decision of the Lands Tribunal, given on May 8, 1956, awarding the owners of the freehold reversion to licensed premises £4,500 compensation. The facts appear in the judgment of DENNING, L.J.

B. S. Wingate-Saul for the acquiring authority.

J. R. Willis, Q.C., and *D. G. Widdicombe* for the freeholders.

C DENNING, L.J.: This case raises the question of the compensation payable when a licensed house is compulsorily acquired. The acquiring authority, the Secretary of State for Air, compulsorily acquired "The Volunteer Inn", at Crookham Common, near Newbury, in Berkshire. He gave notice to treat on Oct. 25, 1951. The house was then being run as a licensed house. The brewers, Messrs. H. & G. Simonds, Ltd., were in occupation (no doubt through a manager). They were leaseholders under a lease which had three and a half years to run. The owner of the reversion was the freeholder, Mr. Tull. The lease contained a stipulation that, at the end of the lease, the lessees were to do everything they could to give the owner the benefit of the licence. In March, 1952, the acquiring authority took possession of the property and turned it to the purposes of the Royal Air Force. When that happened the licence was not destroyed, as it would have been before 1946. It was put into suspense under the provisions of the Finance Act, 1946*; and being in suspense it was put into the joint names of the freeholder, Mr. Tull and the brewers, Messrs. Simonds, Ltd. The brewers did not apply for the licence to be removed to any other premises, either under an ordinary or a special removal, but it was available in the hands of the holders in this way: it could be used so as to be taken into account when monopoly value had to be paid on a new licence of other premises. The question is, what is the proper compensation payable to the freeholder, Mr. Tull, or, rather, to his estate, as he is dead? The compensation payable to the brewers is, we were told, the subject of negotiation and has not yet been settled.

G The acquiring authority say that the compensation payable for a licensed house should include nothing for the fact that it was licensed. They acquire, they say, only the house, not the licence. The licence remains intact in the hands of the holders, suspended it is true, but nevertheless available for use when an opportunity arrives. Accordingly, they say that the compensation should be assessed on the value of the house as a house which is adapted and suitable for use as licensed premises, but not as a house which is in fact licensed. The value of the freehold reversion on that footing is agreed to be £3,900.

H On the other hand the freeholders say that the compensation should be assessed on the value of the house as a licensed house. The value of the freehold reversion on that footing is agreed to be £4,700. That makes the value of the licence, regarded as a current licence, the difference between £4,700 and £3,900, namely, £800. The freeholders say, however, that its value as a suspended licence is not £800 but only £200. The holders might in some circumstances be able to use it to the full amount of £800, but that is not its real value. It all depends on the circumstances in which it can be used. The value of the suspended licence, as such, is £200. The freeholders are ready to give credit for this £200 against the £4,700 and claim £4,500. That was the approach of Mr. Gibbs, the valuer for the freeholders, and the Lands Tribunal said it was the realistic approach.

* The Finance Act, 1946, s. 12, Sch. 1, provided for the suspension of licences on compulsory acquisition: these provisions have now been replaced by Part 6 of the Licensing Act, 1953.

In my judgment the freeholders' contention is correct. Under the Defence Act, 1842 (which is the Act that authorises this acquisition)* compensation is to be paid for the lands, buildings and other hereditaments which are taken. There is no definition in that Act laying down the details of that compensation, but it has been well settled by the authorities that compensation is to be paid for the value of the land taken: it is to be paid for injurious affection to other lands, or for severance between the lands of the owner and other lands; and also compensation must be paid for disturbance. That has all been decided by the courts. In particular, before the Finance Act, 1946 (which enabled a licence to be put into suspense), it was settled that compensation for licensed premises included the increase in value because the premises were licensed premises. True it is that a licence is personal to the holder, but, nevertheless, it adds a value to the premises because of the leverage that it gives to the owner in any application for another licence (see *Belton v. London County Council* (1) (1893), 68 L.T. 411, and *Fitzwilliam v. Inland Revenue Comrs.* (2), [1914] A.C. 753). I see no reason why those cases should not apply since 1946 as well as before. The house which is being acquired is a licensed house and its value at the date of the notice to treat is to be found in the same way as before. The only difference is that previously the licence was destroyed by the compulsory acquisition, now it is suspended. In neither case did the acquiring authority acquire the licence. The freeholders must give credit for the value of the suspended licence, because compensation is to be compensation for the loss sustained, no more and no less (see *Horn v. Sunderland Corpn.* (3), [1941] 1 All E.R. 480); but that is all. The value of the suspended licence here was £200. The sum of compensation is £4,700, less £200: result £4,500.

An alternative way of putting the case (which appealed to the tribunal) is to say: Take the suitability value without a licence, £3,900, and add to it compensation for disturbance because the owner had been disturbed in regard to the licence. The compensation for disturbance is the difference between the current value of the licence as agreed, £800, less the value of the licence in suspense, £200, making the compensation for disturbance £600. Adding £600 to the £3,900, it comes to the figure of £4,500. That is an alternative way of putting the case; but I prefer the way in which I first stated it.

We were referred to a passage in 10 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 165, para. 287, in which it is stated that, in consequence of the provisions enabling a licence to be put into suspense compensation for disturbance is not payable as the licence is not lost. It can be inferred from that statement that the editor thought that the provisions about suspense meant that compensation could not be given for the fact that the premises were licensed premises. I do not take that view. It seems to me that the previous basis which existed before 1946 still holds good, subject to credit being given for the value of the suspended licence which is remaining in the hands of the owner.

I think that this decision of the Lands Tribunal was correct, and I would dismiss the appeal.

ROMER, L.J.: I agree, and have very little to add. In *Horn v. Sunderland Corpn.* (3) ([1941] 1 All E.R. 480), to which my Lord has referred, SCOTT, L.J., made some observations with regard to what "compensation" really means. He was there dealing with the Lands Clauses Consolidation Act, 1845, but the remarks that he made are applicable to the present case. He said that that Act, so far as compensation is concerned, had two features, of which I need only mention the first. He said (*ibid.*, at p. 491):

"The first is that what it gives to the owner compelled to sell is compensation—the right to be put, so far as money can do it, in the same position as

* For the provisions whereby the Secretary of State for Air was given the powers contained in the Defence Act, 1842, and for the provisions which now govern the assessment of compensation, see p. 480, letter G, ante.

A if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater."

B On the footing of the requisitioning authority's contention it has been found as a fact by the Lands Tribunal in the present case that the freeholders would have been £600 better off in respect of their interest in these licensed premises if the compulsory acquisition had never taken place. Prima facie, therefore, applying those observations of SCOTT, L.J., it would seem that that £600 should be included in the compensation properly payable to the freeholders.

C One way in which counsel for the acquiring authority sought to meet that suggestion was by saying that in fact the acquiring authority never acquired the licence in question at all: that the licence remained as it was before but in a suspended state and was put into the joint names of the lessor and lessees, and that therefore, as the acquiring authority did not acquire the licence, it can be disregarded in assessing the compensation. I think that that is a mistaken way of putting the matter, as is made plain, as I think, by SCOTT, L.J., in his judgment in the same case, *Horn v. Sunderland Corpn.* (3) when he listed (as he did on pp. 495 and 496) the principles on which compensation should be based. Under heading (5) he said this (*ibid.*, at p. 496):

E "He can recover no loss to which he is put by his decision to part with his land. (6) On a compulsory sale, however, the principle of compensation will include in the price of the land, not only its market value, but also personal loss imposed on the owner by the forced sale, whether it be the cost of preparing the land for the best market then available or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement. Otherwise, he will not be fully compensated."

F This passage shows, as I think, quite clearly that if a man is carrying on a business and his premises are compulsorily bought he is entitled not only to compensation in respect of the value of the premises, but to compensation for the loss of his business, the value of the goodwill; although undoubtedly the acquiring authority would not themselves acquire the business or the goodwill.

G Therefore that point on which counsel for the acquiring authority relied cannot, I think, be supported—at all events, as in any way a decisive consideration. I agree with my Lord in thinking that this case is really covered by *Belton v. London County Council* (1) ((1893), 68 L.T. 411) and that the grounds of the decision in that case are entirely applicable to the present case. It seems to me that that decision (if any decision be required) really displaces the suggestion that the acquiring authority here are entitled to regard the freeholders' reversion as being merely a reversion of premises suitable for licensed premises, without regard to the fact that they were licensed premises; for, in truth and in fact, and in law, what the freeholders had was a reversionary interest in licensed premises, and it is in respect of that interest and no other that they are entitled, in my opinion, to compensation.

H I agree that the appeal should be dismissed.

SELLERS, L.J.: I agree with what has been said by both my Lords, and I do not wish to add anything further.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the acquiring authority); *Vandercom, Stanton & Co.* (for the freeholders).

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

PETER CASSIDY SEED CO., LTD. *v.*
OSUUSTUKKUKAUPPA I.L.

[QUEEN'S BENCH DIVISION (Devlin, J.), January 21, 1957.]

Sale of Goods—Contract—Licence for export from Finland necessary—Contract provided for delivery: as soon as export licence granted—Licences granted only to members of Finnish exporters' association—Sellers not members of association—Whether sellers liable in damages for failure to deliver goods.

By a contract dated Sept. 16, 1953, the sellers, a Finnish concern, agreed to sell to the buyers, an English company, a quantity of ants' eggs f.o.b. Helsinki. The contract, which provided for disputes to be settled in London, contained the clause: "Delivery: prompt, as soon as export licence granted". Prior to the execution of the contract, the sellers' agents assured the buyers that the obtaining of a licence was merely a formality which might cause a short delay in delivering the goods. Under Finnish law, at all material times, the export of ants' eggs was prohibited except under licence and an export licence was granted only if the Ant Egg Exporters' Association approved the application. It was the practice of the association not to approve an application unless the applicant was a member of the association. The sellers were not members of the association and did not know of its practice. The sellers applied for an export licence but their application was refused on the ground that they were not members of the Ant Egg Exporters' Association and they were unable to deliver the goods in accordance with the contract. On the question whether the sellers were liable in damages for breach of contract,

Held: on the true construction of the contract and in the circumstances the sellers warranted absolutely that they would obtain an export licence because the clause "Delivery: prompt, as soon as export licence granted" showed that the assumption of both parties underlying the contract was that an export licence would certainly be granted and that the only question was when it would be granted; the sellers were, therefore, liable in damages.

Per CURIAM: where a warranty regarding licences has to be implied in a contract for the sale of goods the warranty will generally be to use all reasonable diligence to obtain a licence, but each case must be decided according to its own circumstances (see p. 488, letter B, post).

[As to licence clauses in contracts for the sale of goods from abroad, see 8 HALSBURY'S LAWS (3rd Edn.) 182, para. 315.]

Cases referred to:

- (1) *Re Anglo-Russian Merchant Traders & Batt (John) & Co. (London), Ltd.*, [1917] 2 K.B. 679; 86 L.J.K.B. 1360; 116 L.T. 805; 12 Digest (Repl.) 451, 3395.
- (2) *Partabmull Rameshwar v. K. C. Sethia (1944), Ltd.*, [1951] 2 All E.R. 352, n.; [1951] 2 Lloyd's Rep. 89; 3rd Digest Supp.
- (3) *Brauer & Co. (Great Britain), Ltd. v. James Clark (Brush Materials), Ltd.*, [1952] 2 All E.R. 497; 3rd Digest Supp.
- (4) *Pound (A. V.) & Co., Ltd. v. M. W. Hardy & Co., Inc.*, [1956] 1 All E.R. 639; [1956] A.C. 588.

Special Case.

This was an award in the form of a Special Case stated by an umpire, Mr. E. W. Grimsdale, under the Arbitration Act, 1950, s. 21 (1) (b), the arbitrators appointed by the parties having failed to agree on an award.

The dispute arose out of a contract dated Sept. 16, 1953, whereby Peter Cassidy Seed Co., Ltd. (referred to hereinafter as "the buyers"), of London, agreed to purchase through the agency of Toivo Erikilä (referred to hereinafter

A as "the agent"), of Helsinki, Finland, three thousand kilos of ants' eggs from Osuustukkukauppa I.L. (referred to hereinafter as "the sellers"), of Helsinki, Finland. The sellers having failed to deliver the goods, the buyers claimed damages, and, under a term of the contract, the dispute was referred to arbitration in London. The contract of Sept. 16, 1953, was the outcome of a series of transactions between the parties for the sale and purchase of ants' eggs. The following facts were found by the umpire in the Special Case, which was dated July 29, 1954.

B By a cable sent to the agent on Sept. 8, 1953, the buyers offered to purchase one thousand kilos of ants' eggs at a price of 17s. per kilo net f.o.b. September shipment. In a cable dated Sept. 9, the agent replied "one thousand ant eggs 17s. f.o.b. booked". This transaction was confirmed by the agent in a letter C to the buyers, dated Sept. 9, which read:

"I have sold to you of the shipment Osuustukkukauppa i.l. Helsinki, Finland—one thousand kilos dry sound clean ant eggs . . . shipped net weight f.o.b. Helsinki. Delivery September c.y. . . . The original contract will follow soonest."

D The buyers confirmed this transaction in a letter, dated Sept. 10, which was in similar terms. On Sept. 10, by a further exchange of cables between the buyers and the agent, the buyers purchased a further one thousand kilos of ants' eggs at 17s. a kilo f.o.b., and confirmed this transaction by a letter to the agent, dated Sept. 11, which was, in terms, identical to their letter of confirmation of Sept. 10. The agent's letter dated Sept. 11, confirming this second transaction, E contained this statement:

"I have consequently booked for your account to be shipped as soon as export licence in order by [the sellers] . . ."

F By a cable dated Sept. 14, 1953, the agent offered the buyers a further thousand kilos of ants' eggs at "18s. f.o.b. prompt". By a cable of the same date the buyers accepted five hundred of those thousand kilos, and they accepted the remaining five hundred kilos by a cable dated Sept. 15. In a letter dated Sept. 15, the buyers drew attention to the reference in the agent's letter of Sept. 11 to the goods being shipped as soon as an export licence was granted, and pointed out that they had not bought the goods on this basis. They asked the agent to confirm that there would be no difficulty in regard to export licences, adding G that the agent had not previously referred to the necessity for export licences. On Sept. 15 the agent confirmed the booking of five hundred kilos, "prompt delivery after export licences granted". In a letter dated Sept. 17 the buyers acknowledged the agent's letter of Sept. 15, and after mentioning his reference therein to shipment "after export licences granted", again pointed out that there had been no mention of export licences in their offers and that they had H not bought on those terms. On Sept. 18 the buyers sent a cable to the agent in which, after pointing out that, in a letter of confirmation sent by the agent on Sept. 16, the agent had again stated that shipment would be made after an export licence was obtained, they added the words "expect this only formality as bought without reserve licence wire immediately". On the same date the agent replied: "Licence formality delays delivery usually fortnight". Also on the I same date the buyers confirmed these cables, stating that they were pleased that the granting of an export licence was only a formality and that they took it for granted that they could consider the export licences as issued automatically.

By a contract dated Sept. 16, 1953, these four transactions comprising the sale and purchase of three thousand kilos of ants' eggs were confirmed. The contract contained the term: "Delivery: prompt, as soon as export licence granted". On Sept. 21, 1953, the buyers signed the contract, and on Sept. 22 they returned it to the agent with a covering letter in which, after stating that

"shipment is described prompt as soon as export licence is granted", they referred to their previous cables and letters on the point and noted that the export licence was a pure formality. On Sept. 23 and again on Sept. 28, the buyers wrote to the agent expressing surprise that they had not heard of shipment of the goods and asking for immediate information. On Sept. 29 they sent a cable to the agent inquiring about shipment. On Sept. 30 the agent replied to the cable saying: "Awaiting licence within ten days". On Oct. 1 the agent sent a cable to the buyers saying that he had been informed by the sellers that they (the sellers) had been refused an export licence, that they had delivered the total quantity of the goods to another concern in Finland which possessed a licence, and that, therefore, the contract was cancelled. In a cable, also sent on Oct. 1, the buyers replied:

"Export licence described by you as formality do not agree cancellation holding [the sellers] and you personally responsible all consequences non-fulfilment contracts."

On the same date the agent wrote to the buyers explaining the position regarding the licensing procedure in Finland. Messages passed directly between the buyers and the sellers, the sellers maintaining that, as their application for a licence had been refused, the contract was cancelled. The buyers refused to accept cancellation of the contract and claimed arbitration. Further negotiations took place whereby the buyers agreed to accept shipment of the goods in October, but these negotiations proved abortive, and the dispute, therefore, proceeded to arbitration.

The questions of law raised on the Special Case were whether, on the facts found and on the true construction of the contract dated Sept. 16, 1953, (i) the sellers were liable to the buyers in damages for non-delivery of the goods, and (ii) if the answer to (i) was in the affirmative, whether the date of default for the purpose of measuring damages was Oct. 31, 1953. The buyers contended that the sellers had undertaken an absolute obligation to ship the goods or to be liable in damages for their failure to do so; and, alternatively, that the words "Delivery: prompt, as soon as export licence granted" merely defined when shipment would be made, and were not to be construed as if the contract were made subject to an export licence being granted. The sellers contended (a) that export licences were granted only to members of the Ant Egg Exporters' Association in Finland, and that as they were not members they were unable to obtain a licence; (b) that, until a licence had been granted to them, they were under no obligation to deliver the contract goods and could not in fact do so, and that they had intended to sell subject to their obtaining a licence and had assumed that the phrase used in the contract, namely "Delivery: prompt, as soon as export licence granted", was equivalent to "subject to export licence".

The umpire held that the words used in the contract as to delivery being "prompt, as soon as export licence granted" implied that the contract was made subject to an export licence being granted, and, if the court were of the opinion that this was the case, he found that the buyers had extended the time for shipment during October and that the breach, if any, occurred on Oct. 31, 1953; if, however, the court were of opinion that the words merely dealt with the time when shipment should be made and did not imply a sale "subject to export licence", he held that the licences should have been obtained and shipment should have been made within a reasonable time, namely, by Oct. 31, 1953. He awarded the buyers £1,900 damages if the court held (i) that the contract was not "subject to licence", or (ii) that the contract was "subject to licence", and that the sellers had not applied for a licence in due time or at all, or that their application had not been refused, or (iii) that the reference to delivery after obtaining a licence related only to the time of shipment, and that the sellers had made no attempt to obtain a licence. If, the court held either (a) that the

A contract was "subject to licence" and the sellers had applied in due time for a licence but their application was refused, or (b) that the relevant clause in the contract related only to the time of shipment and that the sellers had applied in due time but no licence had been granted by Oct. 31, 1953, the umpire awarded that the buyers' claim for damages failed.

By a direction of McNAIR, J., dated Dec. 8, 1954, the Special Case was remitted to the umpire for the hearing of further evidence. By his further findings dated July 19, 1956, the umpire found the following facts in regard to the law of Finland. By an ordinance made in 1945, it was unlawful to export ants' eggs without the permission of the Ant Egg Exporters' Association. By a further ordinance which came into force on Sept. 1, 1953, the State Board of Licences was set up to regulate the export and import trade in Finland and it became unlawful to export ants' eggs without obtaining a licence from the Board, from whose decision no appeal lay, but who could not grant a licence unless the Ant Egg Exporters' Association approved. It was the practice of the association not to concur in the granting of a licence unless the applicant was a member of the association. The sellers were not members of the association at any material time. According to Finnish law, where there was a contract for the sale of goods f.o.b., for which an export licence was required, and a licence was refused, the contract was determined and neither party was liable for its non-fulfilment.

As to the steps taken by the sellers to obtain a licence, the umpire found that they applied for a licence on Sept. 15, 1953; that the State Board of Licences had refused their application on the ground that they were not members of the Ant Egg Exporters' Association; and that the sellers had not known prior to the refusal that non-membership of the association was a ground for refusing a licence. The sellers had then applied to join the association, but their application was refused. The umpire further found that this was the first time that the sellers had entered into a contract to export ants' eggs and that they did not know that they required a licence until the agent informed them of that fact on Sept. 11, 1953. The umpire held that the sellers had acted with reasonable diligence in applying for a licence, but that they ought to have known that membership of the association was necessary to obtain a licence.

T. G. Roche, Q.C., and *A. J. Bateson* for the sellers (the respondents).

J. F. Donaldson for the buyers (the claimants).

G DEVLIN, J.: The parties in this case, on Sept. 16, 1953, entered into a contract for the purchase and sale of a certain quantity of ants' eggs. The sellers were a Finnish concern, and the buyers carried on business in England; delivery was to be made f.o.b. Helsinki. The contract contained this term: "Delivery: prompt, as soon as export licence granted". The position under Finnish law was that it was unlawful to export ants' eggs unless a licence for their export had been granted by the State Board of Licences. The State Board of Licences could not lawfully grant a licence for the export of ants' eggs unless the Ant Egg Exporters' Association approved, and it was the practice of the Ant Egg Exporters' Association not to concur in any application to export ants' eggs unless the exporter was a member of the association. The sellers were not members of the association, and, consequently, when they applied for a licence to fulfil their obligations under the contract it was rejected, the reason being: "The applicant is not a member of the Ant Egg Exporters' Association". The sellers were, therefore, unable, in accordance with the law of Finland, to fulfil their contract.

The question, in those circumstances, is whether or not the sellers are liable to pay damages. If the contract said nothing at all about the obtaining of a licence, it is clear that some provision concerning that matter would have to be implied into it. The contract could not be fulfilled legally under the law of Finland unless

one or other, either the buyers or the sellers, obtained a licence, and it would, therefore, be necessary to imply a term as to whose duty it was to apply for a licence. In this case it is accepted (and I think obviously rightly) that it was the sellers' duty to apply for a licence. It is then necessary to imply a term as to what the nature of that obligation was. The person whose duty it is to apply for a licence may either warrant that he will get it, that is an absolute warranty, or he may warrant that he will use all due diligence in getting it. When nothing is said in the contract it is usually—probably almost invariably—the latter class of warranty which is implied, but each case must be decided according to its own circumstances and the question of implication must be settled in the ordinary way in which implied terms are settled. Thus in *Re Anglo-Russian Merchant Traders & John Batt & Co. (London), Ltd.* (1) ([1917] 2 K.B. 679), one of the very early cases where the nature of the obligation had to be considered, VISCOUNT READING, C.J., dealing with this point (*ibid.*, at p. 686), held that in the case before him there was an obligation only to use due diligence. He said (*ibid.*): "A party to a contract may warrant that he will obtain a licence, but no such term can be implied in this case".

On the other hand, an absolute obligation was held to apply in *Partabmull Rameshwar v. K. C. Sethia* (1944), *Ltd.* (2) ([1951] 2 All E.R. 352, n.; [1951] 2 Lloyd's Rep. 89), a decision of the House of Lords. I refer particularly to what was said by LORD PORTER ([1951] 2 Lloyd's Rep. at p. 95). The circumstances in the case were unusual; I need not detail them here, and the only purpose for which I wish to refer to the case is plain enough, namely, that there are always these two alternatives which have to be considered. As DENNING, L.J., said in *Brauer & Co. (Great Britain), Ltd. v. James Clark (Brush Materials), Ltd.* (3) ([1952] 2 All E.R. 497 at p. 501):

"The question for decision depends on the true construction of the words: 'This contract is subject to any Brazilian export licence'. Those words serve a most useful purpose. The parties to the contract knew that the goods could not lawfully be exported from Brazil without an export licence. If this clause had not been inserted, the buyers might have contended that the sellers undertook absolutely to obtain a licence and ship the goods, and that it was no excuse for the sellers to say that they could not get a licence . . ."

Lastly, in *A. V. Pound & Co., Ltd. v. M. W. Hardy & Co., Inc.* (4) ([1956] 1 All E.R. 639), in the House of Lords, while it was, again, not necessary for the House to consider the nature of the obligation, LORD SOMERVELL OF HARROW said (*ibid.*, at p. 651):

"It is also unnecessary to decide other points which were referred to in argument. Had the sellers undertaken an absolute obligation to get a licence for any destination? Was their obligation only to take reasonable steps? Apart from the general objection to dealing with points which it is unnecessary to decide, there is, I think, a special difficulty arising from the absence of certain findings."

That shows once again that the nature of the obligation has to be decided in relation to the circumstances of each particular case.

In the present case there is no "subject to licence" clause in the contract. If there had been such a clause, I think that, on the authorities, it would have concluded the matter. In the absence of a "subject to licence" clause, and further, if there were no other relevant clause in the contract, it would be necessary for me to determine, in relation to all the circumstances of the case, what would be the appropriate terms to be implied regarding the duty to obtain a licence. There is, however, a clause in the contract which, on its true construction, gives considerable assistance to the contention of counsel for the buyers that an

A absolute obligation on the part of the sellers to obtain a licence was intended in this case. The clause, which reads: "Delivery: prompt, as soon as export licence granted", seems to show clearly that the assumption which was underlying the contract, and which was in the minds of both parties, was that an export licence certainly would be granted. The only question was at what precise moment of time this would take place, because delivery could not be

B made until it was granted. If that be right, if that be the underlying assumption, there would be no hardship in holding that the sellers, being the parties responsible, were undertaking absolutely to do that which both parties had assumed would, in fact, be done, or could be done, sooner or later. I think that, on the true construction of that clause, the sellers are saying, in effect: "We can get a licence, but we cannot say for certain just when we will get it, and therefore the

C time for delivery must depend on the getting of it."

Having regard to what I think is the right construction of that clause and to the circumstances in this case, I think that the proper conclusion is that the sellers were warranting absolutely that they would get a licence. If there be any ambiguity in the clause, and if, therefore, it be legitimate to look at what preceded the drawing up of the contract, it would strengthen very much the conclusion

D at which I have arrived. The facts are set out in the Special Case. Putting it shortly, the agent of the sellers, in effect, assured the buyers that obtaining a licence was merely a formality, and it was on that basis that the buyers entered into the contract. As that condition has not been fulfilled, it follows that the award in favour of the buyers, awarding them damages, must be upheld.

There is a further observation which I should like to make. McNAIR, J., in

E May, 1955, called attention to the process of arbitration as compared with the process which is afforded by this court, i.e., the Commercial Court, and his observations on the matter were approved last month in the House of Lords*. The point in this case is an extremely short one; the facts are not in dispute, and there is a short point of law which, whether I decided it rightly or wrongly, could not take a very long time to consider. It has, in fact, taken one and three

F quarter hours, which is well under the time normally allotted for a short cause. It is, therefore, interesting to see what proceedings have led up to it. The contract was made in September, 1953, and broken in October, 1953. The matter went before two lay arbitrators, who disagreed and appointed an umpire who, no doubt, was also a gentleman experienced in the trade; but plainly this

G was not a point on which an expert knowledge of ants' eggs, or even of the conditions of the export trade in Finland, could possibly be of assistance. The umpire stated a Special Case; a motion was made to this court to remit the Case for further consideration and for further findings of fact; affidavits were filed; the motion was granted; the Special Case went back to the umpire. There were two further hearings before him, and finally he found the further facts on which

H the Special Case has been argued before me. It is, of course, beyond dispute that if business men prefer an expensive and lengthy procedure, in this case lasting something over three years, to that which this court provides, they are entitled to have it. There are, no doubt, a great many ways in which arbitration serves a useful purpose. This, I think, is not one of them, but if, in spite of what has been said time and again in these courts, it is made manifest that business men prefer in these matters the expensive and tortuous process of arriving at a

I solution of their legal difficulties rather than the one which this court provides, the time may come when it will have to be considered whether there is any longer any value in the Commercial Court providing the City of London with special facilities not granted to ordinary litigants for the solution of legal disputes. If I may venture to express a purely personal opinion, I would say that it is becoming increasingly difficult to justify the provision of special facilities, such

* See the judgment of LORD TUCKER in *Fairclough, Dodd & Jones, Ltd. v. J. H. Vantol, Ltd.*, [1956] 3 All E.R. at p. 927.

as those which the Commercial Court was designed to provide for the City of London, if they are to be taken advantage of in such a way as to occupy a judge for merely a fraction of his time, and if, in spite of what has constantly been said, business men make it manifest that they prefer to solve their legal disputes by other and more expensive means.

Award in favour of buyers upheld.

Solicitors: *Thomas Cooper & Co.* (for the sellers); *Richards, Butler & Co.* (for the buyers).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

NOKES v. NOKES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), January 24, 1957.]

Divorce—Estoppel—Paternity of child—Order for maintenance of child—Application to vary order on ground that child was not child of marriage—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 26 (1).

The parties were married in 1950 and a child, M.V., was born on Oct. 15, 1950. In May, 1952, the wife obtained a separation order against the husband; she was granted the custody of the child and the husband was ordered to pay maintenance for herself and for the child. In 1954 the wife filed a petition for divorce; she recited the order of May, 1952, but did not include a prayer for the custody of or maintenance for the child. Within two months of the decree absolute the wife gave notice of application for an order (under s. 26 (1) of the Matrimonial Causes Act, 1950) that the husband pay maintenance for herself and for M.V. "the child of the marriage". The husband in his affidavit of means offered to continue payments "in respect of my daughter M.V." In May, 1955, the registrar ordered the husband to pay M.V. "the child of the marriage" maintenance at the rate of 27s. 6d. per week. Subsequently the husband applied to vary the order of May, 1955, and disputed paternity of the child, whereupon an issue was ordered to be tried as to the paternity of the child.

Held: an order for the maintenance of the child having been made under s. 26 (1) of the Act of 1950, the husband was estopped from alleging now that the child was not the child of the marriage.

Observations of LORD ROMER in *New Brunswick Ry. Co. v. British & French Trust Corpn., Ltd.* ([1938] 4 All E.R. at p. 770) applied; *Lindsay v. Lindsay* ([1934] P. 162) followed, and *W. v. W.* ([1953] 2 All E.R. 1013) distinguished.

[As to estoppel in matrimonial causes, see 12 HALSBURY'S LAWS (3rd Edn.) 294, para. 581 and 15 HALSBURY'S LAWS (3rd Edn.) 184, para. 356, note (r); and for cases on the subject, see 27 DIGEST (Repl.) 375, 376, 3089-3098.]

As to inability to put in issue before registrar matters which are *res judicata*, see 12 HALSBURY'S LAWS (3rd Edn.) 435, para. 978, note (i); and for cases on the subject, see 27 DIGEST (Repl.) 614, 5746.

For the Matrimonial Causes Act, 1950, s. 26 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 413.]

Cases referred to:

(1) *New Brunswick Ry. Co. v. British & French Trust Corpn., Ltd.*, [1938] 4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; Digest Supp.

(2) *W. v. W.*, [1953] 2 All E.R. 1013; [1954] P. 48; 3rd Digest Supp.

A (3) *Lindsay v. Lindsay*, [1934] P. 162; 103 L.J.P. 100; 151 L.T. 283; 27 Digest (Repl.) 614, 5746.

Issue.

B The parties were married in August, 1950, and a child, Marion Violet, was born on Oct. 15, 1950. On Aug. 31, 1951, the Southend justices dismissed the wife's complaints that the husband had been guilty of persistent cruelty towards her and had deserted her. On Jan. 8, 1952, the Tower Bridge magistrate dismissed a complaint by the wife that the husband had been guilty of persistent cruelty to her, and granted the custody of the child to the wife, ordering the husband to pay her maintenance for the child. The parties resumed cohabitation. On May 16, 1952, the Southend justices found that the husband had been C guilty of persistent cruelty to her, ordered that the wife be no longer bound to cohabit with him, granted custody of the child to the wife and ordered the husband to pay to the wife £1 a week as maintenance for herself and £1 a week as maintenance for the child.

D In May, 1954, the wife presented a petition for divorce on the ground of the husband's cruelty. In para. 2 she stated: "that there is issue of the said marriage now living one child . . . born on Oct. 15, 1950". The wife did not include in the petition a prayer either for a custody order or for maintenance. The petition was heard undefended on Oct. 29, 1954, and a decree nisi granted which was made absolute on Dec. 13, 1954. In January, 1955, the wife re-married and became Mrs. Nicholson. In February, 1955, the wife gave notice of application for an order that the husband be ordered to pay

E "such sum or sums by way of maintenance for herself and for Marion Violet the child of the marriage as may be just."

The husband filed an affidavit of his means in which he stated:

F "I object to paying my ex-wife any maintenance as she is now re-married but I offer to continue my payment of £1 per week in respect of my daughter Marion Violet."

The wife in her affidavit in reply stated: "I have the custody of the child of the marriage, Marion Violet, born on Oct. 15, 1950". On May 13, 1955, Mr. Registrar TOWNLEY MILLERS ordered the husband to pay to the wife maintenance for herself during their joint lives at the rate of 1s. per annum

G "and to Marion Violet Nokes the child of the marriage between the [wife] and the [husband] maintenance until further order at the rate of 27s. 6d. per week."

H On Nov. 22, 1955, the husband gave notice of application to vary the order of May 13, 1955. On Jan. 17, 1956, Mr. Registrar TOWNLEY MILLERS dismissed the husband's application, and the husband appealed. On Feb. 14, 1956, DAVIES, J., on the hearing of the husband's appeal, ordered that an issue be tried as to the paternity of the child, Marion Violet.

F. M. Drake for the husband.

R. H. W. Dunn for the wife.

I **BARNARD, J.:** The parties in the case are, I believe, both now re-married and Mrs. Nokes is now Mrs. Nicholson. Mr. and Mrs. Nokes were married on Aug. 5, 1950, and there was issue, according to the petition which was filed, a child born on Oct. 15, 1950. The child is a girl by the name of Marion Violet and it is the paternity of that child which is now in dispute. The marriage appears to have been unhappy and there were various proceedings in the magistrates' court. It is only fair to the husband to say that certainly in one of the earlier proceedings he denied the paternity of the child, but it resulted, so far

as the magistrates' court proceedings are concerned, in the wife obtaining an order on May 16, 1952, against her husband on the ground of his persistent cruelty. It was a separation order and it ordered the husband to pay the wife £1 a week for herself and £1 a week for the child. Of course, an order made by justices is not an order made by a court of record and it is not binding on this court, and nobody could suggest, and nobody does suggest that that in any way created an estoppel. [HIS LORDSHIP stated the facts and continued:] The presumption of law in a case of this kind is strongly in favour of legitimacy, and very cogent and clear evidence is required to rebut that presumption. Counsel for the wife has quite properly taken the preliminary point that the husband on the facts of the present case is estopped from denying the paternity of the child by reason of the order of May 13, 1955, ordering him to pay maintenance for the child of the marriage.

Section 26 (1) of the Matrimonial Causes Act, 1950, reads (so far as is material) as follows:

"In any proceedings for divorce . . . the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings . . ."

On this question of estoppel I was referred to *New Brunswick Ry. Co. v. British & French Trust Corpn., Ltd.* (1) ([1938] 4 All E.R. 747). Both counsel accept it as being applicable to the present case and obviously it is binding on this court because it is a decision of the House of Lords. The passage to which both counsel referred me is from LORD ROMER's speech (*ibid.*, at p. 770), in which he says:

"It is no doubt true to say that, whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter."

It seems to me that it is fundamental to the order that the court made on May 13, 1955, that the child was a child of the marriage, otherwise the court would have had no jurisdiction to order maintenance. It is perfectly clear that the jurisdiction of the court is to make an order in respect of

"custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings."

I was referred to a decision of my own in *W. v. W.* (2) ([1953] 2 All E.R. 1013) where the question of estoppel was raised. I ruled against estoppel in that case because no order for custody was ever made. All that had happened was that the husband, who was the petitioner for divorce, alleged that there was a child born of which he did not admit the paternity. Not unnaturally he did not ask for custody and no order for custody was made. Also, not unnaturally, the wife ignored it. It was not an issue in the case at all. It was a different matter in *Lindsay v. Lindsay* (3) ([1934] P. 162), a decision of SIR BOYD MERRIMAN, P. The headnote says:

". . . A petition for maintenance, though a proceeding distinct from a petition for dissolution, can nevertheless be proceeded with only as incidental to a petition for dissolution, and when the paternity of a child has not been disputed and has been established by a substantive order for its custody in a decree nisi, the paternity becomes *res judicata* and cannot be assailed in maintenance proceedings which follow."

In the course of his judgment SIR BOYD MERRIMAN referred to the section

A corresponding to s. 26 (1) of the Act of 1950, namely, s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925*, and said (*ibid.*, at p. 168):

B “Section 193 (1) lays down that in any proceeding for divorce the court may make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings; and that it may do so from time to time, either before or by, or after the final decree. It thus appears that the jurisdiction of the court both with regard to custody and maintenance of children is limited to children the marriage of whose parents is the subject of the proceedings.”

C The present case seems to me to be completely covered by the President’s decision in *Lindsay v. Lindsay* (3). In *Lindsay v. Lindsay* (3) there was a substantive order for custody which the court would not have had jurisdiction to make unless the parents of the child were the parents whose marriage was the subject of the decree. In the present case an order for the maintenance of the child has been made and the court likewise would not have had any jurisdiction to make it unless the parents of that child were the parents whose marriage was the subject of the decree. If the husband in the present case had wanted to raise the present issue, the time for him to raise it would have been when the wife asked for maintenance for herself and for the child of the marriage. He not only did not raise it then, but in his affidavit he said he was ready to continue the maintenance “to my daughter”. It has been suggested that he was in ignorance of the law and his rights and that I ought to read that passage with reference to the order made in the magistrates’ court some three years earlier. E I do not think that I can do that. It would have been easy for him to have said “I am ready to go on paying for the child” without referring to her as “my daughter”. I think that the crux of the whole case is this: an order for maintenance has been made under s. 26 (1) of the Act of 1950 and that estops the husband from now saying that the child is not the child of the marriage. I, therefore, decide the present issue in favour of the wife.

Order accordingly.

Solicitors: *Ashley, Tee & Sons* (for the husband); *Drysdale, Lamb & Jackson* (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

* See 11 HALSBURY’S STATUTES (2nd Edn.) 834.

GRIFFITH v. GRIFFITH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), January 23, 1957.]

Divorce—Alimony—Pendente lite—Amount—Whether wife's earning capacity should be taken into account—Wife's petition for restitution of conjugal rights—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 19 (1).

The wife petitioned for restitution of conjugal rights and applied for alimony pendente lite. The husband's income was between £1,600 and £1,800 a year. There were no children of the marriage. The wife had gone out to work before, but not since, the marriage. On the question whether or not the wife's earning capacity should be taken into account in assessing the amount of alimony to be awarded,

Held: although the court had an unfettered discretion to award what sum it considered just, the wife's earning capacity ought not, in the present case, to be taken into account, particularly as the husband's financial position was such that if his wife were living with him she would not normally be expected to go out to work and as she was asking for restitution of conjugal rights (*Rose v. Rose*, [1950] 2 All E.R. 311 and *Le Roy-Lewis v. Le Roy-Lewis*, [1954] 3 All E.R. 57 applied).

Appeal allowed.

[As to the consideration of earning capacity of wife on claims for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 437, para. 982, note (i); and for a case on the subject, see 27 DIGEST (Repl.) 618, 5777.]

As to the discretion of court in assessing the amount of alimony pending suit, see 12 HALSBURY'S LAWS (3rd Edn.) 350, para. 745; and for cases on the subject, see 27 DIGEST (Repl.) 491, 492, 4298-4317.

For the Matrimonial Causes Act, 1950, s. 19 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 407.]

Cases referred to:

- (1) *Dewe v. Dewe, Snowden v. Snowden*, [1928] P. 113; 97 L.J.P. 65; 138 L.T. 552; 92 J.P. 32; 27 Digest (Repl.) 81, 619.
- (2) *Waller v. Waller*, [1956] 2 All E.R. 234; [1956] P. 300.
- (3) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest (Repl.) 82, 627.
- (4) *Goodheim v. Goodheim & Frankinson*, (1861), 2 Sw. & Tr. 250; 30 L.J.P.M. & A. 162; 4 L.T. 449; 164 E.R. 991; 27 Digest (Repl.) 492, 4312.
- (5) *Le Roy-Lewis v. Le Roy-Lewis*, [1954] 3 All E.R. 57; [1955] P. 1; 118 J.P. 444; 3rd Digest Supp.
- (6) *Rose v. Rose*, [1950] 2 All E.R. 311; [1951] P. 29; 114 J.P. 400; 27 Digest (Repl.) 618, 5777.

Appeal.

The wife appealed against an order of Mr. Registrar TOWNLEY MILLERS dated Dec. 14, 1956.

The parties were married in January, 1954, and there were no children of the marriage. On Nov. 5, 1956, the wife presented a petition for restitution of conjugal rights alleging that the husband had withdrawn from cohabitation in June, 1956, and that he had thereafter refused to return to her and to render her conjugal rights. In the petition the wife applied for an order for alimony pending suit. At the hearing before the registrar on Dec. 13, 1956, of the wife's application for alimony the husband contended that though the wife was not in fact working she was able to work and that her earning capacity should be taken into account when assessing the amount to be awarded as alimony. The husband's income was between £1,600 and £1,800 a year, and it was agreed between the parties that the wife was entitled to alimony at the rate of either £7 a week or £2 a week according as her earning capacity was not or was taken into account. The registrar

A made an order for alimony at the rate of £2 a week and the wife appealed. The summons was adjourned for hearing in open court.

G. H. Crispin for the wife.

F. S. Laskey for the husband.

B SACHS, J.: This appeal raises the question how, on an application for alimony pendente lite, the court should, in favour of the husband, have regard to the wife's earning capacity as opposed to her actual earnings. The issue raised relates to a case in which the husband's income is somewhere between £1,600 and £1,800 a year. When I adjourned this appeal on the occasion it first came before me, it was decided that the further hearing should be in open court on account of two of the points then raised by counsel for the wife. He originally argued C that when the only issue for the court was the assessment of the amount which should be granted to a wife for alimony pendente lite, the question was what amount, she had, as it were, a right to have assessed on the basis of her common law entitlement to be maintained by the husband. That submission was founded on a passage in *LATEY ON DIVORCE* (14th Edn.) at p. 229, where it is stated that:

D "Alimony pending suit is a substitute for provision which a husband is bound to make for his wife under the common law "

coupled with the authority cited of *Dewe v. Dewe*, *Snowdon v. Snowdon* (1) ([1928] P. 113).

E Counsel for the wife went on to submit that largely for this reason the authorities which relate to the taking into account of a wife's earnings, and her earning capacity, in maintenance proceedings after decree absolute, did not apply. On that basis the wife's appeal raised in a somewhat acute form an issue of general concern in relation to her earning capacity. This was because there was agree- ment between counsel, both before the registrar and on this appeal, first, that the wife was not working, secondly, that she had an earning capacity and, thirdly, that the figure to be awarded by way of alimony pendente lite should be either F £7 a week or £2 a week according to whether or not that earning capacity should be taken into account.

As regards the points raised by counsel for the wife, my views are as follows. When dealing with the question what were circumstances in which a court could hold a wife justly entitled to be granted alimony pendente lite, JENKINS, L.J., in *Waller v. Waller* (2) ([1956] 2 All E.R. 234), after quoting the words of s. 19 (1) G of the Matrimonial Causes Act, 1950, with particular reference to the phrase "as the court thinks just" said (*ibid.*, at p. 236):

"It will be seen, therefore, that, so far as the statute is concerned, as the law now stands, the amplest discretion is conferred on the court in the matter of alimony pendente lite whether the case be one of a petition for judicial separation or one of a petition for divorce or nullity of marriage."

H HODSON, L.J., put it in this way (*ibid.*, at p. 240): "The power of the court is entirely at large . . ." In that case on an issue as to eligibility of the wife to be granted alimony pendente lite the court repudiated the suggestion that it was in any way bound by the old common law rules with regard to the husband's liability to support his wife. To my mind the discretion of the court I in assessing the amount which "the court thinks just" is no less wide. Any rules of common law as to the husband's duty to maintain his wife (rules which are discussed in *Jones v. Newtown & Llanidloes Guardians* (3), [1920] 3 K.B. 381) may to some extent provide assistance for the court as a guide but they certainly cannot burden the court as a fetter.

Turning next to the authorities relating to the value of the earnings or earning capacity of a wife on the amount that a guilty husband should, after decree absolute, be ordered to pay, these again, when dealing with alimony pendente lite, are of assistance within the same framework of wide discretion and are regularly

applied in practice. It should, however, be noted that so long as the marriage subsists a husband may have often more difficulty on the particular facts in establishing that his wife ought to go out and work than he would have after that marriage had terminated. During the subsistence of a marriage where the husband is fully capable of supporting his wife, the tendency of the courts is to have regard to what she is actually receiving, rather than to her potential capacities; this is apparent from a series of authorities new and old, going as far back as *Goodheim v. Goodheim & Frankinson* (4) ((1861), 2 Sw. & Tr. 250). Further there are few instances in which the contention of the husband that his wife ought to go out to work is less likely to prevail than in a case where a wife is seeking restitution of conjugal rights and the husband's financial circumstances are such that she would not normally expect to have to work if they were living together; but everything must, of course, depend on the particular facts of the case.

In the present case the wife did work in Canada before the marriage. The husband's income, as I have said, is in the area of £1,700 a year, and his position was such that there was no financial or other reason why he should expect his wife to work whilst they were living together. In fact, she did not so work at any time whilst they were together. Indeed, if she is to earn some reasonably sized salary, she would probably at this stage have to take some further tuition. In those circumstances I find assistance from the judgment of BARNARD, J., in *Le Roy-Lewis v. Le Roy-Lewis* (5) ([1954] 3 All E.R. 57), a case under s. 23 of the Matrimonial Causes Act, 1950, where a young wife's earning capacity had to be considered in the case of a husband who had deserted her, and where also there were no children. BARNARD, J., said (*ibid.*, at p. 58):

"It has been suggested that because she was working before the marriage, that because she is still young and there are no children of the marriage, she ought at once to go back into the position she was in before the marriage and start earning her living—as far as I can see with only one object, to reduce the amount of money that the husband should pay her. I do not accept that view at all . . . I see no reason whatever why the wife should go back to earning to reduce the husband's liability to maintain her."

That line of reasoning, which clearly derives from what was said by SOMERVELL, L.J., in *Rose v. Rose* (6) ([1950] 2 All E.R. 311), as to the *prima facie* way to approach this matter, appears to have added force in the present case where the petition is one for restitution of conjugal rights. In the above circumstances I have come to the conclusion that this appeal should be allowed and that the order of the registrar should be varied making it £350 a year payable monthly less tax.

Appeal allowed.

Solicitors: *Joynson-Hicks & Co.* (for the wife); *Harry Myers & Son* (for the husband).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

A

ATTORNEY-GENERAL (on the relation of HORNCURCH URBAN DISTRICT COUNCIL) v. BASTOW.

[QUEEN'S BENCH DIVISION (Devlin, J.), January 28, 29, 1957.]

B

Town and Country Planning—Enforcement notice—Persistent breach of notice—Convictions resulting in imprisonment in default of payment of fines—Injunction sought by Attorney-General to restrain breach—Jurisdiction—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 24 (3).

Injunction—Breach of statute—Relator action to restrain breach—Scope of court's discretion in relator action.

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Injunction—Restraining infringement of public right conferred by statute—Relator action—Administrative discretion of Attorney-General where doubtful whether other remedies exhausted.

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B. having twice been refused planning permission to use land belonging to him as a caravan site for human habitation, nevertheless so used it, continued to use it and was so using it at the time of the hearing of the relator action subsequently mentioned. In May, 1952, the local planning authority served him with an enforcement notice under s. 23 of the Town and Country Planning Act, 1947, requiring him to discontinue "the use of the land for the parking of caravans for human habitation". B.'s appeal against this notice was dismissed. In September, 1953, he was convicted by a magistrates' court, under s. 24 (3) of the Act of 1947, of contravening the enforcement notice and was fined £20. In January, 1954, he was convicted of continuing the prohibited use of the land after his previous conviction and was fined £30. In April, 1954, he was again convicted and fined £75. He failed to pay the fine of £75 and was imprisoned for one month in default of payment. In October, 1954, a writ was issued against B. in a relator action brought by the Attorney-General, at the relation of the local planning authority, for an injunction perpetually restraining B. from using the land or permitting it to be used as a site for caravans for human habitation without planning permission. In December, 1954, B. was again convicted of continuing the prohibited use of the land and was fined £100. He failed to pay the fine and was imprisoned for three months. In the relator action,

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Held: (i) the court had jurisdiction to grant an injunction where, as in the present case, the Attorney-General was suing for the purpose of enforcing a public right, although that right was conferred by a statute that prescribed remedies for its infringement.

Dictum of BUCKLEY, J., in *A.-G. v. Ashborne Recreation Ground Co.* ([1903] 1 Ch. at p. 107) applied.

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(ii) an injunction perpetually restraining B. from using the land as a caravan site for human habitation would be granted since, although in deciding whether to grant an injunction at the suit of the Attorney-General in the present case it was relevant to consider whether other available remedies had been exhausted, yet the choice of remedy (in a case such as this where the only question was whether other remedies had been exhausted) was a matter rather for the Attorney-General's administrative discretion than for the court's judicial discretion, and the court would be slow to interfere with the Attorney-General's decision that it was a case where the ordinary remedies would no longer prevail.

[As to applications by the Attorney-General for an injunction to restrain an illegal act, see 18 HALSBURY'S LAWS (2nd Edn.) 11, para. 16, note (c); and for a case on the subject, see 28 DIGEST 367, 36.]

For the Town and Country Planning Act, 1947, s. 24 (3), see 25 HALSBURY'S STATUTES (2nd Edn.) 527.]

Cases referred to:

- (1) *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101 ; 72 L.J.Ch. 67; 87 L.T. 561; 67 J.P. 73; 28 Digest 367, 36.
- (2) *A.-G. v. Wimbledon House Estate Co., Ltd.*, [1904] 2 Ch. 34; 73 L.J.Ch. 593; 91 L.T. 163; 68 J.P. 341; 28 Digest 368, 42.
- (3) *London County Council v. A.-G.*, [1902] A.C. 165; 71 L.J.Ch. 268; 86 L.T. 161; 66 J.P. 340; 16 Digest 482, 3637.
- (4) *A.-G. v. Cockermouth Local Board*, (1874), L.R. 18 Eq. 172; 30 L.T. 590; 38 J.P. 660; 16 Digest 487, 3687.

Action.

This was an action by the Attorney-General at the relation of the Hornchurch Urban District Council, the local planning authority for the purposes of the Town and Country Planning Act, 1947, for the urban district of Hornchurch; for an injunction perpetually restraining one, Edward Henry Bastow, from using, causing or permitting certain land owned by him, adjoining a dwelling-house known as Caliente, Lake Avenue, Rainham, Essex, to be used as a site for caravans without the grant of planning permission, and for a mandatory order requiring him to remove from the land such caravans as were on it at the date of the order.

The facts appear in the judgment.

J. P. Widgery for the Attorney-General.

L. J. Davies for the defendant.

DEVLIN, J.: This is an action brought by the Attorney-General, at the relation of the Hornchurch Urban District Council, against Mr. Edward Henry Bastow, the defendant. The gist of the matter is that the defendant is alleged to have infringed the Town and Country Planning Act, 1947, by continuing to use certain land, which he owns, for the purpose of a caravan site, the caravans being used for human habitation. The Attorney-General seeks an injunction restraining him from using the land for this purpose, and a mandatory order requiring him to remove from the land such caravans as may be on it.

The circumstances of the matter are these. On Aug. 8, 1951, the defendant made an application to the Hornchurch Urban District Council, to whom the Essex County Council had delegated their functions under the Act of 1947, as the local planning authority for the urban district of Hornchurch, for permission to develop a piece of land at Rainham, Essex, as a caravan site. That application was considered and, on Sept. 5, 1951, it was refused. The defendant renewed the application on Mar. 8, 1952, and it was again refused, on Apr. 9, 1952. Then on May 8, the Hornchurch Urban District Council served on the defendant a notice, which is called an enforcement notice. The notice stated that development, namely, the use of land for the parking of caravans for human habitation had been carried out on the defendant's land at Rainham without the grant of planning permission, that the council considered it expedient to take steps to restore the land to its condition before the development took place, and that they, therefore, required the defendant on or before the expiration of the period of seven days from the date when the notice took effect, viz., June 7, 1952, to discontinue the use of the land for the parking of caravans for human habitation, and to remove the caravans parked on the land.

The enforcement notice was properly given under s. 23 of the Town and Country Planning Act, 1947. Section 24 of that Act provides for the consequences of disobeying an enforcement notice. Section 24 (1) provides:

"If . . . any steps required by the notice to be taken (other than the

A discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps, and may recover . . . any expenses reasonably incurred by them . . .”

Those words apply to notices which are not notices for the discontinuance of any use of land. If the notice is of that latter class, then, under s. 24 (3), if

B any person

“uses the land or causes or permits the land to be used . . . in contravention of the notice, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding £50; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding £20 for every day on which the use is so continued.”

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There is no power of imprisonment under the Act of 1947, but imprisonment can be imposed under general powers for the non-payment of the fines. The enforcement notice, as I have said, was served on May 8, 1952. Section 23 (4)

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of the Act of 1947, allows an appeal to be brought against an enforcement notice. There was an appeal in this case, and I am told that the Ministry held an inquiry and that the appeal was dismissed in November, 1952. In May, 1953, the local planning authority took proceedings by way of information in a magistrates' court, alleging that an offence had been committed under s. 24 (3) of the Act of 1947, which I have read. There seems to have been some delay over the hearing, but in September the information was heard and the defendant was fined £20, £50 being the maximum fine, and he was ordered to pay the costs. He continued, however, to use the land for the prohibited purpose. Indeed, it is conceded that he is still using the land for the prohibited purpose, and it is conceded that he is permitting it to be used by people who own their own caravans and who are allowed to dwell in them on the land. On Jan. 14, 1954, another information was brought for the further offence under s. 24 (3) [of continuing the prohibited use of the land after a previous conviction]. The defendant was again convicted and fined, this time, £30. On Apr. 6, 1954, another information was brought, and this time the defendant was fined £75 and given eight weeks to pay. Apparently he paid the first two sums, but he did not pay the £75. In due course he was sent to prison for one month in default of payment, and that sentence he served. When he had completed the service of it, he appears to have continued with the prohibited use of the land, and on Oct. 8, 1954, the writ was issued in this case.

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The local planning authority did not desist from their efforts to achieve their object by the use of summary proceedings, and on Dec. 6, 1954, a fourth

H information was laid, which was heard on Jan. 27, 1955. The defendant was charged with the further offence of having unlawfully continued to use the land for two hundred and seventy-eight days after his previous conviction. Under the provisions of s. 24 (3) the justices could have imposed a fine not exceeding £20 for every day on which the use was continued. They could, therefore, have imposed a fine of £5,000 or more. They fined the defendant

I £100, which was, no doubt, as much as there was any reasonable prospect of his paying, and they sentenced him to three months' imprisonment in default. The defendant was given eight weeks in which to pay, but he did not pay and therefore he went to prison and served the three months' sentence. Since then the defendant has continued to use the land in breach of the Act of 1947, but no further proceedings have been taken against him before the justices. It is in those circumstances that the Attorney-General comes to seek a remedy from this court by way of an injunction.

The first question which I have to ask myself is whether there is jurisdiction in this court to grant a remedy by way of injunction in a case where the Act itself prescribes what steps are to be taken to enforce the law. The second question, if I find that I have jurisdiction, is to ask myself whether it is a proper case for me to grant an injunction. On the first point, counsel for the Attorney-General has relied on two authorities, both decisions at first instance. The first is *A.-G. v. Ashborne Recreation Ground Co.* (1) ([1903] 1 Ch. 101), a decision of BUCKLEY, J. The second authority is a decision of FARWELL, J., in *A.-G. v. Wimbledon House Estate Co., Ltd.* (2) ([1904] 2 Ch. 34). Those cases establish that a remedy by injunction for a breach of a statute exists only if a right has been infringed. The mere fact that an illegality has been committed because the provisions of a statute have been broken is not, of itself, enough. The statute, presumably, will provide what is to happen in such circumstances by way of a penalty, as it does provide in the present case, and no other remedy is open unless, as I say, a right has been infringed. However, the judgment of BUCKLEY, J., also decides that, for this purpose, a public right is sufficient if the suit be by the Attorney-General, who is the only authority who has a right to bring a civil suit on the infringement of public rights. BUCKLEY, J., said ([1903] 1 Ch. at p. 107):

“Then it is argued that the defendants’ objection can be sustained because the plaintiffs’ claim is not based on any right of property, but only on the fact that what has been done is an interference with public rights in respect of a highway. I think that is not sound. The Attorney-General suing in respect of the invasion of public rights has at least as large a right to invoke the protection of the court as a private owner suing in respect of his rights.”

Then he cites authorities to support that view*.

That judgment of BUCKLEY, J., was followed by FARWELL, J., in *A.-G. v. Wimbledon House Estate Co., Ltd.* (2). It is true that they are judgments at first instance and, therefore, not absolutely binding on me as authority, but they are judgments that have stood now for half a century. If a different view of the law is to be taken, in my view it is right that it should be taken by a higher court. I follow, therefore, the principle that has been laid down by BUCKLEY, J., in *A.-G. v. Ashborne Recreation Ground Co.* (1). I am satisfied that in the present case the Attorney-General is seeking to enforce a public right and, therefore, that I have jurisdiction to grant an injunction in a proper case. It is none the less a public right because it is one which has been given by the statute which has been infringed. When Parliament makes a provision which enables local authorities to exercise powers over the use of land, that provision is plainly made with the object of conferring a right on the public because Parliament considers that the public is entitled not to have the land used in ways which may be considered to be unhealthy and offensive. To that extent, the rights of private property are to be interfered with. There is the creation of a public right and the Attorney-General is, therefore, entitled to come to this court to have it enforced.

That still leaves the second question, whether or not this is a proper case for the grant of an injunction by this court. It is plain that this court is not concerned with the reasons which have seemed good to the Attorney-General in causing him to bring this action. Obviously if, on every occasion that an offence were committed which involved the invasion of a public right, and which is normally dealt with by a magistrates’ court by the imposition of a small fine, the Attorney-General were to take the matter up and ask for an injunction

* The authorities cited are:—*A.-G. v. Hatch*, [1893] 3 Ch. 36; *A.-G. v. Rufford & Co.*, [1899] 1 Ch. 537; *A.-G. v. London & North Western Ry. Co.*, [1900] 1 Q.B. 78.

A in this court, the work of the court would become impossible, but it is for the Attorney-General to decide with which cases he considers it right to deal in this way. The EARL OF HALSBURY, L.C., in *London County Council v. A.-G.* (3) ([1902] A.C. 165), said (*ibid.*, at p. 168):

B “It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene?”

C A relator action is one which the Attorney-General himself authorises, and over which he retains complete control. I must, and do, regard it, as an action brought by him personally. As to its nature, see ROBERTSON'S CIVIL PROCEEDINGS BY AND AGAINST THE CROWN (1908), p. 465, where the following passage from *A.-G. v. Cockermouth Local Board* (4) ((1874), L.R. 18 Eq. 172 at p. 176) is quoted:

D “Except for the purpose of costs, there is no difference between an ex-officio information and an information at the relation of a private individual. In both cases the Sovereign, as *parens patriae*, sues by the Attorney-General.”

E I have referred to these matters because I think that it is necessary to bear in mind the character of a relator action in considering whether or not it is a proper case for the court to exercise its discretion. It is plain that the fact that the Attorney-General asks for the injunction does not mean that the court has to grant it, even if a clear and deliberate invasion of a public right is proved. The court still has its discretion in the matter and it must have regard to the circumstances to which it usually has regard in considering whether or not it will grant this type of relief.

F One of the circumstances to which it is alleged that the court should have regard, and I think properly, is whether there are or are not other remedies open either to the Attorney-General or to the relator which might be just as effective. I think that is a point to which the court ought to have regard, but, in having regard to it, the court must bear this in mind: the Attorney-General is the person who is primarily responsible for the enforcement of the law, he is the first law officer of the Crown and I think that, if he considers it necessary to come into the court by way of a relator action to ask for the assistance of the court in enforcing obedience to a clear provision of the law, the court, although retaining its discretion, ought to be very slow to say that the Attorney-General ought to have exhausted other remedies before he came to the court. In any doubtful case—at any rate where it may be questionable whether other remedies had or had not been fully exhausted—the court would be slow to interfere with the decision, which the Attorney-General must have made in authorising the action, that it was a case where the ordinary remedies would no longer prevail. I say that because I think that at the time when this action was brought, when the writ was issued, there might have been a question of some doubt whether the efficaciousness of the proceedings prescribed by the Act of 1947 had been really displaced. At the time when this action was begun, three informations had been brought, the defendant had been fined a substantial sum, which he had not paid, and he had served a sentence of one month's imprisonment in default, but it seems to me a little difficult to say that at that time the remedies provided by the Act had been thoroughly exhausted. The justices had not passed the maximum sentence, and they had not been asked to do so. It would be difficult

for the Attorney-General to say that the remedies had been fully exhausted and that there was nothing more that the justices could do when, in fact, the local authority went back and asked them to do something further and the justices exercised their powers to the full, very properly imposing the maximum sentence because the defendant had defied the court. It may be that if the justices had made it plain that they would continue, if necessary, passing that sentence until such time as the defendant decided no longer to defy the court, it would have been efficacious, and in that case the public rights would have been protected, perhaps, a year and a half, or more, ago. That seems to be the delay that has been imposed by the time taken to bring on this particular action.

I should have thought, therefore, that at the time when the writ was issued it was at least a matter of doubt whether the remedies provided by the Act of 1947 had been exhausted, but two things fall for consideration. The first is that I have to consider the matter now, when I am invited to grant an injunction, and not when the writ was issued. Whatever the position may have been at the time of the writ, the position now is plain, that the maximum sentence that can be imposed by the magistrates has not deterred the defendant from continuing to defy the law. He has continued in breach of it and is still in breach of it now. It is perfectly true that if an injunction is granted and it is disobeyed, the result may be that the court will commit the defendant to prison, and thus it may be said that that is only exercising the same power as the magistrates have. They could continue to send him to prison for a maximum period of three months, by imposing so large a fine on each occasion that the defendant could not pay it and, by a succession of sentences in default of payment, it might be said, they could achieve just as good a result as this court can achieve.

However, I think it must be a matter of administrative discretion, whether the enforcement of the law is best achieved, in the face of someone who is determined to defy it, by going to the magistrates' court in a series of applications of that sort, or by going to the High Court and asking it to use its powers, which would amount to the imposition, if necessary, of an indefinite sentence until such time as the defendant had purged his contempt. That must be a matter of administrative discretion, and so, I think, too, is the choice between the other alternatives suggested by counsel for the defendant, who, in the course of his argument, has urged everything that could possibly be urged on behalf of the defendant. He has submitted that it would be open to the local authority, under s. 24 (1) of the Act of 1947 itself, to step in and remove the caravans, and that that would be a much more satisfactory way of securing compliance with the law than by granting an injunction and imposing a term of imprisonment if it is disobeyed. Whether that power in fact exists, I think, depends on what is meant by "any use of land" in s. 24 (1). It might be doubtful, in the present case, whether the power does exist, but, whether it exists or does not exist, I think that the choice of methods for the enforcement of the law is primarily a matter for administrative discretion.

I distinguish, therefore, between administrative discretion and judicial discretion. The Attorney-General, as I say, is the officer of the Crown who is entrusted with the enforcement of the law. If he, having surveyed the different ways that are open to him for seeing that the law is enforced and that it is not defied, has come to the conclusion that the most effective way is to ask this court for a mandatory injunction—and I am satisfied that the very nature of a relator action means that he has surveyed those ways and has come to that conclusion—then I think that this court, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances. I am dealing, of course, purely with that type of case in which the only substantial ground for not giving an injunction is that there are other remedies

A available. In cases where other circumstances arise which are not primarily a matter for administrative discretion, then different considerations might apply and a different view be taken.

The Attorney-General has satisfied me that I have jurisdiction to grant the relief which is asked, and that it is a proper case in which I ought to grant that relief. Accordingly, as far, at any rate, as the first limb* of the prayer goes,

B I shall grant it. With regard to the second limb*, if counsel for the Attorney-General wished to pursue that relief, I should want to hear him further.

[Counsel for the Attorney-General having stated that he did not wish to proceed with the prayer for a mandatory order and that as his main objective was to secure the discontinuance of the use of the land in question for a caravan site, that object had been achieved by the injunction granted by his Lordship, His

C LORDSHIP continued:] It may be, in that case, that the injunction asked for in the first limb of the prayer requires a little qualification, because the offence that the defendant has committed is a breach of the enforcement notice. The enforcement notice does not say that he may not use the land for caravans. It says that he may not use the land for parking caravans for human habitation. I think one must be strict about these things. It is a little difficult to see what

D else he would want caravans on his land for. It may be, also, that an enforcement notice without that description would have been justified, but those are the terms of the enforcement notice, and I should have thought that the injunction should follow it. When it comes to making orders of the court which are punishable by contempt, one has to be strict about the terms of them. Therefore, there will be an injunction perpetually restraining the defendant from

E using the land or causing or permitting it to be used as a site for caravans for human habitation without the grant of planning permission pursuant to the Act of 1947.

Order accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *P. L. Cox*, Hornchurch (for the Attorney-General); *J. H. Fellowes* (for the defendant).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

* The first limb was the perpetual injunction; the second limb was a mandatory order requiring the defendant to remove the caravans (see p. 498, letter D, ante).

HARVEY v. CRAWLEY DEVELOPMENT CORPORATION.

[COURT OF APPEAL (Denning, Romer and Sellers, L.JJ.), January 23, 24, 1957.]

Compulsory Purchase—Compensation—Assessment—Compensation for disturbance—Surveyors' fees, solicitors' costs, travelling expenses etc. reasonably incurred by owner-occupier in finding and purchasing another house for occupation—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5 c. 57), s. 2 (1), (5), (6).

The owner-occupier of a house which was compulsorily acquired tried to find another house in which to live. She found one that she liked, but her surveyor reported that it was unsatisfactory, and she therefore did not purchase it. Later she found and purchased another house. Her total expenditure on travelling expenses, surveyors' fees and legal costs in respect both of the unsatisfactory house and of the house she bought amounted to £241 10s. 1d., and the Lands Tribunal awarded her this sum, as compensation for disturbance under s. 2 (6) of the Acquisition of Land (Assessment of Compensation) Act, 1919. This sum so awarded was in addition to the value of the land compulsorily acquired with vacant possession, surveyors' fees and legal costs in connection with its acquisition, her removal expenses and the cost of alterations to curtains, etc. On appeal by the acquiring authority against the award of the £241 10s. 1d., the authority contended (i) that this sum was in fact the cost of reinstatement, and so could not be the subject of compensation as the case did not fall within s. 2 (5) of the Act (which expressly allows the cost of reinstatement on the compulsory acquisition of land for which there is no market), (ii) that this sum was compensation for the acquisition being compulsory, and so was excluded by s. 2 (1) of the Act.

Held: the sum of £241 10s. 1d. was properly awarded as compensation for disturbance because

(i) it was expenditure reasonably incurred in getting another house, and so could fairly be regarded as a direct consequence of the compulsory acquisition, and

(ii) although cost of reinstatement was specifically provided as the basis of compensation only in cases within s. 2 (5) of the Acquisition of Land (Assessment of Compensation) Act, 1919, the mere fact that expenditure for which compensation was claimed involved some element of reinstatement did not disqualify it for being allowed as compensation for disturbance, if it was otherwise proper so to be allowed.

Venables v. Department of Agriculture for Scotland (1932 S.C. 573); *Horn v. Sunderland Corpn.* ([1941] 1 All E.R. 480), applied.

Per DENNING, L.J.: section 2 (1) of the Acquisition of Land (Assessment of Compensation) Act, 1919, is directed only to the . . . ten per cent. which in the old days was given to soften the blow of compulsory acquisition; sub-s. (1) disallows that ten per cent. (see p. 506, letter H, post).

Per ROMER, L.J. (SELLERS, L.J., concurring): the authorities . . . establish that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance, provided, first, that it is not too remote and, secondly, that it is the natural and reasonable consequence of the dispossession of the owner (see p. 507, letter F, post).

Quaere whether the costs of the abortive purchase were too remote, and so were irrecoverable as compensation (see per ROMER, L.J., at p. 507, letter G, post).

Appeal dismissed.

A [**Editorial Note.** Examples of costs which would be too remote to be included in compensation for disturbance are given at p. 507, letters A to D, post.

As to the measure of compensation for disturbance, see 10 HALSBURY'S LAWS (3rd Edn.) 163, 164, paras. 284, 285; and for cases on the subject, see 11 DIGEST (Repl.) 127, 166-168.

B As to the percentage for the acquisition of land being compulsory, see 10 HALSBURY'S LAWS (3rd Edn.) 95, para. 159.

For the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, see 3 HALSBURY'S STATUTES (2nd Edn.) 977, 978.]

Cases referred to:

- C (1) *Venables v. Department of Agriculture for Scotland*, 1932 S.C. 573; Digest Supp.
- (2) *Horn v. Sunderland Corpn.*, [1941] 1 All E.R. 480; [1941] 2 K.B. 26; 110 L.J.K.B. 353; 165 L.T. 298; 105 J.P. 223; 2nd Digest Supp.
- (3) *Beard v. Porter*, [1947] 2 All E.R. 407; [1948] 1 K.B. 321; [1948] L.J.R. 77; 177 L.T. 570; 2nd Digest Supp.
- D (4) *R. v. Burrow*, (1884), *The Times*, Jan. 24; Cripps on Compensation (8th Edn.) (1938), 906; *affd.* H.L., sub nom. *Metropolitan & District Ry. Co. v. Burrow*, (1884), *The Times*, Nov. 22; Hudson's Compensation, vol. 2, 1521; 11 Digest (Repl.) 135, 191.

Appeal.

E The acquiring authority appealed against the decision of the Lands Tribunal, dated July 31, 1956, awarding the freeholder £241 10s. 1d. compensation for disturbance on the compulsory acquisition of her house. The facts appear in the judgment of DENNING, L.J.

G. D. Squibb, Q.C., and *L. G. Scarman* for the appellant (the acquiring authority).
M. E. Rowe, Q.C., and *J. C. Leonard* for the respondent (the freeholder).

F DENNING, L.J.: The freeholder, Mrs. Harvey, used to own a house, "St. Raphael's," Three Bridges Road, Crawley, Sussex. The acquiring authority, Crawley Development Corporation, decided to acquire that house compulsorily. When the freeholder was faced with the request for acquisition, she agreed to let the acquiring authority have the house at a price to be settled by the Lands Tribunal in accordance with the statutory provisions. The question before us is as to the way in which the compensation should be assessed. The acquiring authority agree that she is entitled to the value of the house with vacant possession in the open market; also the surveyors' fees and the legal costs which she incurred in disposing of her house to the acquiring authority. She has also been allowed the expenses of removing her furniture to other premises, and the cost of alterations to her curtains and carpets, and so on, in order to fit them for use in her new house. The agreed total sum which she has been awarded for those items is £4,148 1s. There is no question about them.

H The question in the case arises in this way. The freeholder tried to find another house for herself to go into. She saw a house which she liked and was proposing to buy it, but she had a surveyors' report for it and when she got the surveyors' report she discovered it was an unsatisfactory house and she did not go on with the purchase of it. Afterwards she did find a house which suited her and she bought it. She had to pay the solicitors' costs and the surveyors' fees when she bought it; she had some travelling expenses, and so on. The total expense to which she was put for travelling expenses, surveyors' fees and legal costs (on the proposed house and the house she bought) comes altogether to £241 10s. 1d.; and the question is whether she is entitled by way of compensation to have that sum in addition to the £4,148 1s. which I have already mentioned. It has been found by the Lands Tribunal that those expenses were all reasonably incurred by her in finding another house, and

the tribunal has awarded that sum to her as compensation. The acquiring authority appeal to this court and say that in point of law such compensation is not to be granted to the freeholder. A

The principles of compensation have been gradually developed over the years in cases decided on the Lands Clauses Consolidation Act, 1845, but specific rules are now stated in the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2. Under those Acts the law is settled, both in this country and in Scotland, by two cases. The Scottish case is *Venables v. Department of Agriculture for Scotland* (1) (1932 S.C. 573), and the English case is *Horn v. Sunderland Corpn.* (2) ([1941] 1 All E.R. 480) in this court. Those cases show that, in addition to the actual market value of the house, when sold with vacant possession, the freeholder is entitled to "compensation for disturbance", which is specifically preserved by s. 2 (6) of the Act of 1919 and includes all damage directly consequent on the taking of the house under statutory powers. The question is whether these costs of £241 10s. 1d. come within that head. B C

The sum of £4,148 1s. which the freeholder has already received does not include anything in respect of these costs of £241 10s. 1d. to which she has been put in getting another house. If you sell your house for £4,000, you can put the £4,000 into the bank and keep it. If you buy another house for £4,000, you can take the money out of the bank to pay for it, and you have your value of £4,000 in the shape of the new house; but you have to find the costs from some other pocket. They are extra costs not included in the £4,000. A good illustration is the decision of this court in *Beard v. Porter* (3) ([1947] 2 All E.R. 407). It seems to me that, as these costs of £241 10s. 1d. were reasonably incurred by the freeholder in getting another house, they can fairly be regarded as a direct consequence of the compulsory acquisition. Prima facie, therefore, they fall within the heading of compensation for disturbance. It is said, however, that they are not properly compensation for disturbance, but only compensation for reinstatement: and that the cost of reinstatement of a person in other premises can never be the subject of compensation; and s. 2 (5) of the Act of 1919 was relied on. I do not think that sub-s. (5) supports that proposition. It is only dealing with the value of land when there is no market for it. Take, for instance, a church, for which there is no market. Under sub-s. (5) the owners can sometimes get the cost of buying another piece of land and putting up a church on it. The fact that the cost of reinstatement is there specifically allowed does not mean that in every other case anything in the nature of reinstatement is to be disallowed. It all depends on whether it comes properly within "compensation for disturbance". D E F G

Next it was said that the freeholder was really seeking compensation for the acquisition being compulsory, and sub-s. (1) was referred to, which says that no allowance shall be made on account of the acquisition being compulsory. Sub-section (1) is, however, directed only to the added sop of ten per cent. which in the old days was always given in these cases to soften the blow of compulsory acquisition. Sub-section (1) disallows that ten per cent. It leaves untouched the rule that everything which is a direct consequence of the compulsory acquisition can be recovered under the head of "compensation for disturbance". Instances were given in this very case. The freeholder gets compensation for having to move out her furniture and put it into the new house: she gets compensation for having to alter the curtains and carpets and remake them to fit the new windows and floors. Take business premises where fixtures and fittings have to be moved; or there is loss of business through being turned out; or loss of goodwill. All that loss and expense is the proper subject of "compensation for disturbance" in addition to the open market value of the land. H I

I would therefore say that the £241 10s. 1d., which has been expended and is the direct consequence of the freeholder being turned out of her house, is properly to be regarded as compensation for disturbance. I would not, however,

- A like this to be taken too far. Cases were put in the course of the argument. Supposing a man did not occupy a house himself but simply owned it as an investment. His compensation would be the value of the house. If he chose to put the money into stocks and shares, he could not claim the brokerage as compensation. That would be much too remote. It would not be the consequence of the compulsory acquisition but the result of his own choice in putting
- B the money into stocks and shares instead of putting it on deposit at the bank. If he chose to buy another house as an investment, he would not get the solicitors' costs on the purchase. Those costs would be the result of his own choice of investment and not the result of the compulsory acquisition. Another case was put in the course of the argument. If an elderly man and wife owned and occupied a house which was compulsorily acquired and they thought to themselves:
- C "We do not think we need to get another house; we will go into a guest house", they would not get the costs of moving into a new house when they had not incurred them. Nor would they be able to claim the cost of living in a boarding house for the rest of their days. They would only get the market value of their former home. These illustrations show that the owner only recovers costs of the present kind in a case where a house is occupied by an
- D owner, living there, who is forced out and reasonably finds a house elsewhere in which to live. If he pays a higher price for the new house, he would not get compensation on that account, because he would be presumed to have got value for his money: but he does get the costs that he has to pay a surveyor and lawyer to get it. The costs are then the subject of compensation under the heading of "disturbance" as specified in s. 2 (6).
- E For these reasons, I think that the decision of the Lands Tribunal was correct and I would dismiss the appeal.

ROMER, L.J.: I agree. The authorities to which our attention was drawn establish that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject of compensation for disturbance, provided,

F first, that it is not too remote and, secondly, that it is the natural and reasonable consequence of the dispossession of the owner. That proposition, I think, emerges from *Venables v. Department of Agriculture for Scotland* (1) (1932 S.C. 573), from *Horn v. Sunderland Corpn.* (2) ([1941] 1 All E.R. 480) (especially perhaps from the judgment of SCOTT, L.J.) and also from *R. v. Burrow* (4) (which is reported in CRIPPS ON COMPENSATION (8th Edn.) 906); and I would

G especially draw attention to the judgment of BOWEN, L.J. (*ibid.*, at p. 914) in the latter case when the matter came before the Court of Appeal.

Applying that principle, no question of remoteness was raised in relation to the items now in dispute, although perhaps it might have been raised with regard to the expenditure which was incurred by the freeholder in connection with the

H abortive purchase of a house which she was advised by her surveyor was not a suitable residence for her; and certainly no question of remoteness could arise with regard to the actual purchase which she did make. Nor is there any question, as I think, but that the items of expenditure were naturally and reasonably incurred by the freeholder. The natural thing for a dispossessed owner-occupier to do is to buy another home of a comparable kind, and that in fact

I is what the freeholder did. Indeed, it appears from the case itself that it was not suggested by the acquiring authority that it was an unreasonable action on the freeholder's part. The fact that in some sense reinstatement or replacement may be involved does not appear to me to disqualify the claim under s. 2 (6) of the Acquisition of Land (Assessment of Compensation) Act, 1919; and I entirely accept for my part the argument which counsel for the freeholder addressed to us on that aspect of the case.

I would only add that the tribunal's decision in this case seems to me not only to be right in law but to accord with common sense. I cannot help feeling

that the contrary view would lead to a great deal of discontentment on compulsory acquisitions. It is bad enough in itself for a person to be compulsorily dispossessed of his home, but it is worse still if he has himself to bear expenses of the kind which are in issue in the present case in finding another house in which to live. A

I agree that the appeal should be dismissed.

SELLERS, L.J.: I agree. Before the tribunal the present claim appears to have been resisted on the ground that the expenditure was already reflected in the vacant possession value of the property, and, if that were right, that would amount to compensation for this particular expenditure having already been assessed. But the tribunal applied (and in my view rightly applied) the majority decision in *Beard v. Porter* (3) ([1947] 2 All E.R. 407), where **TUCKER, L.J.**, said that the buyer must be presumed to have received full value for the money which he paid on his purchase, and that the stamp duty and legal costs were not part of the purchase price. Therefore, this expenditure which was undoubtedly made by the freeholder, the respondent to this appeal, has not been accounted for there. The argument before this court, as I understood it, was that this expenditure was not recoverable because it was in its nature a payment in respect of reinstatement or replacement of herself and her furniture in other premises. In support of the contention that that was not recoverable, reliance was placed on s. 2 (1), (5) of the Acquisition of Land (Assessment of Compensation) Act, 1919; but, for the reasons given by my Lords in dealing with the interpretation of that sub-section, I agree that that does not preclude a claim for disturbance which may include an element of reinstatement. The sub-section is only a provision directed to the assessment of the appropriate compensation where there is no general demand or market for the land which has to be assessed. B C D E

ROMER, L.J., has stated the principles to be derived from the cases, and on those principles (which I entirely accept and would adopt) it becomes in any given case a question of fact for the tribunal whether any particular item of expenditure does come within their terms. The evidence in this case would seem to show that the tribunal were entirely justified in saying that this particular expenditure in relation to the acquirement of new premises—it may be that the abortive expenditure was a misfortune but no distinction is made between the two—is expenditure which was directly arising from the circumstance that this lady had to find another house in which to live by reason of being compulsorily dispossessed of her home. It becomes a question of fact then, and no question of law arises. F G

In my view the tribunal came to a correct decision.

Appeal dismissed. Leave to appeal to the House of Lords subject to terms as to costs being agreed between the parties.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *P. K. S. Wilkinson*, Crawley (for the acquiring authority); *Peacock & Goddard*, agents for *Bevan, Hancock & Co.*, Bristol (for the freeholder).

[Reported by **HENRY SUMMERFIELD, Esq.**, *Barrister-at-Law.*]

NATIONAL ASSISTANCE BOARD v. TUGBY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, JJ.), January 15, 23, 1957.]

Bastardy—Application for order—Right of National Assistance Board to apply—Whether necessary to prove that mother is a single woman—National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 44 (2).

National Assistance—Bastardy order—Right of National Assistance Board to apply—Whether proof necessary that mother a single woman—National Assistance Act, 1948 (11 & 12 Geo. 6 c. 29), s. 44 (2).

The National Assistance Board are entitled, on the true construction of s. 44 (2)* of the National Assistance Act, 1948, to obtain an order, viz., an order for a summons to be served under s. 3 of the Bastardy Laws Amendment Act, 1872†, without proving that the mother of the child is a single woman within s. 3 of the Act of 1872.

Dicta in *National Assistance Board v. Mitchell* ([1955] 3 All E.R. 291) disapproved.

[For the National Assistance Act, 1948, s. 44, see 16 HALSBURY'S STATUTES (2nd Edn.) 970.

For the Bastardy Laws Amendment Act, 1872, s. 3 and s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 478, 480.

For the Bastardy Laws Amendment Act, 1873, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 484.]

Cases referred to:

(1) *National Assistance Board v. Mitchell*, [1955] 3 All E.R. 291; [1956] 1 Q.B. 53; 119 J.P. 572; 3rd Digest Supp.

(2) *Plymouth Union v. Gibbs*, [1903] 1 K.B. 177; 72 L.J.K.B. 33; 87 L.T. 685; 67 J.P. 61; 37 Digest 236, 296.

Case Stated.

This was a Case Stated on the application of the National Assistance Board (herein called "the board"), the appellants, by the Tynemouth justices in respect of their adjudication as a magistrates' court sitting at North Shields on May 17, 1956. On Mar. 8, 1956, the board preferred a complaint against the respondent, Leonard Arthur Tugby, stating that he was alleged by Elsa Tugby, to be the father of her child, Adam Tugby, born on July 1, 1952, and that assistance had been given under Part 2 of the National Assistance Act, 1948, on Feb. 20, 1956, and divers other days by reference to the requirements of the child, and applying under s. 44 (2) of the Act for a summons to be served on the respondent under s. 3 of the Bastardy Laws Amendment Act, 1872, to answer the complaint. The complaint was heard on May 17, 1956, when the respondent appeared but was not legally represented.

The following facts were found. On July 1, 1952, Elsa Lindsay gave birth to a male child which was named Adam Tugby and of which the respondent was the father. At the date of the birth of the child Elsa Lindsay was a spinster. The birth of the child was registered. The respondent and Elsa Lindsay gave information leading to the registration of the birth and the respondent signed the register as the child's father. The respondent had married Iris

* The text of the sub-section is printed at p. 511, letter D, post.

† The Bastardy Laws Amendment Act, 1872, provides: "3. Putative father to be summoned to petty sessions on application of mother of bastard child.—Any single woman who may be with child or who may be delivered of a bastard child may either before the birth or at any time within twelve months from the birth of such child, or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance . . . make application . . . for a summons to be served on the man alleged by her to be the father of the child . . ."

Doreen Ada Smith on June 12, 1948, and that marriage was still subsisting at the date of the birth of the child. The marriage between the respondent and Iris Doreen Ada Smith was dissolved by decree absolute of divorce on Apr. 21, 1953. The respondent married Elsa Lindsay at the Register Office, Tynemouth, on Sept. 12, 1953, and that marriage was still subsisting. The respondent and his wife separated by mutual consent (of which there was no written evidence) in March, 1955. That separation was intended to be permanent and the respondent and his wife were still living apart. The respondent was not maintaining his wife or the child, but the respondent had made a bona fide offer to his wife to the effect that he would support her and the child if they returned to live with him. This offer had been refused by his wife. Assistance was paid to the respondent's wife by the board by reference to the child's requirements on Feb. 20, 1956, and divers other days.

It was contended on behalf of the board (a) that by s. 1 (2) of the Legitimacy Act, 1926, the child was not legitimated by the subsequent marriage of his parents; (b) that since by s. 42 (2) of the National Assistance Act, 1948, references to children in the Act included children of whom a man had been adjudged to be the putative father, there was no liability on the respondent to maintain the child under that Act unless and until such an adjudication was made; and (c) that s. 44 (2) of the Act of 1948 empowered the board to apply for an affiliation order in all cases in which assistance was given under Part 2 of the Act by reference to the requirements of an illegitimate child, and, therefore, it was not necessary for the board to prove that the child's mother was a single woman within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872.

The justices were of the opinion that they were bound to have regard to the direction given to the magistrate by the Divisional Court in *National Assistance Board v. Mitchell* (1) ([1955] 3 All E.R. 291), namely, that he was further to hear that case on the question whether the mother was a single woman within the meaning of the Bastardy Acts. Having directed their minds to the question whether Elsa Tugby was a single woman within the meaning of those Acts, the justices were of opinion that on the authority of *Mooney v. Mooney* ([1952] 2 All E.R. 812), she could not be regarded as a single woman quoad her own husband and, accordingly, dismissed the complaint.

Rodger Winn for the appellants, the National Assistance Board.

The respondent did not appear.

Cur. adv. vult.

Jan. 23. **LYNSKEY, J.**, read the following judgment: This is an appeal by way of Case Stated by the Tynemouth justices against their adjudication on May 17, 1956, refusing an application by the appellants, the National Assistance Board, under s. 44 (2) of the National Assistance Act, 1948, for a summons to be served on the respondent, Leonard Arthur Tugby, under s. 3 of the Bastardy Laws Amendment Act, 1872.

On Mar. 8, 1956, a complaint was preferred by the board against the respondent stating that he was alleged by Elsa Tugby to be the father of her child, Adam Tugby, born on July 1, 1952, and that assistance had been given under Part 2 of the National Assistance Act, 1948, on Feb. 20, 1956, and divers other days by reference to the requirements of the said child and applying under s. 44 (2) of the Act of 1948 for a summons to be served on the respondent under s. 3 of the Bastardy Laws Amendment Act, 1872, to answer the said complaint. The application, therefore, was for the issue of a summons and not for an order that might be made on the hearing of such a summons.

[His LORDSHIP stated the facts, as found by the justices, and continued:] On the findings of facts the justices decided, and in our view rightly decided,

A that the child was not legitimated by the subsequent marriage of his parents. They also decided, and again, we think, rightly decided, that Elsa Tugby was not a single woman quoad her husband within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, and, therefore, she would not be entitled to apply for a summons to be served on the respondent under that section. It was contended before the justices and before us that s. 44 (2) of the National
B Assistance Act, 1948, empowered the board to apply for a summons to be served under s. 3 of the Bastardy Laws Amendment Act, 1872, in all cases in which assistance was given under Part 2 of the National Assistance Act, 1948, by reference to the requirements of an illegitimate child, irrespective of whether the mother could have applied or not, and without proof that the mother was a single woman within the meaning of s. 3 of the Act of 1872. Whether this
C contention is correct depends on the true construction of s. 44 (2) of the National Assistance Act, 1948.

Section 44 (2) of the National Assistance Act, 1948, provides:

D "If no affiliation order is in force, the [National Assistance Board] or local authority may within three years from the time when the assistance was given or accommodation provided make application to a court of summary jurisdiction having jurisdiction in the place where the mother of the child resides for a summons to be served under s. 3 of the Bastardy Laws Amendment Act, 1872."

E On the wording of the sub-section, all that the board have to show in order to obtain a summons under s. 3 of the Act of 1872 is (a) that there is no affiliation order in force, (b) that assistance has been given or accommodation provided, and (c) that such assistance has been given or accommodation provided within three years of the date of the application. The summons under s. 3 of the Bastardy Laws Amendment Act, 1872, is a summons to

F ". . . the person alleged to be the father of such child to appear at a petty session to be holden . . . for the petty sessional division, city, borough, or other place in which [the] justice [to whom the complaint was made and who issued the summons] usually acts."*

G It is true that under s. 3 of the Bastardy Act of 1872 before a mother can obtain the issue of a summons she must show that she is a single woman about to give birth to an illegitimate child, or having given birth to an illegitimate child within twelve months of the date of the application, unless the man alleged to be the father of the child has made payments within the twelve months of the birth in respect of the maintenance of the child or has been out of the country within that twelve months. Having shown these things, only then is
H she in a position to apply for and obtain a summons, a position in which the board or a local authority are put on proof of the matters set out in s. 44 (2) of the Act of 1948.

I Section 4 of the Bastardy Act of 1872 deals with what has to be proved at the hearing of the summons before an affiliation order, or an order for maintenance, can be made. Section 44 (3) of the Act of 1948 deals with the evidence which may be adduced, including the evidence required to be heard by s. 4 of the Act of 1872, and, subject to the provisions of s. 44 (4) of the Act of 1948, proceedings are to be as on an application by the mother under s. 3 of the Act of 1872. The effect of s. 44 is to give to the board a right independent of and separable from any right given to the mother by the Bastardy Acts, and even though she herself, by effluxion of time or by marriage, has lost her right to apply.

* The whole of this passage was repealed by the Magistrates' Courts Act, 1952, s. 132, and Sch. 6, and replaced by s. 51 of that Act.

Under the Bastardy Laws Amendment Act, 1873, s. 5,* where a bastard child became chargeable to a union or parish, the guardians might apply for a summons directed to the man alleged to be the father, to show cause why an order should not be made on him to contribute to the relief of the child, and, on the hearing of the summons, on proof being given as provided in the section, the justices might adjudge the man the putative father of the child and make an order for payment towards the relief of the child. In *Plymouth Union v. Gibbs* (2) ([1903] 1 K.B. 177) this court held that, where an illegitimate child was being maintained by the guardians of a union or parish, justices had jurisdiction, on the application of the guardians, to make an affiliation order against the putative father of the child under s. 5 of the Bastardy Laws Amendment Act, 1873, notwithstanding that the child's mother had married and that her husband was able to maintain the child. Assistance previously given by parishes and the poor law guardians is now given by the National Assistance Board. The National Assistance Act, 1948, repealed the provisions of s. 5 of the Bastardy Laws Amendment Act, 1873*, and gave the National Assistance Board and local authorities the powers contained in s. 44 of the Act of 1948.

Section 44 (2) of the Act of 1948 was considered in this court in *National Assistance Board v. Mitchell* (1) ([1955] 3 All E.R. 291). The point for decision in that case was this. Where the mother of two illegitimate children had not taken proceedings within twelve months of the birth and had thereby lost her right to take such proceedings, could the National Assistance Board bring proceedings under s. 44 within three years of the assistance being given? This court held that the board's right to apply for an order under the Act of 1948 was entirely separate from the mother's right under the Act of 1872, and that, provided that the board applied within three years of the date when they last gave assistance, they were entitled to apply for an order proving that the children were bastards in respect of whom an order could have been made under the Act of 1872.

In that case it seems to have been assumed without argument that it would be necessary for the board to prove that the mother was a single woman for the purposes of the Bastardy Acts before the board could obtain an order under s. 44 (2). The point did not arise directly for decision. Having had the point now argued before us, we take the view that on the true construction of s. 44 (2) the board are entitled to an order without proof that the mother is a single woman within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872. The Case should be remitted to the justices with this opinion.

CASSELS, J.: I agree with the judgment which has just been delivered by LYNSEY, J.

LORD GODDARD, C.J.: I also agree with the judgment which has just been delivered by LYNSEY, J. In fairness to the justices from whom we are differing, I desire to say that I recognise that, in remitting the case of *National Assistance Board v. Mitchell* (1) ([1955] 3 All E.R. 291) to the learned magistrate for further consideration, both I and ORMEROD, J., indicated that he should consider among other things whether the mother was a single woman for the purposes of the Bastardy Acts and the other member of the court [GLYN-JONES, J.] concurred†. This was unnecessary for the actual decision of the case and must be regarded as obiter. It seems from the report of the judgments and of the argument that all concerned were under the impression that whether the mother was or was not to be regarded as a single woman was a matter which

* Section 5 of the Act of 1873 was repealed by the National Assistance Act, 1948, s. 62 (3), s. 68 (2), and Sch. 7, and the whole Act of 1873 was repealed by the Magistrates' Courts Act, 1952, and replaced by provisions of that Act.

† [1955] 3 All E.R. at pp. 294, letter F, 295, letter C.

A the magistrate would have to determine. The matter having now been fully argued and this question falling for direct decision, I am satisfied that those dicta were wrong. I regret that the justices, who naturally and properly followed this expression of opinion, were thus misled.

Case remitted to the justices.

B Solicitors: *Solicitor, National Assistance Board* (for the appellants).

[*Reported by MARGARET D. ABEL, Barrister-at-Law.*]

C

Re GOLDSCHMIDT (*deceased*).

D COMMERCIAL UNION ASSURANCE CO., LTD. *v.* CENTRAL
BRITISH FUND FOR JEWISH RELIEF AND
REHABILITATION AND OTHERS.

[CHANCERY DIVISION (Harman, J.), February 6, 1957.]

E *Charity—Cy-près doctrine—Gift to institution—Gift one of a series of legacies to charitable institutions—Institution not identifiable—Residuary gift to another charity—Finding of general charitable intention.*

By her will a testatrix gave specific and pecuniary legacies and an annuity to various friends and servants and directed the sale and conversion of her remaining real and personal estate. After the usual administrative directions, she directed her trustees to stand possessed of the remainder (called her "residuary estate") "upon trust to make the following payments to the following institutions", and she bequeathed seventeen pecuniary legacies. Fourteen of those bequests were made to charitable bodies which were clearly designated. Two of the others were made to bodies which had ceased to exist before the date of the death of the testatrix and, accordingly, the bequests to them lapsed. The remaining legacy was G "to the Fund for the Relief of Distressed German Jews in England the sum of £5,000". Finally she directed her trustees to hold any balance of her residuary estate on trust for another charity, the Hospital for Sick Children, Great Ormond Street, W.C.1. The Fund for the Relief of Distressed German Jews in England was not identifiable, although the bequest was claimed by two institutions, and two others could also possibly have H been intended to benefit.

Held: the legacy of £5,000 fell into the ultimate residue and passed to the Hospital for Sick Children for the following reasons:

(i) having regard to the fact that the bequest of the £5,000 was one of a series of bequests to institutions which were clearly identified, the testatrix must have intended to benefit a particular institution and not a special object or purpose, but the institution intended was not identifiable, and I

(ii) as the final residuary gift was to a charity there was no room for any finding in favour of a general charitable intent in relation to the bequest of the £5,000.

Re Harwood ([1936] Ch. 285) and *Re Davis* ([1902] 1 Ch. 876) distinguished.

[As to gifts to unidentifiable, non-existent or disclaiming institutions, see 4 HALSBURY'S LAWS (3rd Edn.) 279, 280, para. 581; and for cases on the subject, see 8 DIGEST (Repl.) 417-421, 1082-1117.]

Cases referred to:

- (1) *Re Davis, Hannen v. Hillyer*, [1902] 1 Ch. 876; 71 L.J.Ch. 459; 86 L.T. 292; 8 Digest (Repl.) 417, 1086.
- (2) *Re Harwood, Coleman v. Innes*, [1936] Ch. 285; 105 L.J.Ch. 142; 154 L.T. 624; 8 Digest (Repl.) 460, 1598.

Adjourned Summons.

The Commercial Union Assurance Co., Ltd., as executors and trustees of the will of Victoria Rebecca Goldschmidt, deceased, issued an originating summons for the determination of the question who of the several claimants was entitled to a sum of £5,000 bequeathed by the testatrix "to the Fund for the Relief of Distressed German Jews in England", or whether the bequest fell into the ultimate residue or should be applied cy-près.

J. E. Vinelott for the plaintiffs.

L. H. L. Cohen for the first defendant, the Central British Fund for Jewish Relief and Rehabilitation.

Victor Coen for the second defendant, the Association of Jewish Refugees in Great Britain Benevolent Society.

N. Micklem for the third defendant, the Board of Governors of the Hospital for Sick Children.

H. R. Williams for the Attorney-General.

HARMAN, J.: This case raises a rather peculiar point. It was said by BUCKLEY, J., in *Re Davis, Hannen v. Hillyer* (1) ([1902] 1 Ch. 876) that the court will lean towards finding a general charitable intent in the circumstances which he there mentioned. The court has been doing so ever since, and it has leaned so far over that it has become almost prone. I have always had a preference for an upright posture. Be that as it may, I cannot think there can be any leaning when the residue itself is given to charity, because there is no question of favouring charity against the rest of the world. To lean one way or the other would be to favour one charity against another charity, and there is no injunction that I know of to make the court do that. This is, therefore, a mere question of construction.

Miss Victoria Rebecca Goldschmidt died on Feb. 5, 1954, leaving a considerable estate. By her will dated Aug. 20, 1950, she appointed the plaintiffs, the Commercial Union Assurance Co., Ltd., to be her executors, and gave certain pecuniary legacies, an annuity, and legacies of her chattels to friends, god-children, a nurse, servants, and so forth. She then came to bequeath her residuary estate, and, having no further obligation to her family or friends as she conceived it, she devoted the whole of the rest of her money to charitable objects. She gave her money to her trustees to convert in the usual way, and to pay her debts out of the proceeds, and to pay also the legacies which she had already given. That left her with what she described as "my residuary estate", and out of that she directed her trustees "to make the following payments to the following institutions". *Prima facie* "institution" means "organised bodies" of one sort or another. There are then set out a list of seventeen different institutions. At the end she provides:

"And to hold any balance of my residuary estate which may remain after the payment of the said sums upon trust for the Hospital for Sick Children Great Ormond Street, W.C.1."

That institution, therefore, is the ultimate residuary legatee.

Most of the institutions named in this clause are easily identifiable. Leaving out the first one, which is a controversial one, there are the Royal Society for the Prevention of Cruelty to Animals, Our Dumb Friends' League, the Fund for the Prevention of the Exportation of Horses, the National Society for the

A Prevention of Cruelty to Children, the National Adoption Society, and then one which I will leave out. Then the Sunshine Home for Babies: that is not a description exactly of any institution, but it is easily identifiable with a well-known institution of which it forms part. Then there is the Distressed Gentlewomen's Association, which is also a well-known association. Then I leave out one, and next are the National Trust, the National Art Collections' Fund, and the British Provident Association for Hospital and Additional Services, then the Blinded Soldiers' and Sailors' Hostel, which is well known as St. Dunstons, and then the Star and Garter Home for Disabled Sailors and Soldiers, King George's Fund for Sailors, and, finally, the Soldiers' Sailors' and Airmen's Families Association. There is no difficulty about those at all; but there are three of a different kind. The first one is this: "To the Fund for the Relief of Distressed German Jews in England the sum of £5,000". Secondly, there is a gift to "Lady Islington President of the Pro Patria Day Nurseries the sum of £1,000". Thirdly, there is a gift to "The School of Medical Psychology of the sum of £100".

It appears that Lady Islington's Fund and the School of Medical Psychology had ceased to exist before the testatrix died in 1954. Nobody seems to doubt that their legacies lapse and that the ultimate residuary legatee benefits proportionately. With regard to the first, the position is this. It has not been possible to find out exactly what fund it was that the testatrix intended to benefit. I have no doubt, having regard to the form of this will, that there was in her mind one fund which she intended to benefit, and it is very difficult to suppose that she meant any other. There are two extremely reputable institutions which have come before me both claiming to be *persona designata* under the will, and there are mentioned two others which have been found by the plaintiffs in the course of their researches who do not wish to claim to be *persona designata* but would like not to be forgotten if there is a share out. I sympathise with them entirely in that desire.

The question is why, if the other two legacies lapse, this one should not lapse? It is said that there is a difference in principle between a case where a named legatee being a charity has ceased to exist before the death, in which case the ordinary rule of lapse applies, and a case where the institution as named has never existed at all, or rather where, though the institution is named, the court is unable to find it because of conflicting claims of equal, or more or less equal, probability. That is a distinction which seems to me a very fine one—in fact I am not sure that it is not a distinction without a difference.

The nearest case that has been cited to me is a decision of FARWELL, J., in *Re Harwood, Coleman v. Innes* (2) ([1936] Ch. 285). The headnote states the case very well:

"Where a testator selects a particular charity and takes some care to identify it, it is very difficult for the court to find a general charitable intent, if the named society ceases to exist before the testator's death; but a general charitable intent may be inferred where no charitable institution as described in the will has ever existed."

That is a very remarkable case, because there were two societies involved. One was a society called the Wisbech Peace Society, Cambridge, and the other was the Peace Society of Belfast. There was also the Peace Society of Dublin. There had been a Wisbech Peace Society, but that had ceased to exist, and the learned judge held that there was no general charitable intent. The testatrix meant that society and gave it only as she gave any other legacy. But there was no evidence to show that there had ever been a Peace Society of Belfast. In the case of Dublin it was said that there had been one, but it had been changed to the Irish Peace Society. The learned judge held in the case of the Belfast Society that there was a general charitable intention. The contrast is striking. The learned judge, after rejecting the claimant for the legacy which was the

Belfast Branch of the League of Nations Union, saying that he could not believe that the lady intended to benefit that particular society, continued (*ibid.*, at p. 288):

"... I doubt whether the lady herself knew exactly what society she did mean to benefit. I think she had a desire to benefit any society which was formed for the purpose of promoting peace and was connected with Belfast. Beyond that, I do not think that she had any very clear idea in her mind... At any rate I cannot say that by the description, 'the Peace Society of Belfast', the lady meant the Belfast Branch of the League of Nations Union; but there is enough in this case to enable me to say that, although there is no gift to any existing society, the gift does not fail. It is a good charitable gift and must be applied *cy-près*."

There the residuary legatee was a non-charity, and the learned judge, as a matter of construction, came to the conclusion that the testatrix had not any definite idea what society she did intend to benefit. What she intended to benefit was the cause of peace as propagated in Belfast. That being so, he held that there was a general charitable intent.

Does the same principle emerge here? I cannot doubt that the lady thought that she was giving these specific sums to certain institutions because she called them "the following institutions". It has been pointed out to me by counsel for the first defendant in his argument that in *Re Davis, Hannen v. Hillyer* (1) ([1902] 1 Ch. 876) the Homes for the Homeless case, institutions were also named as the objects of charity. Nevertheless it was held that the gift to the Homes for the Homeless was a gift for a purpose and not for a person. The residue was given to the same charities as were receiving legacies, and, therefore, it was argued that it was charity against charity. In fact, however, if the legacy had to fall into residue, the disposition of a share of residue would also fail and would go to the next of kin no less than the legacy would, and, therefore, the competing persons were really people outside the ring of charity.

Here the testatrix gave legacies to a number of institutions. She then wished to exhaust her estate and she gave whatever was left to another institution. I do not feel that I can stop at the Fund for the Relief of Distressed German Jews in England and say "In this case, and this case only" she was intending to give to an object and not an institution. I feel sure she was not. She was intending to give to a particular institution which was in her mind, but I have been unable to find out which one of several it may have been. I cannot see why in that case I am at liberty to find a specialised general charitable intent. If it were a matter of residue being undisposed of, or even going to some legatee outside the charitable rank, I think the case might be different, but I conceive this clause on the true construction of the will to have been deliberately designed so that the last charity should catch up whatever fell through the net. In my judgment this £5,000 does fall through the net because she has failed to identify the object of her bounty, and I must therefore hold that the residuary legatee succeeds, and this fund goes to the Great Ormond Street Hospital.

Order accordingly.

Solicitors: *J. C. Fox, Gamble & Son* (for the plaintiffs); *Bartlett & Gluckstein* (for the first defendant); *F. G. Boas* (for the second defendant); *Waterhouse & Co.* (for the third defendant); *Treasury Solicitor*.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

ROSE v. ROSE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 5, 1957.]

Divorce—Decree absolute—Application for leave to apply for decree to be made absolute—Decree nisi on grounds of husband's adultery—Resumption of cohabitation—Condonation—Subsequent desertion and adultery by husband—Evidence in support of application.

B

In June, 1945, the wife was granted a decree nisi on the ground of the husband's adultery. In about October, 1945, the parties became reconciled and subsequently they lived together until September, 1953. The husband then left the wife and had since that date lived in adultery with another woman. The wife took no action, hoping that the husband would once more return to her, until November, 1956, when she issued a summons for leave to apply for the decree of June, 1945, to be made absolute. The wife filed an affidavit in support of her application, copies of which were served on the husband and the woman with whom he was alleged to be living in adultery. The husband made a statement in writing admitting adultery and both he and the other woman stated that they did not wish to take part in the proceedings. At the hearing of the wife's summons the Queen's Proctor stated that he had made a full investigation and had been unable to ascertain any relevant facts other than those disclosed by the wife.

C

D

Held: leave would be granted to the wife to apply for the decree to be made absolute since (i) the husband's original adultery, though condoned by the wife, had been revived by his desertion in September, 1953, and by his subsequent adultery and (ii) her delay from September, 1953, until 1956 in making her application was not in the circumstances unreasonable.

E

Elwes v. Elwes ([1950] 1 All E.R. 826) applied.

Per CURIAM: but for the statement made on behalf of the Queen's Proctor it would have been necessary for the wife to have given oral evidence in support of her application.

F

[As to application to make absolute a decree nisi made more than a year earlier, see 12 HALSBURY'S LAWS (3rd Edn.) 406, para. 902, note (f); and for cases on the subject, see 27 DIGEST (Repl.) 687, 688, 6571-6581.]

Case referred to:

- (1) *Elwes v. Elwes*, [1950] 1 All E.R. 826; sub nom. *E. v. E.*, [1950] P. 232; 27 Digest (Repl.) 688, 6581.

G

Summons.

This was a summons by the wife to show cause why she should not be at liberty to apply to have a decree nisi made absolute. The parties were married in 1933 and there were no children of the marriage. In October, 1944, the wife presented a petition for divorce on the ground of her husband's adultery. On June 6, 1945, the petition was heard undefended by BUCKNILL, J., who granted a decree nisi to the wife. In about October, 1945, the parties became reconciled and resumed cohabitation which continued until September, 1953. The husband then left the wife and had, ever since that date, lived in adultery with another woman. In September, 1956, the husband made a statement in writing admitting that he was living in adultery. On Nov. 30, 1956, the wife issued a summons to show cause why she should not be at liberty to apply for the decree nisi granted on June 6, 1945, to be made absolute. In support of her application the wife filed an affidavit, copies of which were served on the husband and the woman with whom he was alleged to be living in adultery, and they both replied by letter that they did not wish to oppose the wife's application. The summons came before WILLMER, J., on Dec. 5, 1956, and he adjourned it for argument by the Queen's Proctor in open court.

I

M. Ahern for the wife.

R. F. Ormrod for the Queen's Proctor.

WILLMER, J.: The matter comes before me on a summons for leave to apply for decree absolute in respect of a case where the decree nisi was pronounced as long ago as June 6, 1945. Since then the parties have become reconciled and lived together from the end of 1945 (subject, according to the wife, to a week's break in 1952) right up to September, 1953. Clearly, therefore, the adultery on which the original decree was based was condoned. It is alleged, however, that in September, 1953, the husband again left the wife, and that he has since that date been living in adultery with another woman. In those circumstances, following the procedure adopted in *Elwes v. Elwes* (1) ([1950] 1 All E.R. 826), the wife now asks for leave to apply for the decree nisi that was granted to her in 1945 to be made absolute. Following the direction which I gave in *Elwes v. Elwes* (1), it is right to say that due notice of the new charge of adultery was given both to the husband and to the woman with whom he is alleged to be living. Copies of the affidavits were served on them, and I have had exhibited before me statements in writing from both of them, not only admitting the adultery but also saying that they wish to take no part in the proceedings. In those circumstances, it is submitted to me that the present case is completely covered by my decision in *Elwes v. Elwes* (1), and that I ought now to allow application to be made for decree absolute.

I am bound to say that I share with counsel, at any rate counsel for the Queen's Proctor, the difficulty of understanding why provision is not made in the rules for dealing with this kind of eventuality. That is a matter on which I commented in the course of my judgment in *Elwes v. Elwes* (1), when I said that the fact that the present rules of court made no provision for dealing with this sort of case was much to be deplored, and I suggested that opportunity might be taken of considering whether some amendment of the rules might be required. No amendment has in fact been made as yet, and in the circumstances I agree with counsel for the Queen's Proctor who described the area of inquiry in a case such as the present as something in the nature of "a procedural desert". I cannot think that this is a very satisfactory way of dealing with the sort of problem that has arisen in the present case.

I have had the advantage of assistance from the Queen's Proctor in two ways. First, I have had the benefit of counsel's argument before me; but, secondly, I have also had the advantage that, in the time during which this summons has been adjourned, the Queen's Proctor has undertaken a full investigation of the case, and I was told by counsel that he has ascertained no facts which would run counter to those which have been put before me on behalf of the wife. But for that statement made to me on behalf of the Queen's Proctor, I should have taken the view that the present is a case which I ought not to allow to go any further without hearing oral evidence from the wife. Having regard to the assurance that has been given to me that the Queen's Proctor has been unable to ascertain any relevant facts other than those disclosed by the wife, I have not thought it necessary to require oral evidence from the wife in the present case. It seems to me that in the special circumstances of the present case oral evidence would have been a useless formality, because I do not know what further questions one would have been able to ask the wife, seeing that she has so fully and fairly set out her story in the affidavit which has been filed. I mention that now, because if this method of procedure is going to become normal, I, speaking for myself, should take the view that in the absence of special circumstances such as exist in the present case, the petitioner ought to go into the witness-box and tell the story in full, in exactly the same way as on an original petition; but for reasons which I have given, I think it right to dispense with the necessity for that in the present case.

On the facts of the present case it seems to be quite clear that although the original adultery was fully condoned by cohabitation from 1945 to 1953, it has been revived by the husband's subsequent desertion and adultery, which have

A not been denied. The only other possible question is whether there has been unreasonable delay in this application. One can only consider the delay that has taken place since the end of 1953, for up to that time the conduct of the wife was wholly laudable. She has, however, delayed three years since the husband finally left her before making this application. She has told me that she delayed for some time in the hope that once again the husband would get tired of his adulterous association and would return to her. That seems to me to be a point of view which, at any rate for some time, she is entitled to adopt without inviting adverse criticism, and in the circumstances I am not prepared to say there has been unreasonable delay in waiting until 1956 before making an application. In those circumstances, holding, as I do, that this is a case which is covered by *Elwes v. Elwes* (1), I think that the wife is, on the facts now disclosed, entitled to have her decree made absolute.

Order accordingly.

Solicitors: *J. Rothwell Dyson & Co.* (for the wife); *Queen's Proctor.*

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

CITY OF LONDON REAL PROPERTY CO., LTD. v. WAR DAMAGE COMMISSION.

[COURT OF APPEAL (Lord Evershed, M.R., Jenkins and Ormerod, L.JJ.), January 28, 29, 1957.]

War Damage—Cost of works —“ Making good war damage ”—Reconstruction of several buildings as single new building—Whether cost of works payment payable—War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 8 (3).

Properties, which in their pre-damage state comprised separate buildings, sustained war damage and for the purposes of the War Damage Act, 1943, were treated by the War Damage Commission as a single unit. In 1948 the commission informed the appellants, who were the owners of the properties, that a cost of works payment under the Act of 1943 was appropriate. The appellants proposed to build, on the sites of the properties and part of certain adjoining property, a single building of a modern type and completely different in design, appearance and character from the buildings which it was to replace, although it would serve the same purpose, viz., office accommodation, as they had served. The new building, while it occupied somewhat less ground space than all the former buildings had occupied together, was very considerably taller towards the centre than the former buildings and consisted at each floor level of undivided areas of space capable of being divided into office accommodation according to the needs of individual tenants. The undivided areas bore no relation to the respective areas of the buildings which had formerly stood on the site. The War Damage Commission, being satisfied that in the circumstances the damage would not in fact be “ made good ” decided, pursuant to s. 13 of the Act of 1943, that a cost of works payment could not or should not be made. On appeal by the appellants on the ground that the damage would be “ made good ” by works which included alterations or additions within s. 8 (3) of the Act,

Held: the appellants were not entitled to a cost of works payment because in order to constitute the making good of war damage within s. 8 (3) of the War Damage Act, 1943, the work done must be such as to leave the repaired construction identifiable as the same thing as the former building, though repaired, and in the present case the new buildings were the substitution of something quite different from the pre-damage buildings, even

though they were designed to serve the same purpose as the former buildings. A

Decision of VAISEY, J. ([1956] 3 All E.R. 236) affirmed.

[For the War Damage Act, 1943, s. 5-s. 8, s. 13, and s. 32 (3), see 26 HALSBURY'S STATUTES (2nd Edn.) 475-479, 485, 507.]

Case referred to:

- (1) *Paddington Borough Council v. War Damage Commission, Associated London Properties, Ltd. v. Paddington Borough Council*, [1956] 3 All E.R. 753. B

Appeals.

These were five appeals by the City of London Real Property Co., Ltd. from an order of VAISEY, J., dated July 24, 1956, and reported [1956] 3 All E.R. 236, dismissing their appeals from the determination, dated Oct. 17, 1955, of the War Damage Commission regarding the appropriate payments to be made under the War Damage Act, 1943, in respect of war damage to (i) 28, Fenchurch Street; (ii) 127, Fenchurch Street; (iii) 134 and 135, Fenchurch Street; (iv) 24, 25, 26, 27, Rood Lane; (v) 3 and 4, Cullum Street; all in the City of London. C

Substantially there were two blocks of properties, one on the North and the other on the South side of Fenchurch Street. The facts relating to 28, Fenchurch Street, part of the property on the South side of Fenchurch Street, are taken as example of facts that were similar in relation to each appeal. D

The property formed part of a continuous row of buildings and consisted of a basement ground floor and five upper floors. Before the property suffered war damage, the basement and ground floors were used for the purposes of a shop, and were let for those purposes together with the basement and ground floors of 26 and 27, Fenchurch Street. The appellants' interest in the property was freehold. On Dec. 6, 1940, the appellants gave notice to the valuation department of the Inland Revenue that the property (and also 26 and 27, Fenchurch Street) had sustained war damage. Notification of further damage was made on subsequent occasions, the last notification being that the property (and also 26 and 27, Fenchurch Street, in which the appellants had a leasehold interest) had been destroyed. On Dec. 2, 1948, the War Damage Commission wrote to the appellants informing them that the damage to the property did not involve total loss and that a cost of works payment under the War Damage Act, 1943, was appropriate. E

In August, 1954, the commission were informed that it was intended to reconstruct 24-30, Fenchurch Street, 24-27, Rood Lane and 29, Rood Lane, and, later, drawings of a proposed new building covering the sites of all those properties were submitted. The proposed new building was designed as a single unit with one principal entrance, entrance hall, staircase and lift shaft, and to consist at each floor level (apart from lavatory accommodation and accommodation in the basement for certain services) of large undivided areas of floor space capable of division into office accommodation according to the needs of individual tenants. These undivided areas bore no relation to the respective areas of the buildings which stood on the site before the war damage occurred. All the said buildings, so far as they were not destroyed as a result of the war damage, had been or would be demolished to make way for the proposed new building. The commission did not accept that proposal to rebuild as one building as a proposal to make good the war damage to the individual properties concerned with alterations and additions. F G H I

In the circumstances the commission determined: (i) the appropriate payment in respect of war damage to 28, Fenchurch Street, under the War Damage Act, 1943, s. 7, was a payment of cost of works; and (ii) the proposed new building did not or would not constitute the making good of the war damage to 28, Fenchurch Street, by works which include alterations and additions for the purposes of s. 8 (3) of the Act of 1943, and that a payment of cost of works

A could not properly be made in respect of such part of that building as included the site of 28, Fenchurch Street. VAISEY, J., upheld the determination of the commission.

Harold Williams, Q.C., J. R. Willis, Q.C., and David Trustram Eve for the appellants.

B *Michael Rowe, Q.C., and Denys B. Buckley* for the War Damage Commission, the respondents.

C LORD EVERSLED, M.R.: The five separate appeals which we have taken together relate to certain properties, some of them north and some of them south of Fenchurch Street in the City of London, of which the appellants, the City of London Real Property Co., Ltd., are the owners, or in which they own substantial interests. I think I can best hope to make clear the subject-matter in the several appeals by reference to the two large plans which are bound up with the documents numbered 4 in cases lettered B. and D., which I take to be the second and fourth appeals.

D The plan attached to case B. shows the property or block of properties south of Fenchurch Street and bounded in part on the east side by Rood Lane. The whole block consists of different sites, on which, before the occurrence of any of the war damage in question, were erected different and distinct buildings. The plan shows that as regards certain of the previous buildings—that is to say, Nos. 24, 25, 29 and 30, Fenchurch Street and No. 29, Rood Lane—any war damage that had occurred was of a relatively slight character, or had been restored before any of the matters with which we are concerned; and they, as such, play no part in the present appeals. Another of the former buildings which constituted Nos. 26 and 27, Fenchurch Street is shown on this plan as having been a “total loss” within the meaning of the war damage legislation, and so to have been the subject at all times of a value payment. The remaining two sites are, first, No. 28, Fenchurch Street, and second, a block constituting Nos. 24 to 27, Rood Lane which was known as Rood Chambers or Rood Lane Chambers. As regards each of these the damage, although serious, was not regarded as constituting total loss. In respect of each of those two pieces of property, therefore, the War Damage Commission had determined that the cases were appropriate for cost of works payments. Whereas, so far as I know, the former of the two, No. 28, Fenchurch Street, was a single building with one street number for identification, the unit in the second case, Nos. 24 to 27, Rood Lane, constituted in origin, or may have constituted, more than one separate tenement. It will be a matter of significance, when I come to look at the War Damage Act, 1943, that for the purposes in hand that last-mentioned property, Nos. 24 to 27, Rood Lane, was determined by the War Damage Commission to be, and has since been treated as, a single unit or hereditament. It is to the last two mentioned pieces of property—No. 28, Fenchurch Street, on the one hand, and Nos. 24 to 27, Rood Lane, on the other—that two of the present appeals relate.

I My analysis of the second block of property—that lying to the north of Fenchurch Street—is similar. The plan shows a property formerly called No. 2, Cullum Street, which, for present purposes, is not the subject of determination for either value payment or for cost of works payment. Then, more or less in the centre of the plan, there is shown a large block consisting of more than one site, or unit for present purposes, as regards all of which there had been a determination of total loss, so that the appropriate payments were at all times value payments. At the extreme south-east of this block of property are, first, Nos. 125 and 126, Fenchurch Street, and, next to it to the west, No. 127, Fenchurch Street. The former property, Nos. 125 and 126, Fenchurch Street, does not enter into the subject-matter of the present appeals for reasons which will later emerge, but No. 127 does. At the other side—that is, on the west—there are two properties, Nos. 134 and 135, Fenchurch Street, which again have been treated as a

single unit or hereditament for war damage purposes, and in regard to which the determination of the commission had been that the damage did not involve total loss, and that the appropriate payment under the Act of 1943 was a cost of works payment. Finally, on the north-west, Nos. 3 and 4, Cullum Street are also taken together as constituting one unit or hereditament, and in regard to that hereditament also the determination had been that the damage did not involve total loss, and, therefore, the appropriate payment was a cost of works payment. A

The appearance on the ground of the old pre-war buildings, the sites of which are delineated on these plans, has been made still clearer for us by models. A reference to the models shows clearly that in pre-damage days what have been treated by the War Damage Commission as separate units or hereditaments constituted, in fact, separate and distinct buildings. All of them were used for substantially the same purpose, that is to say, they were all of them office buildings, except that on the ground floor, in some cases, there were shops. What has now happened in relation to these two blocks is also shown by the models which we have before us. To take first the second block of property which I have described, that is, the property lying to the north of Fenchurch Street, there is now in course of erection (if not completed), on what was the site of all these properties, a single new building, in design, appearance and character wholly different from the buildings which were formerly there. So far as the site is concerned, the new edifices comprise substantially less than the whole of the buildings which were either "totally lost", or were determined to be the subject of costs of works payment, or were neither the one nor the other. On the site there will now be, or there are, vacant spaces which may be used for access or for car parks, but in the centre the edifice rises in the form of a rectangular tower to a height of some two hundred feet and containing fifteen floors, far in excess, both in height and in the number of floors, of anything that was found there before. To make possible the new erection, everything that was there before, including those premises which had not been substantially damaged or which, having been damaged, had been repaired or "made good", has been or has to be wholly demolished. We were told further that inside the edifice on the separate floors there is, or is to be, no division corresponding either to the old divisions between the former individual properties or to the divisions of the tenements on the ground, the idea being that the tenants who will take parts of the new building will be able to have partition walls put on the floors in the positions which will suit their particular requirements. It is also part of the scheme that in certain parts of the building lavatory and similar accommodation may be provided to serve the needs of all the occupants of the entire structure. B C D E F G

To that general statement, however (and I am still dealing with the properties to the north of Fenchurch Street), there is one exception. I referred a little time ago to the building which was Nos. 125 and 126, Fenchurch Street in the south-east corner of the total block. The former building has been replaced by another building which is not at all comparable in height to the central tower, and which is, moreover, quite distinct from the rest of the new building as a whole in that it is wholly severed therefrom by party walls. The old building was occupied for shop purposes by a business of the name of Alexander Clark, and I understand that the new building will also be occupied by that same business. The new building extends over a site area larger than that occupied by Nos. 125 and 126, Fenchurch Street in the old days. It comprehends a substantial part, more than half, of the adjacent site to the west, No. 127, Fenchurch Street, as it formerly was, and also a piece not so large, but not negligible, of the site to the north which was formerly known as No. 7, Fen Court. As regards Nos. 125 and 126 and also No. 127, Fenchurch Street, the War Damage Commission had determined that the cases were appropriate for making cost of works payments, and, so far as Alexander Clark's premises (if I may so describe them in their reconstituted form) H I

A are concerned, the War Damage Commission have not resiled from that view. They have paid, or are prepared to pay, the appropriate cost of works payment for that part of the building, treating it rightly or wrongly (and it does not matter for present purposes) as being the same building, the same developed hereditament, as it formerly was, with the war damage to it made good with alterations and additions—the additions including the pieces taken out of the adjacent sites.

B The result is that there is before us no appeal relating to Nos. 125 and 126, Fenchurch Street. The relevant appeal is confined to the piece which is left of No. 127, Fenchurch Street, now incorporated in the large structure which I have described. I need not take time in a similar description of and reference to the new structure which has been, or is being, put up on the site to the south of Fenchurch Street. The new structure, as in the case of the property north of Fenchurch Street, occupies on the surface of the ground appreciably less space than did all the old hereditaments taken together. A sight of the model shows that the new building is, in style, quite different from the separate structures which formerly existed; it is of a typically modern type. It does not, however, approach so near to the skies as does the central tower to the north of Fenchurch Street. By saying no more about it at the moment, I must not be taken to be leaving out of account the point taken by counsel for the appellants that each of these appeals has to be considered individually. I shall say something on that aspect of the cases later.

C What has happened, and what has given rise to these appeals, is this. Notwithstanding that originally the War Damage Commission had said that the appropriate payment under the War Damage Act, 1943, in respect of each of these five properties* was a cost of works payment, the commission have now determined that the new structure or structures erected, or in course of erection, are of such a nature that cost of works payments cannot and should not, after all, be made, because in the circumstances, these new structures do not constitute a “making good” of the war damage to the hereditaments in question within the meaning of the War Damage Act, 1943. It was submitted, in reliance on s. 13 of the Act, that the proper course for the War Damage Commission now was to make value payments in respect to these five former hereditaments.

D The cases were taken, on originating notices of motion, before VAISEY, J., pursuant to the powers contained in s. 32 (3) of the War Damage Act, 1943, from which it is apparent that the complaint made against the War Damage Commission's decision must be one involving a question of law. That was not disputed by counsel for the appellants. His contention was, in effect, this: the question of law involved was that, in reaching their last decision, that is, the decision under s. 13 not to make cost of works payments, the War Damage Commission had made an error in law in that they had wrongly construed the vital phrase in the Act, “making good the war damage”. The error, counsel says, consists in imposing, in effect, a limitation on the terms of the Act, and particularly on the terms of s. 8, which the language used does not justify. This limitation is that “making good war damage” excludes a reconstruction or development of a hereditament of so substantial a character that, although the reconstructed building comprehends the old unit, and, as re-developed, serves the same general purpose and character as the old unit did, nevertheless the old unit is so submerged in the larger whole that the identity of the old unit is altogether lost, and neither the new edifice nor any part of it can be regarded as representing the old developed unit with the war damage to it “made good” with additions and alterations. It was submitted by counsel for the appellants that that view—the imposition by the War Damage Commission of that limitation on the terms of s. 8—was not justified as a matter of law.

H In the course of the argument, I put his case to counsel for the appellants, and he accepted it in these terms. “What we have done is to make good the

* (i) 28, Fenchurch Street; (ii) 127, Fenchurch Street; (iii) 134, 135, Fenchurch Street; (iv) 24, 25, 26, 27, Rood Lane; (v) 3, 4, Cullum Street.

damage by adopting a development on each of the sites which, in purpose and general character, is the same as was the purpose and general character of the old hereditaments, but which in style and lay-out conforms to modern uses, and particularly to the requirements of modern planning legislation: and such a making good is within the scope and contemplation of s. 8 of the Act". I must say at once that I am unable to agree that there has here been the error of law which counsel for the appellants alleges. I think that the War Damage Commission did not misdirect themselves, or proceed on any wrong view of the real meaning of the vital sections of the War Damage Act, 1943.

In order to lay the foundation for that conclusion I must refer to certain sections of the Act. I again remind myself that, as counsel for the appellants rightly pointed out, it is not necessary that all the appeals must be answered in the same way. There may well be a difference in degree when the language of the sections is applied to what were the five relevant former units or hereditaments. I have already made a reference to the case of the site now occupied by the business under the name of Alexander Clark, and it is convenient to refer at this point to No. 28, Fenchurch Street, being one of the properties lying to the south of Fenchurch Street. In that case, save for a negligible widening of Fenchurch Street which has taken into the street part of the site of the old property, the entire area of the old building has been incorporated into, and is part of, the new structure. Everything that was formerly No. 28, Fenchurch Street (except for the little strip in the road) will now be found at its appropriate place inside the new structure built in Fenchurch Street. The case of No. 28, Fenchurch Street to that extent and to that degree, therefore, may be said to differ from the case of No. 127, Fenchurch Street, the greater part of the old site of which has now been incorporated into Alexander Clark's business, so that, so far as the relevant appeal is concerned, we are dealing with a section only of the former hereditament, less than half its former area. Bearing these differences in mind, I have, however, come to the conclusion that it is really impossible to say, as regards any of these former five units or hereditaments: "Here is the old unit or hereditament. Here it still is, and the war damage to it has been made good with alterations or additions". I think, as a matter of common sense, that one could not now identify any of the old units and make sensible that statement about it. Putting it briefly, their incorporation as a part of a much larger, and quite different, single whole (involving the total demolition of all that was there before, damaged or undamaged, restored or unrestored) is something which extends far beyond anything that could reasonably be called additions or alterations to that which formerly was or stood on the old unit.

I now make my references to the War Damage Act, 1943, and I turn first to s. 5 in Part 1 of the Act. Section 5 (1) provides that, for the purposes of war damage under this legislation, property is to be dealt with "in such units as the commission may determine", and the sub-section goes on to state that a unit is, in the Act, called a "hereditament". It may, and frequently does, consist of a "developed hereditament"*, that is to say, of a building as it stands on a particular piece of ground; and, for the purposes of the legislation, the buildings which may be comprised in a single unit need not necessarily correspond with the identity or title of the ground on which they happen to stand; it will depend rather on the way in which they are used. The sites with which we are concerned in the five appeals constitute what were determined by the commission to be five distinct units or hereditaments, the commission acting under their powers in s. 5. Counsel for the appellants concedes that the commission, in that respect, had a discretion which involved matters of fact only, and which is not subject to review in the courts.

* The term "developed hereditament" is defined in s. 5 (2) of the War Damage Act, 1943.

A Section 6 provides that, in respect of war damage, two classes of payment may be made, a value payment, on the one hand, and a cost of works payment, on the other. It is notorious that a cost of works payment is the more beneficial payment to receive. Section 7 states the circumstances in which a value payment or a cost of works payment may, respectively, be appropriate. The scheme being well-known, it suffices to say that, in the case of a developed hereditament, B a value payment is payable under this section where the commission determine that there has been a total loss. In other cases, the payment appropriate to be made is a cost of works payment. It was a cardinal part of the contention of counsel for the appellants that the terms of s. 7 (1) (a), which require cost of works payments in cases other than those of total loss, are mandatory.

C It will be recalled that in all the five cases with which we are concerned there was an original determination by the commission of a cost of works payment. As regards the contention just mentioned, it is to be borne in mind that the mandatory requirement (if such it be) in s. 7 (1) is expressed to be subject, among other things, to the terms of s. 13, to which I shall later refer. I want, however, to make particular reference to s. 7 (2). It provides:

D "War damage to a developed hereditament shall be deemed to involve total loss, if, and only if, it is such that the proper cost, ascertained [at the date mentioned] of such works as would be required for reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage would be likely to be more than the difference between . . ."

E putting it briefly, the value of the property as it would be if no war damage had occurred, and the value of the site as it was left after the war damage.

From that reading (and the sub-section has a further significance to which I shall come back), it will be seen that the words "total loss", although constituting a convenient formula, might, to the uninitiated reader, be perhaps misleading. One is dealing with a building on the land, and the conception of F total loss, which can be readily applied to a ship or a motor car, is not so easily applicable to a building, and to a piece of land on which a building stands, which, in one sense, can hardly ever be said to be totally lost. I can think of many instances of war damage, which it was an unhappy experience to see, and there was always something left of what had been struck. "Total loss" is not so much a description of the result of bombing as an artificial test for determining whether G one or other of two kinds of payment should be made.

Before I make my further point on s. 7 (2) I will read so much of s. 8 as is necessary. Section 8 (2) reads:

"If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage . . ."

H I pause to say that that, of course, is an echo of the phrase which I have read from s. 7 (2).

"... the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof . . ."

I There then followed a proviso which permits the omission of certain features of the former building in the case of reinstatement where the omission does not detract from, or where it increases the value of, the reconstructed building. There then follows this phrase:

"In this Part of this Act the expression 'the permissible amount' [which has not, I think, hitherto occurred] means, in relation to a payment of cost of works, the amount that is payable by virtue of this sub-section or that would have been payable if this sub-section had had effect in relation to the payment".

I am sorry to say that, for my own part, I remain somewhat in the dark as to the precise intent of those words; but it is not in dispute before us that their effect is to make the amount that would be payable, as provided by the earlier parts of the sub-section, a kind of ceiling which is not to be exceeded when one comes to the appropriate payments under s. 8 (3), which reads:

"If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of works executed for the making good of the damage as falls within the permissible amount."

It will be observed (and again this was a point in the forefront of the appellants' argument) that, although reinstatement is expressly mentioned in s. 7 (2) and s. 8 (2), it is not mentioned in s. 8 (3). It was, therefore, contended that s. 8 (3) goes far beyond what could be called *sub modo* reinstatement, and covers the substitution of an edifice quite different in its structure and scope or in the area which it covers so long as it replaces (and, perhaps, so long as it serves the same uses as) the former building. The words "making good" are given some definition in s. 123 (1) of the Act where it is said that:

"'making good' includes, in relation to war damage, demolition or clearance requisite as a preliminary to, or in the course of, the making good thereof."

Save, therefore, that the words are meant to include the preliminary work to the "making good"—whatever the "making good" may mean—I doubt whether that definition materially assists in the present cases.

Notwithstanding the contentions of counsel for the appellants, I cannot, in its context, construe s. 8 (3) as having the wide scope which counsel would find there. I think that, if regard is had to the general language of s. 5, s. 7 and s. 8, it follows that "making good" involves the notion of restoration and that, at least, there must be preserved in some sense the continuance as a discernible entity of the unit or hereditament, the war damage to which has to be "made good". I think, accordingly, that the "making good" cannot be held in sub-s. (3) of s. 8 (and that it certainly cannot be held in any other part of the section) as intended to cover a redevelopment which in no sense is equivalent to a restoration or reinstatement with alterations or additions, but which is something, as to form and as to the site which it covers, that negatives any continuity in the identity of the previously developed hereditament.

At this stage I will make my other references to the Act, namely, to s. 13 and s. 32. Section 13 (1), which was invoked by the War Damage Commission in regard to these cases, provides:

"Where the appropriate payment in respect of war damage to a hereditament would apart from this provision be a payment of cost of works [which is the case in all the five cases with which we are concerned], if the commission are satisfied that . . . the circumstances are such that the damage or any part of it will not in fact be made good, they may, notwithstanding any previous determination of the kind of payment to be made in respect of the damage to the hereditament, make a payment or payments in respect thereof. . . ."

of the kind set forth, which, so far as we are concerned, will be exclusively value payments in respect of each of the five sites. As I have earlier indicated, the commission have now said, and this is the decision which is sought to be impugned: "We are satisfied that no part of the war damage to these hereditaments, will, in the event, be 'made good' as those last two words are to be construed in s. 7 and s. 8 of the Act".

Section 32 (1) provides that, subject to the provisions of sub-s. (2) and sub-s. (3):

A "... any question arising in giving effect to the provisions of s. 6 to s. 8, s. 10, or s. 13 to s. 15 of this Act . . . shall be determined by the commission."

Section 32 (3) reads:

B "If any person is aggrieved by a determination of the commission of any question which is under this section to be determined by them, other than a determination from which an appeal lies under sub-s. (2) of this section [which does not arise here], he may appeal therefrom on any question of law to the High Court."

C As I earlier said, it is by virtue of that power that the appellants appealed by originating motion to VAISEY, J., and they must, as is conceded, show that they are complaining of an error of law on the part of the commission.

D There is one other point that I ought to mention, namely, the impact of town planning legislation. In the notices of motion reference is made to town planning legislation, and it is undoubtedly the fact that new buildings in Fenchurch Street—or, indeed, anywhere else in the whole country—have to conform to the planning regulations which may apply under the existing town planning legislation. The broad scope of planning which covers all development in the whole country owes its source to the Town and Country Planning Act, 1947. At the time of the Town and Country Planning (Interim Development) Act, 1943, the scope of planning authority was less wide; but it is right to say that the existence of planning powers must be taken to have been known by Parliament, and it is, therefore, one of the contentions of the appellants here that the term E "making good" ought not to be construed so narrowly as to exclude works done which town planning, in its application to the particular site, might require. In my judgment, the answer to that point can be shortly stated: non constat by any means that in every case planning authority would stand in the way of a development which was, in substance, no more than a reinstatement with or without additions and alterations; and it seems to me impossible to say that, F in the light of the existing planning legislation, a construction of the words "making good" which the learned judge favoured (and which I favour) makes the provisions for cost of works payment in any sense futile or nugatory.

G In speaking as I have done of the identity of the former site, or of the buildings on it, which in some sense must be preserved, I am not suggesting that for a cost of works payment the legislature contemplated only an actual and exact restoration of what was there before, or the building of a replica of the former edifice. It is plain that the payment of cost of works is not confined by the terms of s. 8 (2) and s. 8 (3) to such a strictly limited scope of rebuilding. In *Paddington Borough Council v. War Damage Commission, Associated London Properties, Ltd. v. Paddington Borough Council* (1) ([1956] 3 All E.R. 753), a recent decision of this court, it was pointed out, although for other purposes and in another context, that, if Parliament had intended to make war damage payments referable only to what was substantially exact reinstatement, the forms of words which would have been found in appropriate places in the Act would be to the effect "as if the war damage had not occurred". I am certainly not going to attempt to define or indicate where exactly the line should be drawn between, on the one hand, an exact reincarnation of the old building and, on the other, H the appearance of a phoenix which, arising from the ashes of May, 1941, has, in appearance and in detail, no features which can be related to the ancestry of its parent bird. The matter is, as I think, and as those responsible for the administration of this Act have suggested in their Practice Notes, one of applying common-sense tests, the question being—certainly in this case, and, I imagine, in most cases—that, when one has seen what has been done or what is going to be done, one asks one's self: Is this thing that is constructed, or that is going to be constructed, the developed unit, the old hereditament, with the war damage to it "made good" with alterations or additions, or is it something

quite different? When that simple common-sense test is applied to all these five cases, one is, I think, inevitably bound to answer that one cannot, in any case, discern at all the old hereditament. What is found is something far removed from the "making good" of the damage done to, say, No. 28, Fenchurch Street, with additions or alterations thereto. It is, in truth, the substitution over the whole area of a thing in essence quite different, even though the purposes which it is designed to serve are the same as those served formerly. I, therefore, think that the learned judge, VAISEY, J., rightly concluded the matter when he affirmed the way in which the case had been put by the War Damage Commission in their letter of July 1, 1955. In that letter the commission said:

"From the point of view of physical characteristics a comparison of the plans of the original properties and of the proposed redevelopment shows so little correspondence between the old and the new that the commission find it impossible to say of any of the original properties (with the possible exception of 125, 126, Fenchurch Street) that the war damage will have been made good by works which include alterations or additions to the hereditament, but can only conclude that each will have become an indistinguishable part of an entirely different property."

I think that that view of it was correct, and I think it, therefore, quite impossible to say that, in so directing themselves, the commission fell into any error of law.

I add finally that, if the test which I have tried to formulate is applied in connection with the most practical matter involved, namely, payment of cost of works, it will be seen how truly the matter has been stated in the letter which I have quoted. Cost of works payments are not made until the work has been done. If this be a case within the scope of s. 8 (3), then some part of the total cost of building (and I take by way of an example the northern building, this large structure with its two hundred feet high central tower) must be identified as constituting the "making good" of the particular damage done to the particular units, parts but not all of which are included in the new structure. As JENKINS, L.J., asked during the argument: How is it to be discovered what is the appropriate part of the total cost which should be treated as the cost of works payable in respect of the "making good", strictly, of the former hereditaments? I daresay that the ingenuity of quantity surveyors and others might find the answer. To my mind, however, the problem set of discovering the sum is so far removed from the realities of the case as to emphasise what I have already expressed, namely, that in truth, within the meaning of the words used, what has been done has gone far beyond a "making good" of the damage to these hereditaments with alterations or additions. I would dismiss all the appeals.

JENKINS, L.J.: I agree. The sole question in these appeals is whether the new buildings which have now been erected, or are now in the course of erection, on the two sites north and south of Fenchurch Street can be said to constitute the making good of war damage "by works which include alterations or additions to the hereditament" within the meaning of the opening words of s. 8 (3) of the War Damage Act, 1943.

First, I would refer to s. 6 of the Act, and I would observe that a cost of works payment is thus defined in s. 6 (1) (a):

"Subject to the provisions of this Part of this Act, a payment to be made thereunder shall be of one or other of the following kinds, that is to say, (a) a payment of cost of works, being a payment of an amount determined by reference to the cost of works executed for making good the damage, as provided by s. 8 of this Act . . ."

Apart from any further light thrown on it by s. 8, that language seems to me to suggest that the phrase "making good the damage" is used in the ordinary sense of that phrase, and that the cost of works payment is to be made to the owner, or the person having the appropriate interest in the hereditament, where it can

- A be shown that there has been war damage to the hereditament and that works have been executed for making good that damage. To quote a simple instance: A man's roof is blown off by a bomb. He puts it back again. He has suffered war damage, and he has made it good, or in other words put it right, by restoring the roof, and he will be entitled (subject to the provisions of the Act) to the cost of the works executed for that purpose. One starts, therefore, with a phrase which
- B suggests the repair of an existing thing, an operation which, when completed, will leave the thing identifiable as the thing it was before, but in a repaired state.

Passing to s. 8 one finds that by sub-s. (1):

"Subject to the provisions of this Part of this Act, the amount of a payment of cost of works shall be computed as provided by sub-s. (2) to sub-s. (4) of this section."

- C Then two distinct classes of case are dealt with. First, by sub-s. (2):

"If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof . . ."

- D Then sub-s. (3) is the other case:

"If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount."

- E I need not pause to embark on a discussion of the exact meaning of the expression "permissible amount", which for the present purpose can be sufficiently described as an amount equal (subject to certain adjustments) to the proper cost of the works executed for the making good of the war damage.

The appellants rely on the contrast between these two distinct classes of case. The first is that of reinstatement, and reinstatement, no doubt, connotes the repairing of the hereditament so as to leave it, broadly speaking, in the same state and form in which it existed before it was damaged. But s. 8 (3), say the appellants, is of much wider import, for it extends to all cases in which the war damage is "made good" by works which include alterations or additions to the hereditament. They say that there is no limit on the meaning of the words "alterations or additions", or, at all events, that there is no limit set to the meaning of those words in express terms, and that there is no sufficient reason for implying any limit.

- G In my view it is impossible to give s. 8 (3) that unrestricted meaning in the context in which it appears. Although it refers to alterations or additions, it refers also to the process of "making good". The case to which it relates is the case in which war damage is "made good" by works which "include" alterations or additions. It is to be observed not merely that the phrase "made good" with its suggestion of repair is used, but that the alterations or additions are to be *included* in the work of "making good". It seems to me that this points to the conclusion that the effect of s. 8 (3) is to make it clear that the cost of works payment will still be payable if the war damage has been "made good", even though the work done to "make good" that damage goes beyond mere reinstatement, and includes certain alterations or additions to the premises. In that state of affairs the legislature thought it reasonable that the cost of works payment should nevertheless be made, provided that it did not exceed the permissible amount; and that calculation, as I understand it, was designed to ensure that the alterations and additions which have nothing to do with the war damage should not be taken into account so as to increase the amount of the cost of works payment.

I As I have said, I find it impossible to place on s. 8 (3) the unrestricted meaning for which the appellants contend. If that meaning were the right one, then the

sub-section would apply in every single case in which there has been war damage, and some building or other has been put up to replace the damaged building, however different in design, or mode of construction, or use, or siting, the new building may be from anything which existed before. Various extreme examples were put in the course of the argument. It was suggested (and, I think, agreed) that it would be impossible to say that a church damaged by enemy action could be said to be "made good" by the erection on its site of a block of flats or a garage, or some wholly different structure of that sort. Accordingly, those extreme cases must be ruled out. But once one comes to the conclusion that extreme cases must be ruled out, the question whether any given case falls within s. 8 (3) must become a question of fact and degree; and if it is a question of fact and degree, then, having regard to the terms of s. 32 (3) of the Act in regard to appeals, the decision of the War Damage Commission, being a decision of fact, is one which cannot be reopened on appeal. A B C

In my view there is no ground for holding that, in arriving at the conclusion at which they did arrive, the commission misdirected themselves or committed any error of law. No error of law could, as I see it, be imputed to them on a point of this kind, unless it could be said that there was no evidence to support their conclusion. My Lord has dealt fully with the facts, and I will not repeat his references to them; but it appears to me that the new buildings in this case were so different from anything that had ever before existed on those sites that it is quite impossible to say that there was no material on which the commission could properly hold that this was not a "making good" with additions or alterations, but the substitution of entirely new and different buildings for those which formerly stood on the sites. D E

Reference was made in the course of the argument to the Practice Notes issued by the commission under the War Damage Act, 1943, for the guidance of those charged with the administration of the Act. These notes, of course, are not authoritative, but, as VAISEY, J., observed ([1956] 3 All E.R. at p. 239), they have been compiled with great care, and I think that the observations made in these notes on the question: "What is making good by works which include alterations or additions?" are valuable observations for the guidance of such persons. In his judgment (*ibid.*) VAISEY, J., quoted this passage in particular: F

"The test which the commission will apply in order to decide whether works which have been executed, or which it is proposed to execute, constitute making good the war damage or involve the creation of a different property has been set out in Practice Note 14, first series (2nd Edn.), but is repeated here for convenience. It is: 'Looking at the works executed, can the property be fairly described as still the same property as before the war damage though altered or added to?'. And it is to be answered on common-sense lines." G

VAISEY, J., approved that passage as correctly stating the test to be applied and I fully share his approval of it. H

I have endeavoured to state briefly in my own words my reasons for rejecting this appeal, but might well have confined myself to saying that, for the reasons given by VAISEY, J., and in the judgment just delivered by the Master of the Rolls, I entirely agree that it fails and should be dismissed. I

ORMEROD, L.J.: I also agree, and, having regard to the reasons which have been given in the previous judgments, there is very little that I wish to add. The question in each of these appeals is the same, and that is whether the War Damage Commission have applied the right principle of law in coming to the determination that the appellants are not entitled to be paid on a cost of works basis for the buildings which are being erected on the respective sites in question. The answer to that question depends very largely on the construction of s. 7 and s. 8 of the War Damage Act, 1943. Counsel for the appellants submitted that

A s. 7 is mandatory, and that the effect of s. 8 is to do nothing more than to set up a means of computation of the payment of the cost of works, and that the section in no way limits the work in respect of which, or the buildings in respect of which, such a cost of works payment can be made.

For my part I cannot accept that contention. I agree with the previous judgments, and with the judgment delivered by VAISEY, J. If such a construction had been intended, there seems, in the first place, to be no reason why s. 8 should have been set out as elaborately as it has been. It would have been sufficient to provide that a sum not larger than the permitted amount should be payable in all cases where s. 7 applied, and work could be paid for on a cost of works basis. The fact that s. 8 has been set out in detail clearly indicates that such was not the intention of the section. I am satisfied that the intention of s. 8 (3) was that there should be, to some extent at least, a reinstatement of the hereditament in the form in which it was before the war damage was done. It is true that the word "reinstatement" is not used in s. 8 (3), but the whole tenor of the section, I think, must imply that that is the case. The words of the sub-section are not: "If the war damage is made good by works which consist of alterations or additions to the hereditament", or words of that kind, but are: "If the war damage is made good by works which include alterations or additions to the hereditament . . .". Those words make it clear that there must be limitations to the type of work which can be done in order to secure payment on a cost of works basis. As I see it, it is for the commission—using the words in their plain meaning—to ask themselves in each case whether the damage to the hereditament has been "made good", albeit by the inclusion of alterations and additions. In the present cases, if they asked themselves that question, the answer was bound to be "No". What appears to have happened here is that a number of adjacent sites have been cleared and an entirely new building or set of buildings has been erected on them bearing no resemblance, in style or in any other respect, to any buildings which were there before the war damage was done. For these reasons, I am satisfied that the commission directed themselves properly in coming to the determinations against which these appeals have been made, and I agree that the appeals should be dismissed.

Appeals dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Forbes & Son* (for the appellants); *Treasury Solicitor*.

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re FREEMAN-THOMAS INDENTURE.
EASTBOURNE CORPORATION v. TILLY AND OTHERS.

[CHANCERY DIVISION (Harman, J.), January 29, 1957.]

Real Property—Restrictive covenant—Declaration whether any longer affecting land—Covenants not to build or to fell trees—Nobody legally entitled to enforce them—Small part of land subject to covenants intended as school site—No appearance of persons interested—Discretion whether to make declaration—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 84 (2).

In 1901, F. the tenant for life of a large settled estate, the R. estate, conveyed land forming part of that estate to a local authority. Part of the consideration for the conveyance was a covenant by the local authority expressed to be entered into by the local authority with F. and "other the owner or owners for the time being of the [R.] estate . . . his and their heirs and assigns" to maintain the land (subject to certain exceptions) "as a public park or common and for no other purpose whatsoever". The local authority also covenanted in the conveyance not to erect any building on any part of the land without the consent of F. or other the owner for the time being of the R. estate or the trustees for the time being of the estate. The local authority now desired to build a school on part of the recreation ground adjoining the park. The R. estate had been broken up into small plots and the mansion house had been destroyed. There was now no owner of the R. estate. The local authority applied for a declaration under the Law of Property Act, 1925, s. 84 (2)*, that the part of the land on which it was desired to build was no longer affected by the restrictive covenants contained in the conveyance of 1901 and that those covenants were not now enforceable by any person. A large number of persons living in the vicinity were joined as respondents, but none entered an appearance.

Held: the covenants were obsolete, no one was able legally to enforce them and, in the exercise of the court's discretion, the declaration would be made in the circumstances of the present case.

Dictum of MAUGHAM, J., in *Re Sunnysfield* ([1932] 1 Ch. at p. 83) applied.

[**Editorial Note.** Jurisdiction under s. 84 (1) of the Law of Property Act, 1925, to modify or discharge restrictive covenants is generally exercised by the Lands Tribunal. The court's concurrent jurisdiction, i.e., jurisdiction to refuse to enforce a restrictive covenant, is not prejudiced by that of the Lands Tribunal, but under s. 84 (2) the court has a jurisdiction, which the Lands Tribunal has not, to declare, e.g., whether any freehold land is affected by a restriction imposed by any instrument.

As to the discharge of restrictive covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 570, para. 1060; and as to the court's jurisdiction, see *ibid.*, 571, para. 1062; and for cases on the subject, see 31 DIGEST (Repl.) 188, 189, 3202-3205.

For the Law of Property Act, 1925, s. 84, see 20 HALSBURY'S STATUTES (2nd Edn.) 607.]

Case referred to:

(1) *Re Sunnysfield*, [1932] 1 Ch. 79; 101 L.J.Ch. 55; 146 L.T. 206; Digest Supp.

Adjourned Summons.

Eastbourne Corporation applied by originating summons for a declaration that certain land previously forming part of the Ratton Estate and numbered 303 on a plan drawn on an indenture dated Aug. 16, 1901, and made between Freeman Freeman-Thomas and others of the first part, the Settled Land Act trustees therein named of the second part, and Eastbourne Corporation of the third part, was no longer affected by the restrictive covenants contained in

* The relevant terms of s. 84 (2) of the Law of Property Act, 1925, are printed at p. 534, letter I, post.

A the indenture and that such restrictive covenants were not enforceable by any person. There were thirty-nine respondents, none of whom entered an appearance.

B By the indenture of 1901 certain lands, commonly called the Decoy and Ham Shaw together with the pasture land and the piece of land called or known as the Polo Ground adjoining thereto, all of which premises contained about eighty-two acres and were delineated on a plan drawn on the indenture and thereon coloured dark green and light green, were conveyed to the corporation in fee simple. Eastbourne Corporation covenanted in the indenture as follows:

C "And the corporation do hereby for themselves and their assigns covenant with the said Freeman Freeman-Thomas and other the owner or owners for the time being of the Ratton Estate in the said County of Sussex his and their heirs and assigns in manner following that is to say: "

There followed six separate covenants of which the three principally relevant to the present application were numbered 1, 2 and 6. Of these the first was in the following terms:

D "1. The corporation shall for ever hereafter maintain the said pieces of land hereby conveyed and coloured dark green and light green respectively on the said plan as a public park or common and for no other purpose whatsoever."

E This covenant was, however, made subject to four provisos. These conferred on the corporation the benefit of an existing tenancy of the polo ground, and rights of letting the land coloured light green on the said plan, which was land that was not wooded. The proviso principally relevant was that lettered (d) which was in the following terms:—

F "(d) That the corporation shall have full right and liberty to sell or let the whole or any part or parts of the piece of land coloured light green and numbered 303 on the said plan for the erection thereon of not more than four private houses according to plans to be approved by the tenant for life or the trustees for the time being of the said Ratton Estate, such approval not to be unreasonably withheld."

The land coloured light green and numbered 303 on the said plan was pasture land adjoining the polo ground. The other two relevant covenants were numbered respectively 2 and 6 and they ran as follows:

G "2. Save as herein otherwise provided the corporation shall not erect any building on any part of the land hereby conveyed without the consent in writing of the said Freeman Freeman-Thomas or other the owner or owners for the time being of the said Ratton Estate or of the trustees for the time being of the said estate Provided that this restriction shall not apply to the erection of any pavilion, shelter, lavatory, urinal, restaurant, conservatory, bandstand, or other erection or building usually erected in a public park or pleasure ground. 6. The corporation shall keep the existing fences and hedges forming the outer boundaries of the land and hereditaments hereby conveyed in good order and shall within ten years from the date of these presents erect an unclimbable fence along the line of such outer boundaries . . ."

I The corporation covenanted, also, not to fell timber without consent.

George Newsom, Q.C., and *L. Abel-Smith* for the applicants, Eastbourne Corporation.

The respondents did not appear.

HARMAN, J.: On Aug. 16, 1901, Mr. Freeman-Thomas, afterwards the Marquess of Willingdon, being then the tenant for life of a very large estate on the outskirts of Eastbourne, conveyed part of it to the Eastbourne Corporation

for a consideration in money. It consisted of land known as the Decoy and Ham Shaw together with some pasture land and a piece of land known as the Polo Ground adjoining—eighty-two acres in all. Part of the consideration for that assurance was a covenant by the corporation expressed to be entered into by them with Mr. Freeman-Thomas “and other the owner or owners for the time being of the Ratton Estate . . . his and their heirs and assigns”. The covenant was to maintain the land for ever “as a public park or common and for no other purpose whatsoever” but subject to certain provisions as to letting (in effect) such part of the land as was not wooded. Thus this part of the land, subject to the tenancy of the polo ground, was let to various people from time to time for playing fields, and I gather, up to now, for nothing else. It was further provided in the deed that the corporation were not to erect any building on any part of the land (with an exception here immaterial), without the consent of Mr. Freeman-Thomas or other the owner for the time being of the Ratton Estate or the trustees for the time being of the estate. Further, the corporation were not entitled without like consent to fell any timber or timberlike trees.

That was in 1901 when the world was a very different place from what it is today. A park was made by the corporation on the site of the woods, which I gather has been open to the public as such ever since. Eastbourne is a growing place, and the park has become surrounded more and more by small houses. Children from the small houses have to be educated, and the corporation have come to the conclusion (as to the wisdom of which I am not concerned) to build, if they may, a grammar school on a comparatively small part of the recreation ground adjoining the park. Their counsel are instructed that it is not their intention in fact to curtail the recreation ground and the playing fields in the vicinity. They have another piece of land which they can substitute for that which they build on. The ground in question, being included in the conveyance to the corporation, was subject to the covenant with Mr. Freeman-Thomas, his heirs and assigns and other the owners of the Ratton Estate: but today there is no Ratton Estate. The mansion house of Ratton has disappeared either by enemy action or accidental fire, I know not which, and the estate has been broken up into small plots with houses. There is now no land in settlement belonging to the family in that part of the world. I have ample evidence before me that the present representative of the family says that he has no interest in the matter.

In those circumstances the question is, who else can have any such interest? The covenant does not purport to be made with the owner for the time being of any part of the Ratton Estate but with the owner of the estate as a whole, and there appears to be no such owner. The deeds are still in the hands of the vendors' solicitors and have not been handed over to any purchaser. That is evidence that the Ratton Estate as such has not passed to anybody as a purchaser, and it seems to me impossible to say that there is anybody now in a position to enforce these covenants. It would be an extraordinary state of things if they were binding, because the corporation would then be prevented from ever getting any consent to build anywhere, or indeed cutting down any of the trees in the woods. My judgment is that these covenants are obsolete, and there being nobody interested now they are not in fact at anybody's command.

In those circumstances, the corporation was entitled as a public body with a contractual obligation and no more, but no doubt open to criticism of the neighbours and ratepayers, to make an application concerning this instrument under s. 84 of the Law of Property Act, 1925. In s. 84 (2) we find these words:

“The court shall have power on the application of any person interested—
(a) To declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; (b) To declare . . . whether the same [the restriction] is enforceable and if so by whom.”

A Section 84 (2) has not been referred to very often, but there is one reported case before MAUGHAM, J., *Re Sunnyfield* (1) ([1932] 1 Ch. 79), where a somewhat similar application was made to him, and he made an order under s. 84 (2) that the covenants there involved were no longer effective.

B In the present case, as in *Re Sunnyfield* (1), no opposition or body of opponents could be discovered. There are a lot of local people who grumble in a vague way and say: "This kind of trust is something which the local authority ought not to break", but nobody comes on their behalf and says that he is entitled as a matter of law to object to the breach of this covenant. In those circumstances, what is the corporation to do? MAUGHAM, J., says (*ibid.*, at p. 83):

C "When such an order as this is asked for, the court ought to make every effort to see that all persons who may wish to oppose the making of the order have the opportunity of being heard, stating their objections in argument before the court, and inviting the court to refuse to exercise its powers. In the present case, it seems that every effort has been made to give notice to all persons having a probable interest in the property, and accordingly I ought not to refuse to proceed to the hearing of the matter."

D The powers of the court are discretionary and not obligatory. The corporation here has joined as respondents a large number of people, none of whom has entered appearance or made a move to respond. The respondents number thirty-nine, but of that number two have ceased to have any interest in the matter. The thirty-seven who are left are interested in plots of land more or less adjacent to the plot on which it is proposed to build the grammar school. Those plots are shown on Exhibit "F.H.B.11" of the town clerk's affidavit. It has been proved by certificate that no appearance on any other party's behalf has been entered. Is that an adequate compliance with MAUGHAM, J.'s injunction? I think on the whole that it is. I cannot see that anyone else can have any real interest in this matter. These people live in houses which are more or less in proximity to the proposed school, and, therefore, it might be supposed that the proximity of noisy schoolboys would to some extent depreciate the value of their properties, but, nevertheless, none of them has come and said that he is entitled to the benefit of these covenants. The truth is that nobody could possibly have said so or could have put forward such a plea. The objections which they have made are in fact objections more of a moral or ethical nature which this court will only look at because this is a discretionary jurisdiction.

G In my judgment legally there is no one who can enforce these covenants. The only serious question is, ought I to exercise a jurisdiction which is, as I say, of a discretionary kind? The words of the section are: "The court shall have power . . . to declare". It seems to me that that is a power which I should use on this occasion, and I propose to do so in order to quiet possible objections which might be raised by people who have not chosen to come forward here but may like to cherish a grievance hereafter. Consequently, I propose to make a declaration that the property described in the heading to the originating summons, which will be set out on a plan conveniently annexed to the order, is not affected by the restrictions imposed by the instrument mentioned in the heading nor are they enforceable by any person. I do not think the court is entitled to make a general order but only to declare that the land brought to its notice on the particular application is or is not subject to the operation of the restrictive covenant.

Declaration accordingly.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Eastbourne (for the applicants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

N. v. N., L. v. L., C. v. C.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), January 28, February 7, 1957.]

Divorce—Practice—Service—Petition—Dispensing with service—Petition for presumption of death and dissolution of marriage—Principles applicable—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 16 (1)—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 9 (5).

Since the steps taken to trace the respondent to a petition under s. 16 of the Matrimonial Causes Act, 1950, for the presumption of death and the dissolution of marriage must be stated in the petition (see r. 4 (1) (j) of the Matrimonial Causes Rules, 1950), and the court could, therefore, refuse at the hearing to grant a decree until appropriate inquiries had been made, the court in considering an application to dispense with service of the petition (under r. 9 (5)) should be cautious lest it might unnecessarily embark on issues and inquiries which could more properly and more successfully be considered at the trial (see p. 539, letter F, p. 539, letter I, to p. 540, letter A, post).

In each of three cases the parties to each marriage were living in Latvia or the U.S.S.R. when the German army entered the area in the war of 1939-45. In two cases the husbands were enlisted in the German army; in the third case the wife left the town which had come under bombardment, intending to go to her parents' home in a distant town which her husband reached later only to find that she had not arrived. Each of the husbands ultimately settled in England, which he made his permanent home, and none had seen or heard of his wife for more than seven years before the commencement of proceedings. Each husband had made efforts to trace his wife and had exhausted all steps that could be taken, short of such as might involve risk to others, but had not found her. Each husband having petitioned under s. 16 of the Act of 1950 for a decree of presumption of his wife's death and for dissolution of marriage, applied under r. 9 (5) of the Matrimonial Causes Rules, 1950, for leave to dispense with service of the petition on the respondent's wife.

Held: in the exercise of the court's discretion in the circumstances of the present cases each husband would be granted leave to dispense with service of the petition since (i) he had, *prima facie*, made all available inquiries for his wife and (ii) an order for substituted service by advertisement would be worthless, and no other form of substituted service had been suggested.

[As to dispensing with service, see 12 HALSBURY'S LAWS (3rd Edn.) 334, para. 686, note (t); and for cases on the subject, see 27 DIGEST (Repl.) 473, 4097-4103.]

For the Matrimonial Causes Act, 1950, s. 16 (1), (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 403.

For the Matrimonial Causes Rules, 1950, r. 9 (5), see 10 HALSBURY'S STATUTORY INSTRUMENTS 203.]

Cases referred to:

- (1) *Chard v. Chard* (otherwise *Northcott*), [1955] 3 All E.R. 721; [1956] P. 259; 3rd Digest Supp.
- (2) *Luccioni v. Luccioni*, [1943] 1 All E.R. 384; [1943] P. 49; 112 L.J.P. 51; 168 L.T. 263; 27 Digest (Repl.) 473, 4101.
- (3) *Wall v. Wall*, [1949] 2 All E.R. 927; [1950] P. 112; 11 Digest (Repl.) 468, 1020.
- (4) *Thompson v. Thompson*, [1956] 1 All E.R. 603; [1956] P. 414.
- (5) *Spalenkova v. Spalenkova*, [1953] 2 All E.R. 880; [1954] P. 141; 3rd Digest Supp.

A Summons.

In each of these three cases, *N. v. N.*, *L. v. L.*, and *C. v. C.*, the husband petitioned for a decree of presumption of death and of dissolution of the marriage. In each case the husband issued a summons to show cause why an order should not be made to dispense with service of the petition on the wife. The summonses came before SACHS, J., in chambers on Dec. 10, 1956, and HIS LORDSHIP
B adjourned them into court for argument by the Queen's Proctor. The facts appear in the judgment.

M. D. Sherrard for the husband in *N. v. N.*

N. C. Lloyd-Davies for the husband in *L. v. L.* and *C. v. C.*

Colin Duncan for the Queen's Proctor.

Cur. adv. vult.

C Feb. 7. **SACHS, J.**, read the following judgment: In each of these three cases* a petitioner husband is applying by virtue of the Matrimonial Causes Rules, 1950, r. 9 (5) to dispense with service on the respondent wife. In each case the sole relief now claimed in the petition is for "a decree of presumption of death and of dissolution of the marriage" under s. 16 of the Matrimonial Causes Act, 1950. In each case it is alleged to be considerably more than seven years since
D the wife was last heard of by the husband; and in each case the wife when last seen or heard of was in territory that is now within the U.S.S.R. The petitions were placed on the file of this court in October and November, 1956. Each of the husbands, having by then been resident in this country for upwards of eight years, claims to be domiciled here. In none of the three cases is there any issue of the marriage.

E The salient facts, apart from those already mentioned, of the respective cases as stated in the documents before me are as follows: In the first case the parties, after their marriage, had lived together in a forest area in Latvia and continued so to do until the summer of 1944, when the area in question was entered by the German army. The husband was then compulsorily enlisted into a unit of that army and almost immediately sent to Germany, where he served until the date of the surrender to the Western Allies in May, 1945. Some
F three years later he came to England, has lived here since then, and states that he intends to make this country his permanent home. Shortly after his unit was sent to Germany, the area in which he had been living was occupied by troops of the U.S.S.R., and since that date he has neither seen nor heard of his wife. Various efforts have been made by the husband to get into touch with
G his wife, and indeed he appears to have exhausted all means of getting into contact with her and hearing of her, short of those which might have an adverse effect on the safety of other persons. None of his efforts has produced any result.

In the second case the parties lived after their marriage in a farm area in Latvia until the husband, like the husband in the first case, came to be compulsorily enlisted in a unit of the German army. He, too, was
H sent with that unit to Germany, surrendered to the Western Allies in May, 1945, and after a matter of a couple of years came to England. He, too, has remained here ever since and states that he intends to make this country his permanent home. Shortly after his unit had left for Germany there was heavy fighting over the area in which he had lived and it is stated that it is possible that in this fighting the wife was either taken prisoner or killed. Whatever may be the weight to be attached to this possibility, the facts show that since the husband
I left for Germany he has not seen nor has he in any way heard of his wife. Like the husband in the first case, the husband in the second case has made a number of efforts to trace his wife, and according to the statements in his petition and affidavit, has exhausted all steps that can be taken to trace her short of such as might involve risk to others. Accordingly on the facts in evidence before me both he and husband No. 1 have availed themselves of every reasonable means to ascertain whether their respective wives are still alive.

* The cases are referred to in the following sequence—*L. v. L.*, *C. v. C.*, and *N. v. N.*

In the third case the parties after their marriage lived at a town in the U.S.S.R. until the summer of 1941. That town was then bombarded by the Germans and in the general disturbance that resulted the wife became very frightened and found a place in a lorry which was evacuating people from that town. Her intention was to go to her parents' home in a far distant town. The route between the two towns was heavily bombed at the time of the wife's journey, and when the husband reached his parents-in-law's house some time later he found according to his statement that his wife had not arrived. Searches and inquiries over a considerable period failed to provide any information enabling him to trace his wife. Some years later the husband came to England and, like the husbands in the other two cases, has settled here. Whilst in this country he, too, has made considerable inquiries which are detailed in his affidavit and has exhausted all means of tracing his wife short of employing methods which might involve risk to others. In his petition as originally presented to this court there was added to the prayer under s. 16 of the Matrimonial Causes Act, 1950, an alternative allegation that if the wife was still alive she had been, in the premises, guilty of desertion; but that inconsistent allegation, which was not tenable on the facts put forward in the affidavits, was abandoned whilst the present application was before me, and the relevant allegation struck out of the petition.

From the facts as stated it is clear that in each case the court at trial may be asked to say that it falls within s. 16 (2) which provides:

"In any such proceedings [for decree of presumption of death and of dissolution of marriage] the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved."

In the third case, however, the husband is likely to ask for the inference of the wife's death to be drawn independently of that sub-section: in the first and second cases the husbands might perhaps take a similar course, but this I rather doubt. Since *Chard v. Chard* (otherwise *Northcott*) (1) ([1955] 3 All E.R. 721), it appears that the practice of the superintendent registrars acting under the Marriage Act, 1949, has been modified where, in circumstances such as those in the present cases, the issue of a certificate of marriage is sought by someone who has already been once married to enable him or her to re-marry despite no death certificate being available to establish the demise of the other party to that previous marriage. I was further informed that as a result the production of a decree obtained under the provisions of s. 16 is now more frequently needed before the re-marriage can take place; that questions as to the service of petitions in cases similar to those under consideration may well recur frequently; and that there was no reported decision on the points which it was desired to argue in the present cases. Accordingly the applications were adjourned into court and the attendance of the Queen's Proctor was invoked under the provisions of s. 10 (1) of the Matrimonial Causes Act, 1950*. As usual counsel for the Queen's Proctor has provided much assistance in the course of his argument; and amongst the authorities helpfully placed before the court I would first refer to *Luccioni v. Luccioni* (2) ([1943] 1 All E.R. 384), where it was emphasised that whilst it can be helpful in relation to an application under r. 9 (5)[†] to provide indications of what matters have

* 29 HALSBURY'S STATUTES (2nd Edn.) 398.

[†] Matrimonial Causes Rules, 1950, r. 9 (5) provides: "Service may be dispensed with altogether in any case in which it may appear necessary or expedient to do so. An application for leave to dispense with service on a respondent spouse shall be made to a judge and an application for leave to dispense with service in any other case shall be made to a registrar."

A affected the court in exercising its discretion, nothing in the way of rules fettering that discretion should, or indeed could, be laid down. That principle, of course, applies with full force to applications such as those now before the court.

B As, however, none of the reasoned judgments cited concerned the application of r. 9 (5) to a case where a decree of presumption of death was sought, I now turn to the provisions of s. 16 to consider whether petitions brought thereunder may give rise to special factors in regard to the applications before me: for whilst all other decrees of divorce are pronounced on the footing that the respondent is alive, the court, when acting under that section, assumes the identically opposite fact. The relief that can be granted under s. 16 is, for that and for other reasons, in many respects sui generis—as was cogently pointed out by PEARCE, J., in *Wall v. Wall* (3) ([1949] 2 All E.R. 927). The nature of such a petition necessitates in every instance an application to the court on the question of service. C Then the court has to choose between the alternatives of making an order (a) dispensing with service under r. 9 (5) or (b) for some form of substituted service under r. 9 (3) and (4), and as regards the latter the very phrase

D “to order substituted service on a person whom it is sought to be presumed dead”

has a somewhat odd ring and points to the need for a guarded approach to the problem.

E It is convenient here to refer to two points under s. 16 which were raised by the Queen's Proctor in the course of the argument in *Thompson v. Thompson* (4) ([1956] 1 All E.R. 603). First, he desired to reserve the point how far the court is, under s. 16 (2) entitled to or obliged to take account of the absence of full inquiry in relation to the words “reason to believe”. Secondly, he submitted that under sub-s. (1) the word “may” in relation to the making of a decree imported that the court had a discretion whether a decree should be granted, even where, for instance, the requirements of sub-s. (2) had been fulfilled. It is unnecessary to discuss the first of these points here; but the second has a manifest bearing on applications to dispense with service. In aid of the exercise of the court's discretion in a s. 16 case the trial judge has the benefit of that information on the steps taken to trace the respondent which by r. 4 (1) (j) of the Matrimonial Causes Rules, 1950, must be set out in the petition. On considering the available evidence as to the disappearance of the respondent the trial judge may, and in appropriate cases no doubt will, refuse to grant a decree unless and until appropriate further inquiries have been made. At that stage the case can be adjourned for those inquiries to be set on foot through advertisements or otherwise; and, by virtue of having witnesses before it, the court at trial is frequently in a better position to assess the need or otherwise for further inquiry than a chambers judge looking at affidavits. In this respect the court's powers to ensure that all reasonable inquiries have been made is perhaps analogous to that exercised in the Chancery Division on an application for a *Re Benjamin** order enabling an estate to be distributed on the footing that a beneficiary who has disappeared is dead.

H To that extent petitions under s. 16 of the Matrimonial Causes Act, 1950, differ from those where a decree is sought under the provisions of s. 1 and s. 4†. For instance, where the petition is for a decree on the grounds of desertion against a spouse who is alleged first to have deserted and then later to have vanished, once service has been dispensed with by the court no further opportunity occurs for investigating the chances of that spouse being found. In the light of that difference it seems to me that a court when considering an application to dispense with service in a s. 16 case in which all proper inquiries have prima facie been made, should be cautious lest it may unnecessarily embark on issues

* *Re Benjamin, Neville v. Benjamin*, [1902] 1 Ch. 723; the form of order is exemplified in 12 ENCY. COURT FORMS 712, Form 208.

† 29 HALSBURY'S STATUTES (2nd Edn.) 389, 394.

and inquiries which can more properly and more successfully be considered at trial. Further, to my mind, there is force in the submission of counsel for the Queen's Proctor that the general intent of s. 16 is to enable a petitioner to lay before the court such facts as are known to him, in order that he may ascertain whether or not they enable him to be granted what is in some respects a declaration as to their effect; and that accordingly the court, whilst remaining carefully conscious that the status of the respondent may be affected, should not be astute to find reasons at the outset of the proceedings why the petitioner should incur expense under orders for substituted service by advertisement when, *prima facie*, the chances of its producing a result are in substance nil. As regards any danger in s. 16 cases of an attempt to mislead the court by concocted evidence, such chances as there may be of parrying such an attempt seem often likely to be greater at trial than in chambers; and further such cases are unlikely to be sufficient in number to justify of themselves imposing in every case an otiose expense on all honest petitioners under the section.

I am, however, far from acceding to the submission of counsel for the husbands in the first and second cases that on petitions under s. 16 cases there either is or should be an automatic rule that service should be dispensed with; or his alternative suggestion that in such cases service should be dispensed with unless the court found on the evidence that such service was necessary. That would contravene both the wording of r. 9, which puts the onus on the petitioner to bring himself within para. (5), and the principle laid down in *Luccioni v. Luccioni* (2) that no rules may fetter the court's discretion. On the contrary, each case must be dealt with on its merits. But the matters indicated above do constitute factors which may affect the exercise of the court's discretion under that rule, and may in quite a range of cases lead to the result that service can properly be dispensed with where relief is being sought under s. 16.

I now return to the facts disclosed in the present series of cases. In each of them an order for substituted service by advertisement would be worthless. No other form of substituted service has been suggested. All available inquiries have *prima facie* been made; and it is wholly impracticable on an application in chambers to look behind the *prima facie* evidence here in the light of the points discussed above. Those factors of themselves lead to the conclusion that it is expedient within r. 9 (5) to dispense with service. I should perhaps add that the present cases are in more than one respect the converse of *Spalenkova v. Spalenkova* (5) ([1953] 2 All E.R. 880) where a respondent known to be alive and a political prisoner was charged with desertion, and where, further, the chances of a change in his circumstances were deemed worth consideration. It was also submitted both by counsel for the Queen's Proctor and by counsel for the husbands in *C. v. C.* and *L. v. L.* that the risks to others to which I have earlier referred can properly be regarded as a factor affecting the discretion of the court. With that submission I agree: if a certain course may result in great and irreparable harm, that possibility must obviously have potent weight in the scales used to determine what is expedient. Accordingly I order that service be dispensed with in each case and understand that in so doing I am doing nothing inconsistent with any known previous decision in chambers.

Order accordingly.

Solicitors: *Hunters* (for the husband in *N. v. N.*); *Beckingsales* (for the husbands in *L. v. L.* and *C. v. C.*); *Queen's Proctor*.

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

EDWARDS v. WEST HERTS GROUP HOSPITAL MANAGEMENT COMMITTEE.

[COURT OF APPEAL (Hodson, Morris and Sellers, L.JJ.), January 31, 1957.]

Hospital—Negligence—Property—Loss of property from hostel—House physician obliged to reside in hostel—Theft of his personal effects from bedroom—Whether management committee owed duty to take reasonable care of employee's property in hostel.

Contract—Implied term—Hospital—House physician—Obligation to reside in near-by hostel—Theft of personal effects from bedroom—Whether hospital management committee liable.

Master and Servant—Duty of master—Property of servant—House physician's clothing stolen from hostel—Whether master owed duty to take reasonable care of property.

The resident house physician at a hospital was required by the terms of his employment to live at a neighbouring hostel provided by the hospital management committee who employed him. He was required to leave the key of his bedroom in the lock. He received a salary of £425 a year, from which £125 was deducted in respect of board and lodging. On returning to his bedroom one night he found that some articles of his personal clothing had been stolen, there being no indication whether the theft was by a person from inside or from outside the premises. He brought an action for damages against the committee on the grounds either that they were in breach of a duty owed to him "that they their servants or agents would take reasonable care" of his bedroom and of his clothes and personal effects and of the key to the door, or that they were in breach of a term to the same effect implied in his contract of employment.

Held: the committee were not liable for damages because (i) neither as invitor towards invitee (*Tinsley v. Dudley*, [1951] 1 All E.R. 252, applied), nor as master towards servant (*Deyong v. Shenburn*, [1946] 1 All E.R. 226, applied) did the committee owe the plaintiff a duty to take reasonable care of his personal effects in the hostel, (ii) although a boarding-house keeper owed a duty of care to all his guests (*Dansey v. Richardson* (1854), 3 E. & B. 144, considered), the relationship between the committee and the plaintiff was not that of boarding-house keeper and guest, and (iii) in the circumstances of the present case no such term as the plaintiff alleged should be implied in the contract for his employment.

Appeal dismissed.

[As to the duty owed by an invitor to an invitee, see 23 HALSBURY'S LAWS (2nd Edn.) 604-609, paras. 853-858; and for cases on the subject, see 36 DIGEST (Repl.) 54-56, 291-305.]

As to the duty owed by a master to a servant, see 22 HALSBURY'S LAWS (2nd Edn.) 174, para. 292, 176, para. 296; and for cases on the subject, see 34 DIGEST 115, 857-867.

As to terms being implied in contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 121-124, paras. 212-215; and for cases on the subject, see 12 DIGEST (Repl.) 685-689, 5269-5295.]

Cases referred to:

- (1) *Tinsley v. Dudley*, [1951] 1 All E.R. 252; [1951] 2 K.B. 18; 2nd Digest Supp.
- (2) *Dansey v. Richardson*, (1854), 3 E. & B. 144; 23 L.J.Q.B. 217; 118 E.R. 1095; *subsequent proceedings*, 3 E. & B. 722; 3 Digest 82, 185.
- (3) *Deyong v. Shenburn*, [1946] 1 All E.R. 226; [1946] K.B. 227; 115 L.J.K.B. 262; 174 L.T. 129; 2nd Digest Supp.

- (4) *Heaven v. Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; A 47 J.P. 709; 34 Digest 192, 1570.
- (5) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (6) *Scarborough v. Cosgrove*, [1905] 2 K.B. 805; 74 L.J.K.B. 892; 93 L.T. 530; 3 Digest 83, 187.

Appeal.

The plaintiff, a resident house physician at the defendants' hospital, had had some articles of clothing and personal effects stolen from his bedroom at the hostel where he was required to reside, and brought an action for damages for negligence and breach of an implied duty of care under his contract of employment against the defendants in respect of the loss. On Sept. 24, 1956, His Honour JUDGE GRANVILLE-SMITH in Watford County Court dismissed the action, holding that the defendants owed no duty to the plaintiff to take reasonable care in respect of his personal effects at the hostel. The plaintiff appealed on the ground that the judge had misdirected himself in that he: (i) directed himself that there was no real reason to distinguish the case of a house physician, required by the terms of his employment to reside in a hostel near the hospital and paying to the hospital by way of deduction from his salary £125 a year in respect of board and lodging and other services provided, from that of a domestic servant; (ii) directed himself that the relation between the parties was simply that of master and servant and not, so far as residence at the hostel was concerned, that of lodger and boarding-house keeper; (iii) directed himself that, although the plaintiff was required by the defendants to leave the key of his bedroom in the mortise lock so that the domestic staff of the hostel might have access to the room to clean and tidy it and, although there was, as he found, negligence by the defendants, yet (a) no duty was owed by the defendants to the plaintiff to take reasonable care of the plaintiff's bedroom and of his clothes and personal effects therein, and of the key to the door; and (b) there was no implied term of the plaintiff's contract of employment with the defendants that they should take such reasonable care.

Neville Faulks for the plaintiff.

J. P. Widgery for the defendants.

HODSON, L.J.: This is an appeal from an order of His Honour JUDGE GRANVILLE-SMITH made at Watford County Court on Sept. 24, 1956. The appeal is by the plaintiff, a doctor, who at the material time was employed by the defendants, the West Herts Group Hospital Management Committee, as a resident house physician or house officer, as he was otherwise described. He was employed by the defendants at the hospital, and one of the terms of his employment was that he should live at a hostel provided by the defendants. We have not any specific evidence as to the exact lay-out of the premises; but it is conceded that the hostel was near the hospital, although not part of the hospital, and that the plaintiff (amongst others) lived in it. How large a place it was, or how many other doctors were there, we do not know from the evidence.

We have seen a circular, which emanates presumably from the Ministry of Health, concerning the negotiations between the Whitley Councils for the Health Services (Great Britain) and the British Medical Association, setting out the terms and conditions of service of medical staff which cover this case. Under his contract, the plaintiff was to get £425 a year and a deduction of £125 per annum was to be made in respect of board and lodging and other services, so that from one point of view the plaintiff's salary was £425. From another point of view his total salary was £300, plus board and lodging valued at £125. That was the position of the plaintiff.

He took up his duties in July, 1955. He had a room at the hostel. On Dec. 17, 1955, he came in at two o'clock in the morning and found that several

A articles of personal clothing, etc., had been stolen. There is no finding of fact as to the circumstances in which they were stolen and no one knows exactly what they were—whether anyone got in from outside, or some dishonest person stole the things from inside. The plaintiff has claimed for their loss, and in the event of his claim being justified the sum has been fixed by the county court judge at £70. He bases his claim on two grounds. He says that the defendants

B owed him a duty “that they their servants or agents would take reasonable care” of his bedroom and of his clothes and personal effects, and of the key to the door. That is the first way in which he puts his claim. He said in the alternative that it was an implied term of his contract of employment that the defendants should do what he claimed they were liable to do apart from the contract.

C The particulars of negligence pleaded are to this effect: That the defendants allowed the back door of the hostel to remain open; that they failed to employ a porter or caretaker other than between certain limited hours in the day; that they required the plaintiff to leave his bedroom door key-in the lock; that they failed to take any care of the key left for their use or to have any system by which, after the bedroom had been cleaned, the door was locked

D and the key kept in a safe place. There is then an allegation that they failed to take any steps to prevent unauthorised persons from entering the hostel and the plaintiff’s bedroom.

The defendants’ answer to this is a very short one indeed. It is that they deny that they owe any duty of care to the plaintiff at all. They contend as a proposition of law (which was accepted by the learned county court judge)

E that there is no duty on the occupier of premises to safeguard against theft of the chattels of a third party who comes on the premises. If a visitor to a house loses something, the householder is not liable in law; and, generally speaking, that applies as a rule of law to the occupier of premises.

The general position is dealt with by this court, in particular by the judgment of JENKINS, L.J., in *Tinsley v. Dudley* (1) ([1951] 1 All E.R. 252). JENKINS, L.J., said (at p. 260):

F

“There is no warrant at all on the authorities, so far as I know, for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third party. That implied liability, so far as I know, is one unknown to the law.”

G

That is the general position, and, according to the argument of counsel for the defendants, the exceptions to that general position are very limited in number. Innkeepers are dealt with specially for particular reasons, and there

H are exceptions in the case of guest-houses or boarding-houses where people carry on the business for gain of taking in guests. In those cases, on the authorities, I think that there is a duty on the boarding-house keeper to take some care of the goods of his guests. There has been a certain variation in the views taken by learned judges on this topic in the past; but the matter appears to have been expressed very clearly in *Dansey v. Richardson* (2) ((1854), 3 E. & B. 144), when a court of five judges dealt with this matter in quite general terms. For example, referring to the defendant boarding-house keeper, ERLE, J.,

I said (at p. 150) that he thought:

“The main principle was, that the defendant’s duty was performed, if she took such care of the house and things in it as a prudent owner would take . . .”

WIGHTMAN, J., said (*ibid.*, at p. 155):

“I can find no authority for holding that a boarding-house keeper is a

bailee of the goods of his guest at all, or that he is bound to take more care about the goods of his guests, which are no further given into his care than by being in his house with the guest, than he, as a prudent owner, would take with respect to his own."

COLERIDGE, J., expressed an opinion on the same lines, and LORD CAMPBELL, C.J., said (*ibid.*, at p. 165):

"The defendant did receive the plaintiff with her goods, on the terms of providing her with rooms, furniture, meat, drink, servants' attendance and other necessities *and of taking due and reasonable care of her goods while they were in the said house and plaintiff remained such guest therein*; i.e., such due and reasonable care as a boarding-house keeper ought to take of the goods of a guest."

I think that that may be taken to be the general position without entering into a discussion whether the duty varies having regard to the circumstances of particular cases. It is unnecessary to do that because, in my judgment, the duties which are relevant in what I may call the boarding-house cases cannot possibly be said to arise here. In this case, the position was not that the defendants were carrying on a boarding-house in keeping this hostel for the benefit of the hospital staff any more than if the staff were resident in the hospital building itself and getting their food and lodging free. The fact that the value of the food and lodging was quantified at the sum of £125 to my mind makes no difference.

The position, therefore, is that this was simply a case of master and servant where the master was paying his servant partly in cash, and partly by giving him food and lodging, or its equivalent. The plaintiff did not make any separate payment for this service; the money for the board and lodging was deducted from his pay. He received the net sum in the same way as a domestic servant who is kept free receives a net sum.

The duty of a master towards his servant in those circumstances is not devoid of authority. *Deyong v. Shenburn* (3) ([1946] 1 All E.R. 226), a case in this court, was concerned with a contract entered into between the plaintiff and the defendant to act the dame in a pantomime for three weeks. In that case the rehearsals took place at a theatre and on the second day the plaintiff had stolen from his dressing-room his overcoat as well as two shawls and a pair of shoes forming part of his theatrical equipment. In the county court the judge found that the defendant had been negligent in failing to provide a lock on the dressing-room door and in having no one at the stage door during the morning of the particular day to prevent the entry of unauthorised persons; but the county court judge held that the defendant was under no duty to protect the clothing from theft. The learned county court judge's decision in that case was upheld on the ground that there was no duty on the defendant to take reasonable care to protect the plaintiff's clothing from theft.

The argument in the Court of Appeal in that case proceeded on the basis that a duty rested on a master to use care to provide a safe system of working to protect his servant from injury, and that that duty applied also as regards protection of property so far as it enabled the servant to do his work, and even extended to protection against theft. That contention was rejected, and in rejecting it DU PARCQ, L.J., said ([1946] 1 All E.R. at p. 229):

"I am not deciding that it is so, but it may well be that if, through a breach of the duty to provide a proper system of working, a workman is not only injured in his person but also suffers damage to his clothing, the damage to the clothing can properly be included in the damages. It may be that if, through such a breach, his clothes are torn off his back and he suffers no personal injury he may be entitled to recover damages, but it does not in the least follow from that that there is a duty upon the employer, which

A would be quite a different duty from that which I have mentioned, to take steps to safeguard the workman while in his employ against loss through the wrongful act of a third person. That conclusion does not follow, as it seems to me, in the least, and cannot be made to follow by any process of reasoning that is not plainly fallacious . . .”

B He went on to say (ibid.): “. . . where do we get the obligation? There is no bailment . . .” I should interpose here that the case for the appellant was not here put on the basis of bailment; there was no allegation that his property had been specifically handed over into the custody of the respondent.

The learned judge continued (ibid):

C “It is said that this is a case of tort, and we were reminded of observations which are very familiar to lawyers in *Heaven v. Pender* (4) ((1883), 11 Q.B.D. 503) and in *M’Alister (or Donoghue) v. Stevenson* (5) ([1932] A.C. 562). I do not think I need cite them in terms. There are well-known words of LORD ATKIN in *M’Alister (or Donoghue) v. Stevenson* (5) ([1932] A.C. at p. 580), as to the duty towards one’s neighbour and the method of ascertaining who is one’s neighbour. It has been pointed out (and this only shows the difficulty of stating a general proposition which is not too wide) that unless one somewhat narrows the term of the proposition as it has been stated one would be including in it something which the law cannot support. It is not true to say that wherever a man finds himself in such a position that unless he does a certain act another person may suffer, or that if he does something another person will suffer, then it is his duty in the one case to be careful to do the act and in the other case to be careful not to do the act. Any such proposition is much too wide. One has to find that there has been a breach of a duty which the law recognises, and to see what the law recognises one can only look at the decisions of the courts.”

F Now comes the passage which is directly in point in this case ([1946] 1 All E.R. at p. 229):

G “There has never been a decision that a master must, merely because of the relationship which exists between a master and servant, take reasonable care for the safety of his servant’s belongings in the sense that he must take steps to insure, so far as he can, that no wicked person shall have an opportunity of stealing the servant’s goods. That duty is the duty which is contended for here, and there is not a shred of authority which suggests that any such duty exists or ever has existed. Probably the case in which one would have expected to find decisions on the point is that of the domestic servant and his or her master. Nobody has ever suggested, and in my opinion it is clearly not the law, that if the master of the house leaves the house unattended and empty, or if he forgets to shut a window at night or properly to secure it or if the locks on the door have ceased to be secure, by reason of which lack of care a housebreaker enters and steals, among other things, the goods of a domestic servant living in the house, then the master is liable to his servant for negligence.”

I Here the learned county court judge held (and I agree with him) that that language applies directly to the facts of this case and is not in any sense confined to persons who might be regarded as domestic servants. If that is right, I think that this claim must fail; and, having regard to the diligent researches of counsel, it seems tolerably clear that no authority in any way supports it. The only way in which the plaintiff could succeed would be if he were able to say, as indeed his counsel has sought to say, that a term must be implied in the contract of employment that the master should take such care of his servant’s goods as to enable him to avoid such a calamity, or at any rate to have a chance of avoiding such a calamity, as occurred in this case when the plaintiff’s goods

were stolen. On the facts as found in this case (and indeed as pleaded) in my view there is no room for such an implication. It would be going a long way to contend that the intervention of a wicked person such as a thief should be insured against by masters who employ servants in any capacity in which they may be employed. In my judgment there would have to be either a specific term in the contract to that effect, or circumstances from which a term must necessarily be implied, before such a result could be reached. I think that the learned county court judge's decision was clearly right, and this appeal fails and must be dismissed.

MORRIS, L.J.: Before the plaintiff could succeed in this claim, he would have to establish that a duty was owed to him of the nature that he alleges, that there was a breach of that duty, and that damage resulted to him because of that breach of duty. The plaintiff alleged that the defendants owed him a duty which was formulated as follows:

"A duty that they their servants or agents would take reasonable care of the plaintiff's said bedroom and of his said clothes and personal effects therein and of the said key to the door thereof."

The plaintiff said alternatively that such a duty arose by virtue of a term to be implied in his contract; but he principally put his case on the footing that the duty arose in the circumstances created by and resulting from his contract of employment.

The plaintiff was employed as a house officer, and it was a term of his contract that a deduction should be made from his salary of £125 per annum in respect of board and lodging, and other services provided. It was also a term of his contract that he was to be resident; indeed the title "house officer" so suggests. The plaintiff was under an obligation to reside in the hostel.

Whether a term as alleged is to be implied into the contract must be decided by considering, not what might have been a reasonable term for the parties to agree, but whether, if this matter had been put to the two parties, they would at once have said: "That, of course, is understood". I cannot think that we could say that there would inevitably have been unanimity on the matter if it had been raised; and I agree entirely with the conclusion of the learned county court judge in regard to that part of the case.

It is said that the defendants nevertheless owed a duty which resulted from the contract of employment. It is said that they were really in a twofold position: employers of the plaintiff for the purpose of his profession, and boarding-house keepers as regards his domestic life. It is said that they were boarding-house keepers in the sense that they were providing staff and food at a certain fee. The learned county court judge said that the fee, £125 per annum, was not an economic amount. No question of bailment arises in the case, and that has been made quite clear.

It therefore has to be considered how this duty as alleged can be said to arise. I cannot think that it can arise merely from any relationship of invitor and invitee. Indeed, that was made plain by *JENKINS, L.J.*, in his judgment in *Tinsley v. Dudley* (1) ([1951] 1 All E.R. 252 at p. 260), where he said:

"There is no warrant at all on the authorities, so far as I know, for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third party."

Undoubtedly the plaintiff was a servant of the defendants. Can the alleged duty be said therefore to arise merely from that relationship? I think that

A the answer to the question so stated has been clearly given by DU PARCQ, L.J., in *Deyong v. Shenburn* (3) ([1946] 1 All E.R. 226 at p. 229), where he said:

B "There has never been a decision that a master must, merely because of the relationship which exists between master and servant, take reasonable care for the safety of his servant's belongings in the sense that he must take steps to insure, so far as he can, that no wicked person shall have an opportunity of stealing the servant's goods."

The learned lord justice was treating the matter as clear and accepted law.

C "That duty is the duty which is contended for here, and there is not a shred of authority which suggests that any such duty exists or ever has existed."

D It may be that one reason why no such duty existed was that in times past many employees and many servants became a part of the household of their employer: so, too, apprentices often became members of the household of the master. But the statement of DU PARCQ, L.J., is quite clear and explicit, and, so far as I know, no authority exists to cast doubt on it.

E It is said that the defendants were in the position of boarding-house keepers. If they were, the law relating to the duties of boarding-house keepers has been stated in the two authorities, *Dansey v. Richardson* (2) ((1854), 3 E. & B. 144) and *Scarborough v. Cosgrove* (6) ([1905] 2 K.B. 805). It would, however, be quite unreal here to say that the defendants were in any sense boarding-house keepers. Although the plaintiff was living in a hostel near the hospital, I think that it is common ground that the case must be treated on the same footing as if he had been sleeping and eating in the main part of the building, as, e.g., in one wing of the main hospital building itself. He was a resident house officer, and he was presumably resident so that he could be available at nearly all times at very short notice. The fact that he was in a hostel adjacent to the building makes no difference.

F It would be contrary to the whole substance and reality of the matter to view the defendants as being in the position of boarding-house keepers. In *Scarborough v. Cosgrove* (6) ROMER, L.J., pointed out that boarding-house keepers are carrying on a business. He said ([1905] 2 K.B. at p. 815):

G "Seeing that the landlord carries on his business of a boarding-house keeper for reward, I think he is bound to carry on that business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him . . ."

H On whatever basis the duty owed by a boarding-house keeper as now laid down in the two cases arises, it seems to me it would be quite wrong to treat this hospital, and the defendants, as being in a position in any way analogous to that of a boarding-house keeper. The position simply was that of master and servant with an obligation on the servant to live in the hospital. That does not mean that someone in the position of the plaintiff could be called a domestic servant, nor did the learned judge so state. He said:

I "I think he lives in as much as though he lived in the hospital and were a domestic servant."

In effect he does live in the hospital just as a domestic servant would live in, and he lives in because of the relationship of master and servant. It seems to me, therefore, that on the authorities the learned judge came to a correct conclusion, and I see no reason to disturb it.

SELLERS, L.J.: As I see it, the decision in this appeal must depend primarily on whether the learned county court judge is to be held to have been correct in his finding that the plaintiff as a resident house physician was living

in the premises, or whether the submission should be accepted that he is to be regarded in the particular circumstances as in effect a lodger in a boarding-house. The finding of the learned judge is clear. He has treated the adjacent or adjoining premises, where the plaintiff was required to live to perform his duties, as part of the hospital. The judge said:

"I think he lives in as much as though he lived in the hospital and were a domestic servant."

That is stating only the nature of his residence, not the capacity in which he works. It is well known that the object of having a house physician, who very often does live in the hospital premises, is to have a resident doctor on the spot. With the demand on space it may well be that hospitals have provided some outside accommodation for the doctors instead of taking up part of the accommodation in the hospital premises.

As I see it, that finding is not one which this court can disturb on any of the facts which have been disclosed. If that be right, then the authority which has already been cited—particularly the passage from the judgment of DU PARCQ, L.J., in *Deyong v. Shenburn* (3) ([1946] 1 All E.R. 226 at p. 229)—establishes that the learned county court judge was correct in the conclusion to which he came that no duty was owed by the defendants towards the plaintiff in respect of the theft of his goods whilst he was living in, and whilst those goods were in, the premises provided. If the other view had prevailed—that the residence was to be treated as a boarding-house, and the plaintiff as a guest there—authority would seem to show that some duty of care would have arisen in respect of the plaintiff's goods. Precisely what such a duty would be would depend on the particular facts. Although we were told that the learned county court judge made a general statement that he would have found there was negligence, he did not find expressly what the duty was or what matters amounted to negligence. If that question had arisen, it would have been necessary to go further and say whether any breach of duty found was to be treated in any way as a cause of the loss for which the plaintiff claims. As the case has developed, however, that issue does not arise, and there is no necessity for the matter being investigated further. In my judgment, the learned county court judge came to the right conclusion as to the position of the plaintiff in relation to the hospital and on the law relative thereto. I agree that the appeal must be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Hempsons* (for the plaintiff); *Sedgwick, Turner, Sworder & Wilson*, Watford (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

A

Re MARSHALL (deceased).

BARCLAYS BANK, LTD. v. MARSHALL AND OTHERS.

[CHANCERY DIVISION (Hartman, J.), January 11, 14, 15, February 6, 1957.]

B

Will—Gift to issue—Adopted child—Child adopted in British Columbia—Child and adoptive parent domiciled in British Columbia—Testator domiciled in England—Adoption of Children Act, 1926 (16 & 17 Geo. 5 c. 29), s. 5 (2). Adoption—Foreign adoption—Adopters and adopted child domiciled in foreign country—Rights of child under English will—Whether “issue” of adoptive parent.

C

The principle of the legitimation cases*—viz., that a child born of parents domiciled abroad in a country whose laws then allowed legitimation per subsequens matrimonium may be entitled, if legitimated subsequently by the foreign law, to take beneficially under a bequest in an English will in favour of children or issue, as if he were a child born in lawful wedlock—is applicable to cases where children are adopted according to the law of the foreign domicile of the adopters and adopted child (see p. 555, letters D to H, post).

D

A testator, by his will dated Apr. 12, 1945, left his residuary estate on trust for his wife during her life and gave the ultimate residue of his estate after her death to such of named cousins of his as might be then living, and provided that “should any of the above cousins be then dead leaving issue then living such issue shall take the share which his her or their parent would have taken had such parent survived me and my said wife and if more than one in equal shares”. One of the cousins named as a beneficiary, C.S.J., had emigrated to Canada in 1912 with his wife, and had become domiciled in British Columbia. C.S.J. had no children of the marriage. In 1913, when there was no adoption legislation in British Columbia, C.S.J. and his wife entered into an agreement with the Children’s Aid Society of Vancouver under which the society agreed to commit to them the care of a female child, D., then less than a year old, who C.S.J. and his wife agreed to treat as a member of their family. It was agreed that D. was to remain in the care of C.S.J. and his wife so long as they and the society were satisfied with the arrangement. D. had ever since been treated by C.S.J. and his wife as their daughter. On Mar. 9, 1945, C.S.J. and his wife legally adopted A., a child domiciled in British Columbia, under the adoption legislation then subsisting in British Columbia. The testator died on June 14, 1945. C.S.J. died in February, 1950. The testator’s widow died on Jan. 10, 1955. The question thus arose whether D. and A. were “issue” of C.S.J. so as to take under the provision in the testator’s will quoted above.

E

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Held: (i) D. was not entitled to take under the bequest to the issue of C.S.J. because the agreement of 1913 was an agreement to take a foster child and gave D. no right of inheritance under an English will.

(ii) A. could not take under the will for the following reasons:

(a) the relevant date at which to determine whether A. qualified to be treated as issue of C.S.J. was June 14, 1945, the date of the testator’s death, and,

I

(b) at that date an adopted child could not be “issue” of the adoptive parents for the purposes of taking beneficially under the will of a third person either (if the law of British Columbia applied) under the Adoption Act (R.S. 1936 c. 6) of British Columbia, or (if the law of England applied) under the British statute then in force, the Adoption of Children Act, 1926, s. 5 (2).

* For the line of cases described as the legitimation cases, see footnote, p. 554, post.

(iii) (*Obiter*) if the relevant date at which to determine whether A. qualified to be treated as issue of C.S.J. had been Jan. 10, 1955, the date of the death of the testator's widow, A. would have been entitled to take under the testator's will for the following reasons:

(a) C.S.J., his wife and A., being domiciled in British Columbia at the time of A.'s adoption, the law to be applied in ascertaining the effect of the adoption was that of British Columbia, and.

(b) under the Adoption Act (R.S. 1948 c. 7) of British Columbia as amended in 1953, an adopted person stood in regard to the kindred of his adoptive parent in the same position as if he had been born of that parent in lawful wedlock.

Re Luck ([1940] 3 All E.R. 307) followed; dictum of KAY, J., in *Re Andros* ((1883), 24 Ch.D. at p. 639) applied.

Re Wilson ([1954] 1 All E.R. 997) considered.

Re Wilby ([1956] 1 All E.R. 27) not followed.

[As to adoption and succession to property in relation to the conflict of laws, see 7 HALSBURY'S LAWS (3rd Edn.) 129, para. 232.

As to succession to movables being governed by the law of domicile at the time of death, see 7 HALSBURY'S LAWS (3rd Edn.) 53, para. 103, note (r); and for cases on the subject, see 11 DIGEST (Repl.) 393, 394, 505-511.

As to legitimation by extraneous law, see 3 HALSBURY'S LAWS (3rd Edn.) 94, para. 148.

For the Adoption of Children Act, 1926, s. 5, see 12 HALSBURY'S STATUTES (2nd Edn.) 965.]

Cases referred to:

(1) *Re Wilby*, [1956] 1 All E.R. 27; [1956] P. 174.

(2) *Re Wilson, Grace v. Lucas*, [1954] 1 All E.R. 997; [1954] Ch. 733; 3rd Digest Supp.

(3) *Re Donald, Baldwin v. Mooney*, [1929] 2 D.L.R. 244.

(4) *Re Andros, Andros v. Andros*, (1883), 24 Ch.D. 637; 52 L.J.Ch. 793; 49 L.T. 163; 3 Digest 372, 131.

(5) *Re Pearson, Equity Trustees Exors. & Agency Co., Ltd. v. Michaelson-Yeates*, [1946] V.L.R. 356; [1946] A.L.R. 387; 2nd Digest Supp.

(6) *Re Brophy, Yaldwyn v. Martin*, [1949] N.Z.L.R. 1006.

(7) *Re Luck, Walker v. Luck*, [1940] 3 All E.R. 307; 164 L.T. 172; sub nom. *Re Luck's Settlement Trusts*, [1940] Ch. 864; 109 L.J.Ch. 380; 2nd Digest Supp.

(8) *Re Wright's Trust*, (1856), 2 K. & J. 595; 25 L.J.Ch. 621; 27 L.T.O.S. 213; 20 J.P. 675; 69 E.R. 920; 3 Digest 372, 134.

(9) *Re Grove, Vaucher v. Treasury Solicitor*, (1888), 40 Ch.D. 216; 58 L.J.Ch. 57; 59 L.T. 587; 3 Digest 372, 136.

Adjourned Summons.

The trustee of the will of Chapman Frederick Dendy Marshall, deceased, issued an originating summons for the determination of the question whether the eighth defendant, Anthony Francis Stansfeld Jones and the ninth defendant, Deirdre Georgina Stansfeld Jones or either of them were or was entitled to the share of a specific legacy and of the ultimate residuary estate which Charles Stansfeld Jones would have taken had he survived the testator's widow. The facts appear in the judgment and are summarised in the headnote.

M. W. Cockle for the plaintiff, Barclays Bank, Ltd.

A. A. B. Fuller for the first seven defendants, persons interested under the testator's will in the specific legacy and the ultimate residue.

Frank Gahan, Q.C., and *J. G. Le Quesne* for the eighth and ninth defendants, Anthony Francis Stansfeld Jones and Deirdre Georgina Stansfeld Jones.

Cur. adv. vult.

A Feb. 6. **HARMAN, J.**, read the following judgment: Chapman Frederick Dendy Marshall, the testator, died domiciled in England on June 14, 1945, having by his last will, made on Apr. 12, 1945, bequeathed his not inconsiderable estate, valued for probate at some £40,000 and comprising a very large number of chattels, which the testator at any rate supposed to be of interest and value, to the plaintiff on trust for his wife during her life. On her death, the testator
B bequeathed a large number of chattel legacies and one pecuniary legacy and left his residue to certain of his cousins, who were also legatees in equal shares of a number of the chattels. In order to take, these cousins must survive the tenant for life. Such as did so are the first seven defendants to the summons. There were three others, two of whom predeceased the widow and left no issue: the third, Charles Stansfeld Jones, died in February, 1950. The will contains a
C clause of substitution in these terms:

"Provided always that should any of the above cousins be then dead leaving issue then living such issue shall take the share which his her or their parent would have taken had such parent survived me and my said wife and if more than one in equal shares."

D The last two defendants claim to be the children of Charles Stansfeld Jones and, therefore, entitled to share with the first seven defendants under the substitution clause.

Charles Stansfeld Jones appears to have emigrated to Canada some time before 1912. He settled in British Columbia with his wife and, according to the evidence before me, was undoubtedly domiciled in British Columbia in 1912. He had no issue born of his wife.

E The ninth defendant was born on July 18, 1912, in British Columbia and was then known as Georgina Dale. She was apparently in the care of the Children's Aid Society of Vancouver, British Columbia, when, by an agreement under the hands of its president and secretary dated Apr. 14, 1913, and expressed to be made between the society and Charles Stansfeld Jones and his wife, the society agreed to commit the care of the child to Mr. and Mrs. Stansfeld Jones who, on
F their part, agreed to receive her into their home and to act towards her at all times with kindness and consideration and to provide her with food, clothing, washing and necessaries. Mr. and Mrs. Stansfeld Jones further agreed to treat the child as a member of the family and to educate her. Clause 4 of the agreement is in these terms:

G "It is agreed that the said child shall remain in the care of the said parties of the second part so long as both parties hereto are satisfied with this arrangement, and that while with them the child may be visited by any person duly authorised to do so; also that should it be found necessary to return the said child the parties of the second part shall give two weeks' notice of their intention to the secretary, and pay the return fare."

H The ninth defendant has ever since lived as a member of the family and used the surname Stansfeld Jones. She has been treated and referred to as their daughter by Mr. and Mrs. Stansfeld Jones.

The eighth defendant was born on Aug. 25, 1934, at Vancouver, British Columbia, and went by the name of Anthony Yates: he was apparently under the legal guardianship of the before mentioned Children's Aid Society until
I adopted by Mr. and Mrs. Stansfeld Jones under an order of the Supreme Court of British Columbia made on Mar. 9, 1945. This was a joint adoption made on the petition of the adopters and the order is very similar to an English order for the same purpose.

The question is whether these defendants or either of them can take the share which Charles Stansfeld Jones would have taken in the testator's estate had he survived the widow, who died on Jan. 10, 1955. In order to take they must satisfy the court that they are properly described in the will as issue of Charles Stansfeld Jones.

In my opinion, so far as the ninth defendant is concerned, there can be no doubt that the answer must be in the negative. She may rank for some purposes as a natural child of her adoptive parents, but there was apparently no legislative adoption machinery existing in British Columbia at the date of the agreement I have recited, viz., in 1913, and no further step was ever taken to formalise the relationship. Now it is true that under some systems of law adoption is effected by agreement and I suppose that it is possible that this court would give effect to such an agreement. The document in the present case, however, is not, in my judgment, a true adoption agreement at all. It is a mere putting out of the child as a foster child and can be terminated by the adopting party at any time on two weeks' notice. Such an agreement cannot possibly give the object of it rights of inheritance under general words in an English will.

The eighth defendant's claim is different and depends on the order of the Supreme Court of British Columbia of Mar. 9, 1945, made shortly before the date of the will, whereby he was adopted as a son of Charles Stansfeld Jones and his wife.

The rival contentions may be thus summarised. For the eighth defendant it is said that adoption is a matter of status, that the date for ascertaining who are issue of Charles Stansfeld Jones is the date of the widow's death because the interest given does not vest till that date. Suppose, therefore, the master be directed to inquire in the usual way whether Charles Stansfeld Jones survived the widow and, if he did not, whether he left any issue who did, the master will inquire for issue of Charles Stansfeld Jones at the relevant date, viz., the widow's death, and will find that the eighth defendant is such issue because his father and he being domiciled in British Columbia, the English law will on a question of status follow the law of domicile rather than the law of testamentary disposition and that under the former, having regard to an alteration made in 1953 to the Adoption Act of British Columbia*, the eighth defendant ranks for all purposes of inheritance as if he had been born in legal wedlock to his adoptive parents.

The contentions of the first seven defendants may be stated as follows: (i) This is an English will of a domiciled Englishman and must be construed as such, the meaning given to the word issue being unaffected by the law of any foreign domicile. (ii) The relevant date is 1945 when the will came into operation. (iii) Even if the right date be 1955, the English law, namely, the Adoption Act, 1950, does not recognise a foreign adoption and the common law prevails. (iv) At common law issue means issue born in lawful wedlock to the parents and no adoptive child can properly be described as issue.

It may be convenient to consider the case first on the footing of the English law alone. Supposing both the adopter and the eighth defendant had been domiciled in England and an adoption order had been obtained from the English court in March, 1945, then the relevant Act would have been the Adoption of Children Act, 1926†, which by s. 5 (2) expressly provided that an adoption order should not confer on the adopted child any right under or interest in property as a child of the adopter and that the expression "issue" where used in any disposition whether made before or after the making of an adoption order should not unless the contrary intention appeared include an adopted child. It follows that at the date of the testator's death the eighth defendant would not have been recognised in England as issue of Charles Stansfeld Jones for purposes of inheritance.

Suppose now that the testator had been domiciled in British Columbia and was disposing of property there, then the British Columbian law would have

* Revised Statutes of British Columbia, 1948, c. 7, amended by the Adoption Act Amendment Act, 1953, of that Province.

† Section 5 (2) of this Act was subsequently repealed by the Adoption of Children Act, 1949, s. 10 (5); 42 HALSBURY'S STATUTES (1st Edn.) 615. This section (s. 10 of the Act of 1949) is now replaced by s. 14 of the Adoption Act, 1950.

A applied. Adoption in that province goes back to 1920*, and the Act in force when the adoption order of 1945 was made was that which appears in the Revised Statutes for 1936† which consolidated the law up to that date. I read s. 9 (c), s. 10 (1) and s. 12. Section 9 (c) provides:

B “The parent by adoption and the minor so adopted shall sustain towards each other the legal relation of parent and child, and shall respectively have all the rights and be subject to all the obligations and duties of that relation, including the right of inheritance and succession to real and personal property from each other, except as those rights are affected by the provisions of this Act.”

Section 10 (1) reads:

C “As to inheritance and succession to real and personal property, a person adopted in accordance with the provisions of this Act shall, subject to the provisions of sub-s. (2) of s. 3, stand in regard to the legal descendants, but to no other of the kindred of his parent by adoption, in the same position as if born to that parent in lawful wedlock.”

D Section 12 is:

“The word ‘child’ or ‘issue’, or its equivalent, in a will, grant, or settlement shall include an adopted child, unless the contrary plainly appears by the terms of the instrument.”

E It has not been suggested to me that the principles of construction applicable to the British Columbian statute are any different from those which apply in this country. Considering, therefore, the statute, it appears to me that rights of inheritance and succession are given only as between each other to persons adopted and their adopters. Further, the status of an adopted person is only equated to that of a natural born child so far as regards the legal descendants of his adoptive parent. If then the relevant date be 1945, the eighth defendant could not succeed under British Columbian law.

F Now, in my judgment, 1945, the testator’s death, and not 1955, the widow’s death, is the relevant date. It is true that interests in remainder after her death did not vest until that event. Nevertheless, it seems to me that the class of persons capable of taking must be capable of ascertainment when the will first comes into operation. The eighth defendant was not then such a person.

G This is enough to dispose of the summons, for on this analysis neither law enables the eighth defendant to succeed. As, however, the further question was elaborately argued before me, I think that I should say something about it.

I return, therefore, to the statutory provisions. The English law was altered by the Adoption Act, 1949, now consolidated and re-enacted in the Adoption Act, 1950. Section 13 (2) of the Act of 1950 reads as follows:

H “In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil), after the date of an adoption order—(a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person.”

I Section 13 (4) reads as follows:

“The references in this section to an adoption order include references to an order authorising an adoption made after the commencement of this Act under the Adoption of Children Act (Northern Ireland), 1929 . . .”

* Adoption Act, 1920, c. 2 of the Statutes of British Columbia, which received the Royal Assent on Apr. 17, 1920.

† R.S. 1936 c. 6. The title of the Act is the Adoption Act, no year being included in the title. This Act, as amended, became c. 7 of the Revised Statutes of British Columbia, 1948.

If, therefore, there had been an English adoption order and the relevant date be any date after the coming into force of the Act of 1949*, the eighth defendant would be entitled to share. A

It has, however, been pointed out by BARNARD, J., in the recent case of *Re Wilby* (1) ([1956] 1 All E.R. 27) that s. 13 (4) of the Act of 1950 by necessary implication is confined to adoption orders made in England or Northern Ireland and it follows that if English law alone is relevant the eighth defendant cannot inherit. B It also follows, in my opinion, from the judgment of VAISEY, J., in *Re Wilson, Grace v. Lucas* (2) ([1954] 1 All E.R. 997) that if Charles Stansfeld Jones, the adopter, or the eighth defendant were at the time of the adoption domiciled either in England or in some country other than the country of the adoption, the eighth defendant cannot inherit. That case leaves it open, however, to consider the question raised in the present case where both the adopter and the eighth defendant were domiciled in British Columbia at the time when the adoption was made. C

The British Columbian legislation was revised in 1948 but the 1936 position in this respect is left unaffected. In 1953, however, s. 10 (1) of the Adoption Act [R.S. 1948 c. 7], which in effect repeated s. 10 (1) of the Act of 1936 [R.S. 1936 c. 6], was amended by striking out the words "the legal descendants, but to no other of".† The effect of this is that an adopted person stands in regard to the kindred of his parent by adoption in the same position as if born of that parent in lawful wedlock. If, therefore, the British Columbian legislation is to be followed in England and the relevant date is the death of the widow, the eighth defendant would be entitled to succeed. D

Now this is an English will and therefore to be construed by English law. One view of this is that no other law need be looked at. "Issue" by English law means issue of the body unless there be some context to indicate a wider meaning. This was the view taken by the Supreme Court of Canada in *Re Donald, Baldwin v. Mooney* (3) ([1929] 2 D.L.R. 244). This case rejects the view that the legitimization cases‡ are applicable to cases of adoption. SMITH, J., says (*ibid.*, at p. 247): E

"It seems clear that there is no principle in the rule referred to [that is the legitimization cases] that can be applied to an adopted child. The limitation as to parents marrying in the country of domicile can have no application in such case, and it was not suggested that the adopted child must be born in the domicile of the party adopting. The bequest in this case is to 'the children' of Andrew Speedie, and there is nothing in the will or the circumstances to indicate that these words 'the children' were used otherwise than in their ordinary sense. The judgment in *Re Andros, Andros v. Andros* (4) ((1883), 24 Ch.D. at p. 638), as stated above, lays it down that English law (which is Saskatchewan law) 'requires that all who take under a gift to sons of a named father should be legitimate offspring'. Saskatchewan law therefore requires that the parties who take under this bequest to the children of Andrew Speedie shall be the legitimate offspring of Andrew Speedie, and the simple question is, does this adopted child come within that description? It seems perfectly clear that he does not, for the reason that he is not in fact the offspring of Andrew Speedie. It is not a question of status, but a question of whether this adopted child is a person such as mentioned and described in this bequest." F

* This was Jan. 1, 1950; see s. 16 (3) of the Adoption of Children Act, 1949; the Adoption Act, 1950, which, as stated above, consolidated the statute law, came into force on Oct. 1, 1950 (*ibid.*, s. 47 (3)).

† The text of s. 10 (1) of the Act of 1936 is at p. 553, letter C, ante. The amendment was made by the Adoption Act Amendment Act, 1953, s. 2.

‡ These are the line of cases beginning, in England, with *Re Wright's Trust* ((1856), 2 K. & J. 595) and continuing with *Re Goodman's Trusts* ((1881), 17 Ch.D. 266) and *Re Grove, Vaucher v. Treasury Solicitor* ((1888), 40 Ch.D. 216); see, generally, as regards legitimization by extraneous law 3 HALSBURY'S LAWS (3rd Edn.) 94. I

A This case does not seem to have been cited to VAISEY, J., in *Re Wilson* (2), but he nevertheless decided in the same way. He held, in deciding that the adopted child was not entitled to succeed under the intestacy as the adopter's child: (i) that the question whether an adopted child can succeed to property as the child of an adopter dying intestate is to be determined by the law governing the succession, not by that governing the adoption; (ii) that an adoption effected under a foreign jurisdiction, in any event where no adopter was domiciled there at the date of the adoption, cannot give to the adopted person rights under the English law of intestacy. He left open, as I have observed before, the circumstances which exist here. He says ([1954] 1 All E.R. at p. 1001):

C "In my judgment, if the testator had been domiciled in Quebec at the time that the infant defendant was adopted, the case of the latter would have been different and very much stronger."

The Canadian case to which I have referred has not received universal approval. For instance, GAVAN DUFFY, J., in *Re Pearson, Equity Trustees Exors. & Agency Co., Ltd. v. Michaelson-Yeates* (5) ([1946] V.L.R. 356 at p. 361) expresses the opposite view. Similarly in *Re Brophy, Yaldwyn v. Martin* (6) ([1949] N.Z.L.R. 1006) the judge, after citing *Re Donald* (3) expressed the opposite view. These no doubt are persuasive, but for an English lawyer the authoritative case is *Re Luck, Walker v. Luck* (7) ([1940] 3 All E.R. 307) in the Court of Appeal where the judgment of the majority (SIR WILFRID GREENE, M.R., and LUXMOORE, L.J.) definitely states that the principle of the legitimation cases is applicable to cases of adoption. It is said in the judgment (*ibid.*, at p. 320):

E "In our judgment, the principles laid down in the authorities which we have cited [about legitimation per subsequens matrimonium] are not limited to the one case of legitimation per subsequens matrimonium. It is natural that references to that form of legitimation should have found a place in the statements of the law, since that was the particular form which was relevant in those cases, but the language used is, we think, of wider import. In particular, SIR WILLIAM PAGE-WOOD, V.-C., in the passages from *Re Wright's Trust* (8) ((1856), 2 K. & J. 595) which we have cited, lays down the principle in quite general terms which clearly cover the present case. He regards the law of the father's domicile, as 'fastening on' the child at its birth, and as determining the nature of their relationship. If, by the law of that domicile, the relationship is immutably that of putative father and illegitimate child, nothing thereafter can change it. If, on the other hand, by the law of that domicile, such relationship is not immutable, but is capable of becoming that of father and legitimate child, that capacity, when duly fulfilled, is to be recognized by the courts of this country. There appear to us to be sound reasons in principle why this should be the law."

H No doubt, as VAISEY, J., said in *Re Wilson* (2), the analogy must be used with caution*. I also agree with him that the law applicable is the law of the succession, but that does not, in my judgment, preclude reference to the law of the domicile because the law of the succession may import it. This is pointed out by KAY, J., in *Re Andros* (4) in these words (24 Ch.D. at p. 639):

I "A bequest in an English will to the children of A. means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children. That certainly is not a question of construction of the will. It is a question of status. By what law is that status to be determined."

The learned judge came to the conclusion that the law of the domicile controlled this matter. The Court of Appeal in *Re Luck* (7) approved of this and of *Re*

* See [1954] 1 All E. R. at p. 1000, letter H.

Grove, Vaucher v. Treasury Solicitor (9) ((1888), 40 Ch.D. 216) and *Re Wright's Trust* (8). The court also approved of PROFESSOR DICEY's statement in the third edition of his book, *CONFLICT OF LAWS*, and disapproved of the later editor's statement (PROFESSOR KEITH).

If, therefore, I had been of opinion that 1955 was the relevant date, I should have held the eighth defendant entitled to share with the first seven because he and his adoptive parent were both domiciled in British Columbia when he was adopted. I am aware that this is not consistent with the view of BARNARD, J., in *Re Wilby* (1). He was impressed with the difficulty for an English judge of estimating the effect of foreign systems of law. This is no doubt formidable, but is a task often faced. It is in English courts a question of fact to be ascertained on proper evidence of skilled persons. It does not prevent the law of the domicile prevailing in cases of legitimation by other means, and should not do so, in my view, in cases of adoption which is a kind of legitimation. In any event, *Re Luck* (7), which was apparently not cited to BARNARD, J., points in this direction, and I think I ought to follow it.

In the present case, however, taking, as I do, the year 1945 to be the relevant date, I am of opinion that neither the English nor the British Columbian system would entitle the eighth defendant to succeed, and I therefore feel bound to hold that he cannot do so.

Declaration accordingly.

Solicitors: *McMillan & Mott* (for the plaintiff); *Candler, Stannard & Co.* (for the first seven defendants); *Knapp-Fisher, Wartnaby & Blunt* (for the eighth and ninth defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

MCCARTHY v. LEWIS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Lynskey, JJ.), January 15, 23, 1957.]

Coal Mining—Statutory regulation of mines—Ventilation—Deliberate stopping of fan for repair—Liability of manager—Coal Mines Act, 1911 (1 & 2 Geo. 5 c. 50), s. 29 (1), s. 75.

On June 26, 1955, the respondent, who was the under-manager of a colliery, was appointed to perform the duties of the manager during the manager's absence on an instructional course. On Saturday, July 23, the respondent, who was still so acting as manager, ordered the fan by which the mine was ventilated to be stopped at 1 p.m. for maintenance. That morning he posted a notice of the stoppage in his office at the pit bottom, where, however, it would only be seen by the deputies. The fan was re-started at 7 p.m. on July 24. There had been no previous trouble from noxious gas in the mine, but during the stoppage of the fan gas accumulated in No. 9 district. On the morning of July 25, the respondent assigned to N., a deputy, No. 9 district and detailed six men to do work in that district. The deputy did not fulfil his statutory duty to inspect the district before work began. Two of the men were overcome by the gas in No. 9 district. The respondent was charged with an offence against s. 75* of the Coal Mines Act, 1911, for contravention of s. 29 (1)† of the Act, which required an adequate amount of ventilation to be produced in the mine to render noxious gases harmless. The respondent contended, among other conten-

* Section 75 is printed at p. 559, letter D, post.

† Section 29 (1) of the Coal Mines Act, 1911, provided: "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, . . . and workings of the mine shall be in a fit state for working and passing therein . . ."

A tions, that he had taken all reasonable means, within the exempting words of s. 75, to prevent the contravention.

Held: the duty to provide adequate ventilation imposed by s. 29 (1) of the Act of 1911 was a duty for the performance of which the respondent as manager was primarily, not vicariously, liable and for non-fulfilment of which the exempting words of s. 75 afforded him no defence; the case would be

B remitted, therefore, to the justices with a direction to convict.

Dicta in Davies v. May ([1937] 2 All E.R. at pp. 584, 586, 587) applied. Appeal allowed.

[**Editorial Note.** The Coal Mines Act, 1911, was repealed by s. 189 of and Sch. 5 to the Mines and Quarries Act, 1954, which was brought fully into force on Jan. 1, 1957, by the Mines and Quarries Act, 1954 (Commencement) Order, 1956 (S.I. 1956 No. 1530). Section 29 of the Act of 1911 did not state on whom the duty of securing ventilation was imposed, but the corresponding s. 55 of the Act of 1954 expressly imposes the duty on the manager, thereby following the decision in *Atkinson v. Morgan* ([1915] 3 K.B. 23) which was accepted in the present case. Duties are also imposed generally on the manager of a mine by s. 2 (2) of the Act of 1954. The exempting words of s. 75 of the Act of 1911, which were considered in the present case, are superseded by s. 156 of the Act of 1954, which expressly confines the defence that it affords to contraventions for which the manager would otherwise be vicariously responsible, so that the construction placed on the exempting words of s. 75 by judicial decision in this respect is statutorily confirmed; but the wording of the exemption is altered.

E For s. 29 (1), s. 75, s. 101, and s. 102 (3) of the Coal Mines Act, 1911, see 16 HALSBURY'S STATUTES (2nd Edn.) 119, 144, 160, 161.

For the Mines and Quarries Act, 1954, s. 2 (2), s. 55, s. 156, see 34 HALSBURY'S STATUTES (2nd Edn.) 522, 559, 626.]

Cases referred to:

F (1) *Atkinson v. Morgan*, [1915] 3 K.B. 23; 84 L.J.K.B. 1431; 113 L.T. 488; 79 J.P. 378; 34 Digest 742, 1176.

(2) *Davies v. May*, [1937] 2 All E.R. 582; [1937] 2 K.B. 260; 106 L.J.K.B. 526; 157 L.T. 143; 101 J.P. 250; Digest Supp.

Case Stated.

G This was a Case Stated by justices for the West Riding of Yorkshire in respect of their adjudication as a magistrates' court sitting at Castleford on Feb. 8, 1956.

On Jan. 6, 1956, an information was preferred by the appellant, Maelor McCarthy, a district inspector of mines, against the respondent, Myles Lewis, that he on July 25, 1955, was performing the duties of manager of Ledston Luck Colliery in the West Riding of the County of York, at which there was a non-compliance with s. 29 (1) of the Coal Mines Act, 1911, in that an adequate amount of ventilation was not constantly produced to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, etc., of the mine were in a fit state for working and passing therein, contrary to the said section and to s. 75 and s. 101 of the Act of 1911.

I The following facts were found. The respondent was appointed under-manager of the colliery on Apr. 1, 1952, and owing to the absence of the manager on an instructional course from June 26 to Aug. 6, 1955, he was appointed to perform the duties of the manager for that period in accordance with s. 3 of the Act of 1911. The ventilation of the colliery was carried out by means of one mechanical fan designed to ventilate the whole mine. From time to time this mechanical fan was stopped for the purpose of servicing it. Before leaving, the manager of the colliery had instructed the respondent that the fan should be stopped for maintenance work during the first week-end of the annual holiday period, and, accordingly, the respondent gave instructions for it to be stopped at

1 p.m. on July 23. That morning the respondent posted a notice in his office at the pit bottom that the fan would be stopped during the week-end for repair. The notice could be seen by the deputies, but not by the workmen who did not go into the office. The fan was re-started at 7 p.m. on the evening of Sunday, July 24, and during the period of stoppage there was no mechanical ventilation in the colliery. An accumulation of noxious gases took place at the coal face of a district in the colliery known as No. 9's district, and this accumulation was still present when the colliery re-started work on the morning of July 25 and, in fact, was not dispersed for some three days thereafter. Prior to July 25, 1955, there had been no trouble from gas in the colliery, but on that date the amount of ventilation in No. 9's district was not adequate to dilute and render harmless the noxious gases in the district so that at the material time the district was not in a fit state for working or passing therein. On the morning of July 25 the respondent went down the pit together with two deputies, one of whom was Mr. Needham, and certain workmen. At the office at the pit bottom the respondent detailed two sets of three workmen each under two charge hands to do back ripping in No. 9's district. Mr. Needham was the deputy in charge of those six men and of the district. The six men proceeded to walk to a point known as No. 9's Loadergate and it was their duty not to pass beyond this meeting station or enter the district until it had been examined by the deputy. The deputy stayed behind at the pit bottom for a short time and then followed the men and found them at the Loadergate where stripping off ready for work had begun and it was found that some necessary tools were not available. Two of the workmen went along the conveyor towards the coal face to obtain a tool which was thought to be there. They were overcome by noxious gases and when they were brought out one of them died as a result of the gas. The other subsequently recovered. The justices also found that at no previous time had the fan been stopped for as long as thirty hours, and that the stoppage on this occasion was not due to an accident, within s. 29 (1) (b) of the Act of 1911, but was a deliberate stoppage so that maintenance work could be carried out on the fan. The justices also found that the respondent had assigned Mr. Needham as deputy for this district and relied on him to fulfil his statutory duties under s. 14 and s. 64 of the Act of 1911, and, in particular, to inspect No. 9's district before the commencement of work therein. The respondent did not take any other step to find out if there was any concentration of noxious gases in the district. Mr. Needham did not make an inspection as he ought to have done. The justices accepted the evidence of the manager of the colliery that, had he been on duty, he would have relied on the deputy's inspection, and they also accepted the evidence of the area production manager of the National Coal Board that the respondent's conduct in relying on the deputy's pre-shift inspection for gas after the stoppage of the fan would meet with his approval. The justices found that the respondent had taken all reasonable means to prevent the contravention of or non-compliance with s. 29 (1) of the Act of 1911, within the meaning of s. 75 of the Act, and, accordingly, dismissed the information.

H. Edmund Davies, Q.C., and Rodger Winn for the appellant.

G. De P. Veale, Q.C., and R. Withers Payne for the respondent.

Cur. adv. vult.

Jan. 23. LORD GODDARD, C.J., read the judgment of the court in which, after stating the offences alleged, the facts found by the justices, and their acceptance of the evidence of the manager of the colliery and of the area production manager of the National Coal Board, HIS LORDSHIP continued: We understand by these findings that the two witnesses in question considered that, as the respondent had not received any report from the deputy as to the presence of gas, he was entitled to assume that the deputy had inspected the district and had not found any gas. The justices then found that the respondent had taken all

A reasonable means to prevent the contravention of or non-compliance with s. 29 (1) of the Coal Mines Act, 1911, within the meaning of s. 75 of the Act, and accordingly dismissed the information.

Section 2 of the Coal Mines Act, 1911*, provides that every mine shall be under one manager who shall be responsible for the control, management and direction of the mine, and the owner or agent of every mine shall appoint himself or someone else to be the manager of such mine. By s. 3 (2)† it is provided that in the absence of the manager the duties must be performed by the under-manager if he is properly qualified, and there was no question but that the respondent was so qualified. [HIS LORDSHIP read s. 29 (1)‡ of the Act of 1911 which dealt with the standard of ventilation and continued:] Although s. 29 does not say, in terms, on whom the duty of seeing to the adequate ventilation is imposed, it was decided in *Atkinson v. Morgan* (1) ([1915] 3 K.B. 23) that the duty of providing sufficient ventilation was imposed on the manager, and that, if it proved to be insufficient, it was no defence for the manager to say that he had appointed some other competent person to attend to it. As in this case there was an accumulation of gas due to insufficient ventilation, it would appear clear that the respondent did commit a breach of s. 29 (1) of the Act of 1911.

We now turn to s. 75 of the Act of 1911§ which provides that:

“Any person who contravenes or does not comply with any of the provisions of this Part of this Act [viz., s. 29 to s. 75] . . . shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act . . . by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance.”

The result of *Davies v. May* (2) ([1937] 2 All E.R. 582) is to confirm the opinion which had been tentatively expressed by AVORY, J., in *Atkinson v. Morgan* (1) that that part of s. 75 which begins with the words “and, in the event of any contravention” is dealing with offences for which the owner, agent or manager may be vicariously liable, while the first part of the section deals with the primary liability of a person who contravenes any of the provisions of the Act||. It follows that, as the duty of seeing that there was adequate ventilation constantly produced lay on the respondent, he was primarily, and not vicariously, liable for the failure. In our opinion, therefore, the second part of s. 75 has no application. This is not a case where the respondent is vicariously liable for somebody else's failure. He himself has contravened the Act by failing in the duty which was imposed on him in respect of the continuous ventilation of the mine.

It is now necessary to consider s. 101 and s. 102¶ of the Act of 1911. Section 101 is a penalty section. Section 101 (1) provides:

* The corresponding provision is now contained in s. 2 of the Mines and Quarries Act, 1954.

† The provision in regard to supervision by the under-manager in the absence of the manager is now contained in s. 8 (1) of the Act of 1954.

‡ Section 29 of the Act of 1911 is replaced, with amendments, by s. 55 of the Act of 1954.

§ Section 75 of the Act of 1911 is replaced, with amendments, by s. 152 and 156 of the Act of 1954. Section 75 was amended, in respects not material to the present case, by the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O. 1947 No. 973).

|| See dicta of LORD HEWART, C.J., HUMPHREYS, J., and SINGLETON, J. ([1937] 2 All E.R. at pp. 584, 586, 587).

¶ Sub-sections (1) and (2) of s. 101 of the Act of 1911 are reproduced, with amendments, in s. 152 of the Act of 1954, and the penalties are now set out in s. 155 of the Act of 1954. Section 102 (3) of the Act of 1911 is reproduced, with amendments, in s. 157 of the Act of 1954.

“ Every person employed in or about a mine, other than an owner, agent, or manager, who is guilty of any act or omission which in the case of an owner, agent, or manager would be an offence against this Act, shall be deemed to be guilty of an offence against this Act.”

Section 101 (2) provides:

“ If a mine is not managed in conformity with this Act, the owner, agent, and manager thereof shall each be deemed to be guilty of an offence against this Act.”

The effect of these two sub-sections would seem to be that, if the manager is guilty of an offence against the Act, so also the owner or agent is guilty, and s. 101 (3) provides for the penalty which may be imposed for the offences. Section 102 (3), however, provides:

“ Nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision.”

In our opinion if the respondent had sought to excuse himself for the contravention, it was this sub-section, and not s. 75, which would be material for this purpose. Section 102 (3) does not seem to have been considered by the justices, nor is there any indication that the respondent relied on it. It would be for him to set it up if he wished to take advantage of it. We do not, however, consider that it would be right to remit the case to the justices for them to consider whether the respondent could escape liability under s. 102 (3), first, because it would have been for him to set it up at the hearing and he did not, and, secondly, because it is quite clear that, on the facts found by the justices, by no possibility could it be said that the contravention was due to causes over which the respondent had no control and against the happening of which it was impracticable for him to make provision. We have already pointed out that s. 75 of the Act of 1911 affords no defence to the respondent for a contravention for which he was directly, and not vicariously, liable, and accordingly the Case must go back to the justices with an intimation that an offence was committed and there must be a conviction.

Appeal allowed.

Solicitors: *Treasury Solicitor* (for the appellant); *Divisional Legal Adviser, National Coal Board* (for the respondent).

[Reported by MARGARET D. ABEL, *Barrister-at-Law.*]

A FIRESTONE TYRE AND RUBBER CO., LTD. (as agents for Firestone Tire and Rubber Co. of Akron in the United States of America) v. LEWELLIN (INSPECTOR OF TAXES).

B [HOUSE OF LORDS (Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Cohen), December 13, 17, 18, 1956, February 14, 1957.]

Income Tax—Foreign company—Subsidiary in United Kingdom—Contracts with foreign distributors—Whether agents of foreign company—Whether foreign company carrying on trade within United Kingdom—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, para. 1, All Schedules Rules, r. 5.

C The appellants, a company registered in the United Kingdom, were a subsidiary of an American company making and selling branded tyres, and having a world-wide organisation. Under agreements with distributors in Europe, the American company granted the distributors the exclusive right to sell the branded tyres in their areas in return for an undertaking not to sell or distribute other kindred products and to keep a sufficient stock of the branded tyres. The American company fixed prices by lists and undertook to deliver against ninety-day sight drafts. By a separate agreement between the American company and the appellants, who manufactured branded tyres for the American company, the appellants were to fulfil orders for the European market obtained by the American company, to forward the goods ordered to the purchaser and to give such instructions for payment of the price of tyres supplied as the American company should request. In consideration of these services the American company undertook to pay to the appellants the cost price, as defined, of the tyres supplied plus five per cent. In practice, however, the appellants fulfilled orders received direct from the distributors, provided they appeared on the lists of authorised distributors as supplied by the American company, normally without any further intervention by the American company. The appellants received orders by post direct from the distributors and executed them by delivering the tyres f.a.s. vessels at an English port, and payment in each case was effected in the United Kingdom. The American company was notified of the details of each such order effected. The appellants were assessed to income tax as agents for the American company in respect of agency profit for each of the five years of assessment 1940-41 to 1944-45.

F **G** **Held:** the appellants were properly assessed to income tax as agents for the American company since the American company was exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom and was exercising the trade through the appellants as its agents.

H Decision of the COURT OF APPEAL ([1956] 1 All E.R. 693) affirmed.

[As to taxation of non-residents in the United Kingdom, see 17 HALSBURY'S LAWS (2nd Edn.) 172-174, paras. 357-362; and for cases on the subject, see 28 DIGEST 32-37, 166-198.]

I For the Income Tax Act, 1918, Sch. D, para. 1, and the All Schedules Rules, r. 5, see 12 HALSBURY'S STATUTES (2nd Edn.) 151, 183; and for the replacing provisions of the Income Tax Act, 1952, s. 122, s. 369, see 31 HALSBURY'S STATUTES (2nd Edn.) 112, 354.]

Cases referred to:

- (1) *Weiss, Biheller & Brooks, Ltd. v. Farmer*, [1923] 1 K.B. 226; 92 L.J.K.B. 179; 128 L.T. 471; 8 Tax Cas. 381; 28 Digest 35, 180.
- (2) *Greenwood v. Smidth (F. L.) & Co.*, [1922] 1 A.C. 417; 91 L.J.K.B. 349; 127 L.T. 68; sub nom. *Smidth (F. L.) & Co. v. Greenwood*, 8 Tax Cas. 193; 28 Digest 36, 186.

Appeal.

Appeal by the taxpayers, Firestone Tyre and Rubber Co., Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., JENKINS and BIRKETT, L.JJ.), dated Feb. 13, 1956, and reported [1956] 1 All E.R. 693, affirming an order of HARMAN, J., dated Oct. 20, 1955, whereby he dismissed an appeal by the appellants by Case Stated from a decision of the Special Commissioners of Income Tax.

The appellants (hereinafter called "Brentford") carried on the business of tyre and rubber manufacturers at Brentford, Middlesex. They appealed to the Special Commissioners of Income Tax against two alternative series of income tax assessments made on them under Sch. D to the Income Tax Act, 1918, for 1940-41 to 1944-45 inclusive. The first series of assessments was made under Case I of Sch. D in respect of profits as tyre manufacturers in the sum of £5,000 in the years 1940-41 to 1943-44 respectively, and in the sum of £10,000 in the year 1944-45. The second series of assessments was made on them as agents for the Firestone Tyre and Rubber Co. of Akron, Ohio, in the United States of America, who were incorporated in the State of Maine but whose principal place of business was in Akron in the State of Ohio (hereinafter called "Akron") in respect of agency profits in the sum of £10,000 in each year respectively. These assessments were in addition to the assessments made on Brentford in respect of their own business of tyre manufacturers. The facts admitted or proved were as follows.

Akron was the head of a world-wide organisation consisting of a large group of corporations operating in America and in various parts of the world. Some of its associated and subsidiary corporations manufactured and sold tyres in the countries in which they were registered and others sold, in the countries in which they were registered, tyres which had been manufactured in America or by subsidiary corporations in other countries. Brentford was an English company registered in 1922 with an issued capital of £20,000 in £1 ordinary shares. This capital was increased to £140,000 in 1938. All the shares in Brentford were owned by Akron. The board of directors of Brentford consisted of individuals resident in the United Kingdom with the exception of Mr. Harvey Firestone, the chairman of the board of directors of Akron, who was a director of Brentford and occasionally attended meetings of its directors. Following its incorporation, Brentford's business consisted in the selling of Firestone tyres in the United Kingdom which had been manufactured in America. In 1928 a factory for the manufacture of tyres was built at Brentford, and from 1929 onwards Brentford's business consisted by agreement with Akron of the manufacture and sale of tyres under the name of Firestone tyres in the United Kingdom. Brentford had been throughout duly assessed to income tax under Case I, Sch. D, in respect of this business. The trade mark in these tyres was owned by Akron and Brentford was, therefore, unable to sell them inside or outside the United Kingdom without the consent of Akron.

Firestone tyres, which had been manufactured by Brentford, were exported to customers outside the United Kingdom by agreement with Akron in accordance with the following arrangements. They were exported only to persons approved by Akron as "Distributors" of Firestone tyres, who were required to sign an agreement with Akron. Under such an agreement dated May 20, 1935, Akron granted to a Swedish distributor, Aktiebolaget A. Wiklunds Maskin & Velocipedfabrik, the exclusive right to sell Firestone tyres and accessories in Sweden and the latter undertook to buy, sell and distribute such Firestone branded products exclusively, to keep on hand reasonable stocks of these products and to use its best efforts to sell these products in Sweden but not elsewhere. The distributor was entitled to buy Firestone products at prices set out in lists attached to the agreement, subject to Akron's right to change the prices without notice. Akron undertook to make deliveries f.a.s. vessel, and it

- A was agreed that delivery to a carrier should constitute delivery to the distributor. The terms of Akron were ninety days sight draft documents against acceptance. Akron agreed that, in the event of its reducing its billing prices, it would credit the difference between the old and the new prices not only on goods in transit to but also on stocks held by the distributor. The distributor agreed that, in the event of Akron increasing prices, the former would accept a debit
- B for the difference in prices not only on goods in transit to but also on stocks held by it. It was understood and agreed between the parties to the agreement that it was not to be construed as constituting the distributor as an agent of Akron for any purpose whatever. The contract between the parties set out in the agreement was to become effective only when executed by the duly authorised representative of Akron at Akron in Ohio, it being agreed that the agreement
- C was to be construed under the laws of the State of Ohio in the United States of America. It was also agreed that the terms of the agreement could not be altered, waived or modified, except by written indorsement thereon executed on behalf of Akron at Akron in Ohio. It was agreed between the parties to the appeal that this document could be taken as typical of the agreements entered into between Akron and its distributors outside the United Kingdom.
- D These agreements are hereafter referred to as "master agreements". The foreign distributors who had entered into a master agreement with Akron were given lists of the corporations which manufactured Firestone products and were empowered to order these products in accordance with the terms of the master agreement from whichever manufacturing corporation they preferred. Brentford was included in the lists of corporations furnished by Akron to its distributors
- E outside the United Kingdom.

Brentford was authorised by Akron to supply Firestone products outside the United Kingdom to distributors who had signed a master agreement with Akron, and was supplied by the latter with lists of such distributors. Brentford did not seek orders from the distributors of Akron or employ travellers outside the United Kingdom but fulfilled by manufacture or from its existing stocks

F orders made on it by the distributors in accordance with the terms and conditions laid down by Akron in the master agreements.

- From 1929 to 1930 Brentford charged Akron the factory cost of the goods dispatched to Akron's distributors, and from 1930 to 1934 the factory cost of such goods plus a share of certain of Brentford's expenses. Following negotiations between the two corporations an agreement was drawn up on Feb. 8,
- G 1936, regulating the fulfilment by Brentford on behalf of Akron of orders obtained in Europe and elsewhere by Akron, whereby Brentford undertook to use its best endeavours to fulfil either by manufacture or from its existing stock all orders obtained by Akron in Europe or elsewhere as and when requested to do so by Akron. Brentford also agreed on receipt of such an order to forward the goods ordered to the purchaser and to give such instructions for payment
- H of the purchase price as should be requested by Akron. In practice, however, Brentford continued to fulfil orders received by Brentford direct from the distributors, provided they appeared on the lists of authorised distributors supplied by Akron to Brentford as above-mentioned, without normally any further intervention by Akron. Akron, in consideration of these services, undertook to pay to Brentford a sum equal to the total cost price (as therein
- I defined) of the goods supplied plus five per cent. thereof. The agreement was to continue for a period of five years and thereafter until determined by either party. It had never been determined.

Until the outbreak of war in 1939, Brentford continued to supply goods to authorised distributors of Akron as ordered by them, to collect the moneys for these goods and to pay these into Akron's bank account in London. Transfers from this account to the United States of America were regularly made. Following the outbreak of the war money could not be remitted from the United Kingdom

to the United States of America. Up to Nov. 30, 1939, all the moneys collected by Brentford from Akron's distributors were paid into a separate bank account and on that date the balance in this account was transferred to Brentford's own bank account. In its own books Brentford credited Akron with the amount so transferred. From Dec. 1, 1939, onwards it was agreed between Akron and Brentford that the proceeds of sales to Akron's distributors should be placed to the credit of a new banking account marked "Firestone Tyre & Rubber Company Ltd. Export Proceeds account". At the end of each month the balance of that account was transferred to Brentford's own current account. The sums so transferred were pursuant to the agreement treated in Brentford's books as sums lent to or deposited with it by Akron. From September, 1939, to April, 1942, the export of tyres from the United Kingdom was prohibited except by licence of the Board of Trade. Orders from Akron's distributors abroad could, therefore, be fulfilled by Brentford only if it was able to obtain a licence from the Board of Trade. In April, 1942, the Ministry of Supply set up a Tyre Control Section. By virtue of S.R. & O. 1942 No. 596, it was provided that, with certain exceptions, no person other than an authorised tyre depot should acquire or dispose of, or agree or offer to acquire or dispose of, any tyre. The statutory order gave power to deal in tyres under the authority of, and in accordance with, a licence granted, or a special or general direction issued, by the Ministry of Supply. The effect of the statutory order was to cancel all existing export licences and, until normal export shipments were resumed for passenger car tyres in 1947 and for larger tyres in 1948, all exports were made in accordance with allocations made by the Tyre Control, and all goods which were sent abroad by Brentford were sent under and by the authority of a licence issued by the Tyre Control Section of the Ministry of Supply. The tyres so exported by Brentford were sent either in response to an order originating with an Akron distributor and authorised by Tyre Control or else in pursuance of a direction by the Ministry of Supply to send tyres to a certain country. In the latter event the tyres were sent to the appropriate Akron distributor in that country if there was one. The only exception to this practice was that sales of tyres amounting to some £12,000 and £37,000 respectively were made to the Government of New Zealand and to the Free French government in London. These tyres were exported by the purchasers themselves. The total sales abroad in the period with which this case is concerned was £782,000. Apart from the two items referred to above, amounting to £49,000, the whole of these sales were made to distributors of Akron. They were treated by Brentford as the fulfilment of orders obtained by Akron in accordance with the agreement of Feb. 8, 1936, and the proceeds thereof less the cost of the goods plus five per cent. of that cost were accredited to Akron in the books of Brentford. The amounts retained by Brentford, namely, the cost of the goods plus five per cent. of that cost, had already been brought into account in the assessments made on it in respect of its own business. Throughout the period concerned, sales were invoiced to the appropriate distributor in the name of Brentford and a sight bill of exchange on the distributor for payment in London was drawn in the name of Brentford. Brentford arranged for the shipment to the distributor of the tyres, etc., ordered by them from Brentford. In respect of each transaction Brentford furnished to Akron copies of the export invoice, the export manifest, the sight draft and the bill of lading. Akron was also notified by the bank when Brentford received payment for the goods. These documents and this information were sent for the purpose of enabling Akron to prepare their own sales ledgers. No sales ledgers for accounts of distributors outside the United Kingdom were kept by Brentford. In the case of the relatively small sales to the New Zealand government and the Free French government, although the sales were made to agents in this country, Brentford regarded them as sales to persons outside the United Kingdom and as, therefore, coming

A within the scope of the agreement of Feb. 8, 1936. The proceeds of these sales less the factory cost plus five per cent. thereof were, in the books of Brentford, credited to Akron and not to the sales account of Brentford itself.

After the cessation of Tyre Control Akron and Brentford reverted to their pre-war practice, the only difference being that the proceeds of all sales to foreign distributors had to remain in London and could not be remitted to Akron in America.

B The questions for determination were (a) whether Brentford itself was carrying on a trade on its own behalf of selling tyres to persons outside the United Kingdom; and, if not, (b) whether Akron was exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom; and, if so, (c) whether that trade was carried on by Akron through the agency of Brentford.

C The Special Commissioners answered question (a) in the negative, and questions (b) and (c) in the affirmative. The Crown did not seek to contest their decision on question (a).

G. G. Honeyman, Q.C., and D. Wilson for the appellants.

Sir Frank Soskice, Q.C., and Sir Reginald Hills for the Crown.

D The House took time for consideration.

Feb. 14. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, in this case I agree with the conclusions successively reached by the Special Commissioners, HARMAN, J., and the Court of Appeal, and I can state my reasons very briefly.

E Three companies were concerned in the transactions giving rise to this appeal. They are—(i) the Firestone Tyre and Rubber Co., Ltd., which carries on the business of tyre and rubber manufacturers at Great West Road, Brentford, Middlesex; (ii) the Firestone Tire and Rubber Co. of Akron, Ohio, in the United States of America; (iii) a company named Aktiebolaget A. Wiklunds Maskin & Velocipedfabrik, carrying on business (inter alia) as a distributor of tyres at Stockholm, Sweden. These three companies have been referred to in the courts below as “Brentford”, “Akron” and “Sweden” and I shall adopt the same convenient course.

F The events giving rise to this appeal are fully set out in the Case Stated and are summarised in the judgment of the Master of the Rolls. I gratefully accept his summary* and shall not repeat it. The questions for determination before the Special Commissioners were—(a) whether Brentford itself was carrying on a trade on its own behalf of selling tyres to persons outside the United Kingdom; and, if not, (b) whether Akron was exercising within the United Kingdom a trade of selling tyres to persons outside the United Kingdom; and, if so, (c) whether that trade was carried on by Akron through the agency of Brentford. The Special Commissioners answered question (a) in the negative and the Crown has not sought to contest this decision, so your Lordships are only concerned with questions (b) and (c).

The relevant provisions of the Income Tax Act, 1918, are as follows:—The Income Tax Act, 1918, Sch. D, para. (1), provides:

I “Tax under this Schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (iii) to any person, whether a British subject or not, although not resident in the United Kingdom . . . from any trade, profession, employment, or vocation exercised within the United Kingdom”;

General Rule 5 provides:

“A person not resident in the United Kingdom, whether a British subject or not, shall be assessable and chargeable in the name of . . . any factor,

* See [1956] 1 All E.R. at p. 695.

agent, receiver, branch, or manager whether such factor, agent, receiver, branch, or manager has the receipt of the profits or gains or not, in like manner and to the like amount as such non-resident person would be assessed and charged if he were resident in the United Kingdom and in the actual receipt of such profits or gains."

General Rule 10 provides:

"Nothing in these rules shall render a non-resident person chargeable in the name of a broker or general commission agent, or in the name of an agent not being an authorised person carrying on the regular agency of the non-resident person or a person chargeable as if he were an agent in pursuance of these rules, in respect of profits or gains arising from sales or transactions carried out through such a broker or agent."

It is clear that if Akron was carrying on the trade in question through the agency of Brentford, the agency was a "regular" one within the meaning of General Rule 10, and counsel for the appellants did not seek to rely on that rule.

The first stage in considering questions (b) and (c) is to determine whether the trade in selling tyres to persons outside the United Kingdom, with which this appeal is concerned, was exercised within the United Kingdom. My Lords, I cannot doubt that it was so exercised, in view of the facts as to the course of dealing set out in the Case Stated and in particular in para. 6 to para. 12* inclusive. JENKINS, L.J., states the result of this course of dealing, in language which I entirely accept, as follows ([1956] 1 All E.R. at p. 703):

"An order placed by a distributor direct with Brentford as one of the listed manufacturers of Firestone tyres could at most only create a contract between the distributor and Akron to the effect that the distributor would purchase, and Akron would cause the manufacturer to sell to the distributor, the tyres ordered on the terms and conditions of the distributor agreement. There was no privity of contract between distributor and manufacturer quoad the distributor agreement, and it is, I think, quite impossible to hold that the mere placing of an order with any one of the listed manufacturers would, without more, oblige that manufacturer to deliver the tyres ordered. As between the distributor and the listed manufacturer, the matter must have been one of offer and acceptance, that is to say an order placed by the distributor with the manufacturer and accepted by the latter. The order and its acceptance would alone constitute the effective contract under which the distributor could call on the manufacturer to deliver the tyres ordered, and would be bound on his own part to take and pay for them. Such contracts in the case of Brentford would be made in England as the place of acceptance. On applying this view of the contractual position to the facts found, it appears that, during the material period, Brentford were selling to distributors abroad under contracts made in the United Kingdom tyres manufactured by Brentford in the United Kingdom, and deliverable in the United Kingdom to the purchasers thereof against payment in the United Kingdom of the contract price; and, furthermore, were in fact effecting delivery of and receiving payment for such tyres in the United Kingdom."

The next stage is to consider whether there was evidence to justify the Special Commissioners in finding that during the relevant years Akron was exercising the trade in question through Brentford as its agent.

My Lords, in my view this question must be answered in the affirmative. Having regard to the course of dealing pursued by the parties there were only two views open for consideration by the Special Commissioners. One was that Brentford was exercising the trade on its own behalf; the other was that

* These are set out at p. 563, letter C, to p. 565, letter A, ante.

Commissioners rejected the first view and accepted the second and in my opinion they were right. It is true that the goods sold belonged to Brentford and not to Akron, but this fact does not show conclusively that Brentford was selling the goods on its own behalf and not as agent. See *Weiss, Biheller & Brooks, Ltd. v. Farmer* (1) ((1922), 8 Tax Cas. 381). Each case has to be determined having regard to all the facts, and the other facts in the present case were strongly in favour of the view expressed by the Special Commissioners. I agree with their summary of the position, as set out in para. 16 (d) of the Case Stated:

C “ It seems to us that the effect of the agreement of Feb. 8, 1936, and the course of the dealings between Akron and Brentford was to set up standing arrangements whereby Brentford agreed to hold goods of its own at the disposal of Akron and to sell the same on Akron's behalf to customers approved of by Akron and subject to terms imposed by Akron; and, further to account to Akron for the proceeds of the sales less the cost of the goods sold plus five per cent. ”

D In his helpful argument for the appellants counsel rightly referred your Lordships to a number of other cases, but the view that I take makes it unnecessary to refer to any of them. I can see no good reason for disturbing the determination of the Special Commissioners, and I would dismiss the appeal with costs.

E LORD RADCLIFFE: My Lords, I agree that the appeal ought to be dismissed. I believe that all your Lordships are of the same opinion. Since the assessments in question cover the revenue years 1940-41 to 1944-45, it is, perhaps, time that the litigation with regard to them should come to an end. It will be some consolation to the appellants, when the tax is paid, to know that none of the four courts by whom their case has been heard has differed from the others in the decision given, nor has there been a dissentient voice here or in the Court of Appeal: and this despite a full and careful presentation on the appellants' behalf of all the arguments that might lead to a contrary result. In my view, what needs to be said has already been said in the other courts and in the speech of my noble and learned friend on the Woolsack. I propose to say, therefore, only in the briefest way where it is that I think that the appellants' argument breaks down.

G The question before the Special Commissioners was whether the American company, styled Akron in the Case Stated, was exercising a trade within the United Kingdom. I omit for the moment the subsidiary question whether, if so, the English company styled Brentford was its regular agent for the purpose of assessment. The question whether a trade has been exercised within the United Kingdom is a question of fact in this sense that, although the law must rule whether any given set of facts can amount to such an exercise or cannot but amount to such an exercise, it is for the Special Commissioners, within those limits, to decide in the particular case before them whether a trade has, or has not, been so exercised. That done, there remains only the question whether they made any error of law in the decision that they came to. I do not myself take the view that this distinction is of any special importance in the present case, since the weight of the appellants' argument rested in any event on a legal proposition, the proposition that, where the trade sought to be assessed was what was called a “ pure ” merchanting business, the place at or in which the goods merchanted were “ sold ” determined in law the site of the exercise of the merchanting trade itself. The second step in the argument was that the sales, the profits of which were now being assessed, were made outside the United Kingdom, because the master agreement between Akron and its Swedish distributor, out of which arose the orders given to Brentford by the latter, was not itself made within the United Kingdom or, alternatively,

because those orders, originating in Sweden, brought about American/Swedish sales despite the not unimportant part allotted to Brentford in the course of dealing. A

My Lords, no one can doubt that, in considering what are the legal requirements of the phrase "trade exercised within the United Kingdom", courts of law have ruled that the place where sales or contracts of sale are made is of great importance when it is a merchanting business that is in question. They have not gone so far as to seek to substitute this test (which, under the conditions of international business and modern facilities of communication, is capable of proving a somewhat ingenuous one) for the statutory duty to inquire whether a trade is or is not exercised within the United Kingdom. I should be doing an injustice to the arguments of counsel for the appellants if I said that he submitted that they had. But he rightly reminded us that more than once the place where the contract is made has been spoken of as the "crucial" test or, again, as the "most vital" element. B C

Speaking for myself, I do not find great assistance in the use of a descriptive adjective such as "crucial" in this connection. It cannot be intended to mean that the place of contract is itself conclusive. That would be to rewrite the words of the taxing Act, and could only be justified if there was nothing more in trading than the act of sale itself. There is, of course, much more. But, if "crucial" does not mean as much as this, it cannot mean more than that the law requires that great importance should be attached to the circumstance of the place of sale. It follows, then, that the place of sale will not be the determining factor if there are other circumstances present that outweigh its importance, or unless there are no other circumstances that can. Since the courts have not attempted to lay down what those other circumstances are or may be, singly or in combination, and it would be, I believe, neither right nor possible to try to do so, I think it true to say that, within wide limits which determine what is a permissible conclusion, the question whether a trade is exercised within the United Kingdom remains, as it began, a question of fact for the Special Commissioners. In my opinion, therefore, HARMAN, J., in the High Court and the Master of the Rolls in the Court of Appeal were well founded in laying stress on the observations of ATKIN, L.J., in *F. L. Smidth & Co. v. Greenwood* (2) ((1922), 8 Tax Cas. 193 at pp. 203, 204): D E F

"The contracts in this case were made abroad. But I am not prepared to hold that this test is decisive. I can imagine cases where the contract of re-sale is made abroad, and yet the manufacture of the goods, some negotiation of the terms, and complete execution of the contract take place here under such circumstances that the trade was in truth exercised here. I think that the question is, where do the operations take place from which the profits in substance arise?" G

Now in the present case the sales from which trading arose were the dealings by virtue of which Brentford disposed of Firestone tyres to the Swedish distributor in response to the orders received from the latter. It is, I think, the major fallacy of the appellants' argument that it seeks to determine the locality of this trading by the locality which the law would attribute to the master agreement between Akron and that distributor. In my opinion, the master agreement has very little, if any, significance for this purpose. It was important, of course, for other purposes. It was one of the basic treaties on which the international organisation of Akron was built up. It settled many particulars of the terms of trade on which would take place the dealings of those who were to come within the operational range of that organisation. But it did not itself constitute the contracts of sale, the locality of which was to be so important in deciding whether Akron was carrying on any trade inside the United Kingdom. The sales to look at for that purpose were the dealings which took place in the course of trade between Brentford and the Swedish distributor; and those H I

- A dealings consisted of invitations to trade received by Brentford in England, the manufacture or appropriation of stock in England in response to those invitations, the delivery of the stock free alongside vessel in England in discharge of the order, and the receipt of the payment in a bank in England. Those operations constituted the exercising of a trade in England. The Special Commissioners thought that it was Akron's trade, not Brentford's, and I do not see
- B why we should disagree with them.

I think that the trading situation is accurately described by the Special Commissioners in para. 16 (d) of the Case Stated:

- C "It seems to us that the effect of the agreement of Feb. 8, 1936, and the course of the dealings between Akron and Brentford was to set up standing arrangements whereby Brentford agreed to hold goods of its own at the disposal of Akron and to sell the same on Akron's behalf to customers approved of by Akron and subject to terms imposed by Akron; and, further to account to Akron for the proceeds of the sales less the cost of the goods sold plus five per cent."

- D There is nothing in law that prevents such a finding being made. It is a very natural description of the course of trading that was pursued. But, if so, the Special Commissioners were fully entitled to their conclusion that Akron was trading in the United Kingdom during the years of assessment and that Brentford had constituted themselves their regular agents for the purpose of this trade. The latter point seems to me to be involved almost of necessity in the reading of the facts which I have set out above.

- E I would dismiss the appeal.

LORD TUCKER: My Lords, I agree that the appeal should be dismissed for the reasons which have been stated by my noble and learned friends.

LORD COHEN: My Lords, I agree that the appeal should be dismissed and cannot usefully add any further reasons of my own.

Appeal dismissed.

Solicitors: *Lovell, White & King* (for the appellants); *Solicitor of Inland Revenue*.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

ARNOLD v. ARNOLD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.),
January 11, 14, 24, 1957.]

Divorce—Foreign decree—Decree granted to wife in Finland on ground of husband's desertion—Husband domiciled in Finland at date of desertion—Subsequent acquisition by husband of English domicile—Recognition of decree by English court—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 18 (1) (a).

The parties were married in England in 1922. The husband was an Englishman born in England; the wife was born in Finland. After the marriage the parties went to Finland where the husband acquired a domicile of choice. In 1930 the husband returned to England, leaving the wife and the two children of the marriage in Finland, and by 1932 the husband had reverted to his English domicile of origin. In 1940 the wife obtained in the Finnish court a divorce on the ground of the husband's desertion, service of the petition having been effected by advertisement. The husband petitioned for a declaration under R.S.C., Ord. 25, r. 5, that the marriage had been validly dissolved by the Finnish decree. It was proved that by Finnish law the Finnish court had had jurisdiction to hear the wife's case since (i) the parties had last lived together in Finland before the husband had deserted the wife, and (ii) desertion as a ground of divorce was common to both English and Finnish law.

Held: the marriage had been validly dissolved by the Finnish decree although the husband was domiciled in England at the date of the decree since at the relevant date for determining the jurisdiction, i.e., the date of desertion in 1930 (*Travers v. Holley & Holley*, [1953] 2 All E.R. 794 applied), the husband was domiciled in Finland; the Finnish decree was thus a decree of a competent foreign court and would be recognised by the English courts (*Mezger v. Mezger*, [1936] 3 All E.R. 130 and *Armitage v. A.-G.*, [1906] P. 135, applied), moreover, the desertion on which the decree was founded had been for a substantial period, far more than three years.

[As to recognition of foreign decree of divorce granted to deserted wife, see 7 HALSBURY'S LAWS (3rd Edn.) 113, para. 200, note (u); and for cases on the subject, see 3rd DIGEST Supp. to 11 DIGEST (Repl.) 1023.

For the Matrimonial Causes Act, 1950, s. 18 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 405.]

Cases referred to:

- (1) *Har-Shefi v. Har-Shefi*, [1952] 2 All E.R. 821; [1953] P. 161; 11 Digest (Repl.) 478, 1071.
- (2) *Travers v. Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; 3rd Digest Supp.
- (3) *Carr v. Carr*, [1955] 2 All E.R. 61; 3rd Digest Supp.
- (4) *Warden v. Warden*, 1951 S.C. 508; [1951] S.L.T. 406; 11 Digest (Repl.) 504, 732.
- (5) *Dunne v. Saban* (formerly *Dunne*), [1954] 3 All E.R. 586; [1955] P. 178; 3rd Digest Supp.
- (6) *Igra v. Igra*, [1951] P. 404; 11 Digest (Repl.) 518, 1324.
- (7) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest (Repl.) 468, 1011.
- (8) *Mezger v. Mezger*, [1936] 3 All E.R. 130; [1937] P. 19; 106 L.J.P. 1; 155 L.T. 491; 100 J.P. 475; 11 Digest (Repl.) 486, 1111.
- (9) *Armitage v. A.-G.*, *Gillig v. Gillig*, [1906] P. 135; 75 L.J.P. 42; 94 L.T. 614; 11 Digest (Repl.) 483, 1094.
- (10) *Gatty & Gatty v. A.-G.*, [1951] P. 444; 2nd Digest Supp.

A Petition.

In this case the husband petitioned for a declaration under R.S.C., Ord. 25, r. 5, that the marriage, celebrated in England in 1922, had been validly dissolved by a decree of divorce pronounced by the Court of Appeal at Abo, Finland, on Mar. 15, 1940; alternatively he petitioned for a divorce on the ground of the wife's desertion and prayed for the exercise of the court's discretion in his favour.

B By the Finnish Marriage Law of 1929, art. 76, the Finnish court can grant a divorce on the ground of "desertion for at least one year". The Finnish Act of Dec. 5, 1929, relating to questions of family law of an international character, provides:

C "Article 8: (a) If both spouses, or one of them, are of a foreign nationality, the proceedings for the annulment of the marriage can be commenced only in that case that the defendant be domiciled in this country. (b) The aforesaid relates even to proceedings for divorce. The proceedings for divorce can even be started if the spouses had last lived together in Finland, but the spouse who is defendant had deserted the other spouse or has left the country after the grounds for the divorce have appeared. (c) If in the country of which a spouse holds nationality the right to dissolve a marriage of its citizens is reserved only for authorities in that country, proceedings for dissolving the marriage can be commenced in Finland only on condition that there is not a competent court to deal with the matter in the said country. (d) The aforesaid does not prevent a Finnish citizen from commencing proceedings for dissolving the marriage in this country. (e) A wife who was a Finnish citizen at the time of contracting the marriage is entitled to commence in Finland proceedings for annulment of the marriage.

D "Article 10: (a) If one or both spouses are foreigners a decree of divorce can be granted in this country only in that case that the grounds for the decree exist in the laws of the countries of both respective spouses and in the Finnish law. (b) If the spouse has previously belonged to another foreign country, a divorce may be granted on grounds that have taken place during that time only in case divorce could be granted on that ground also according to the law of that country."

E The petition, dated Apr. 13, 1955, had been served on the wife but she did not appear. The facts appear in the judgment.

F *J. B. Gardner* for the husband.

Cur. adv. vult.

G Jan. 24. **MR. COMMISSIONER LATEY, Q.C.**, read the following judgment: It was decided by the Court of Appeal in *Har-Shefi v. Har-Shefi* (1) ([1952] 2 All E.R. 821), that under R.S.C., Ord. 25, r. 5, a declaration of status could be made in the divorce court without its being tacked on to a matrimonial case, but in the present case the alternative of a suit for dissolution of the marriage is attached.

H The marriage took place on Feb. 13, 1922, at Paddington register office when both the husband, an Englishman born in England, and the wife, a national of Finland, were a very young couple. Soon afterwards the husband went with her to Helsingfors, or Helsinki as it is now called, and her people being well off he was installed in a home which, in the course of time, he found was beyond his means. Nevertheless, he acquired a domicile of choice in Finland, and they had two sons, born in 1924 and 1926 respectively. He became an agent at Helsinki for the sale of various types of British manufactures, but finding that his house was costing him too much and that in his view his wife's parents were exercising too great an influence in their lives, he returned to England in 1930. He wrote frequent letters to the wife in Finland asking her to join him with the children in a satisfactory home in England, but she either ignored or evaded his pleas. These requests became rare as time went on and in her letters she never

suggested that he should return to Finland, nor did she claim any maintenance. A

I am satisfied that at any rate by 1932 the husband had reverted to his domicile of origin in England. Then came the war in 1939. During the war the wife, unknown to him, commenced a divorce suit at Helsinki on the ground that he had deserted her. The court of first instance dismissed the petition for lack of sufficient evidence, but the Court of Appeal at Abo found desertion proved and in March, 1940, granted the wife a judgment of divorce. The husband instituted B inquiries at the end of the war to find out what had happened to his family, and learned through the Red Cross and finally through a cousin of the wife that the wife had got this decree of divorce. He did not know that until 1946. He had thrown in his lot with a single lady since 1940, by whom he had had two children, and he wanted to marry her. I am informed that on his application for a licence to marry, the Registrar-General in 1947 did not deem himself at liberty to C sanction the proposed marriage until he could be satisfied that the Finnish divorce was valid in English law; therefore these proceedings.

I now have to try this issue. The general rule of jurisdiction in divorce in England is that English domicile only is the test and that has to be the domicile of the husband. Pausing there, the English conception of domicile is the most rigid in the world. It must be residence with the intention of permanent D settlement in that place. Throughout the war, and indeed before that, the husband was domiciled in England and continued so. Various statutory exceptions have been created by Parliament, but only one section of the Matrimonial Causes Act, 1950, is relevant in the present case and only then because of a comparatively recent decision in the Court of Appeal in *Travers v. Holley & Holley* (2) ([1953] 2 All E.R. 794). That court held that it would be contrary E to principle if the English courts refused to recognise a jurisdiction which, *mutatis mutandis*, they claimed for themselves, and that as the New South Wales courts by s. 16 (a) of the New South Wales Matrimonial Causes Act, 1899, No. 14, and the English courts by s. 13 of the Matrimonial Causes Act, 1937, which is now reproduced in s. 18 (1) (a) of the Matrimonial Causes Act, 1950, F possessed the same jurisdiction, a decree absolute of divorce made by the New South Wales court in 1944 was valid, even though the husband might have reverted to his English domicile of origin. In the Report of the Royal Commission on Marriage and Divorce, 1956, Command Paper 9678, it is recommended that it should be enacted that the courts in England should recognise a foreign divorce pronounced according to the law of (i) the domicile of both spouses or, (ii) the G domicile of either spouse, or which would be recognised by the law of such country of domicile, and that in such cases the European conception of domicile approximating to habitual residence should be accepted. It is further recommended that a foreign divorce should be recognised if granted in circumstances substantially similar to those in which the English courts exercise jurisdiction in respect of persons not domiciled here. None of these recommendations has yet passed into law, and I have to consider the present case in the light of decided authorities. H

The principle enunciated in *Travers v. Holley* (2), which I have summarised, was followed by BARNARD, J., in *Carr v. Carr* (3) ([1955] 2 All E.R. 61). In 1948 a wife presented a petition for divorce in Northern Ireland (which for purposes of the matrimonial jurisdiction is, like Scotland, a foreign country). At that time the husband had acquired a domicile of choice in England. In 1954 the court in Northern Ireland exercised jurisdiction and pronounced a divorce on I the ground of desertion, the case being uncontested. That court relied on the terms of s. 26 of the Matrimonial Causes Act (Northern Ireland), 1939, the terms of which were in substance the same as in s. 18 (1) (a) of the English Matrimonial Causes Act, 1950. Meanwhile in 1953 the husband had presented in England a petition for divorce on the ground of his wife's desertion. She contested this petition on various grounds, but before it came to trial she obtained her decree in Northern Ireland, and in January, 1955, she presented a petition here for a

- A declaration that the decree of divorce in Northern Ireland was valid, and that therefore the marriage had been dissolved. The learned judge so found, following *Travers v. Holley* (2) and made the declaration which the ex-wife sought. That principle was not accepted in an older case by the Scottish courts in *Warden v. Warden* (4) (1951 S.C. 508). By the time that that case was heard a provision, now contained in s. 18 (1) (b) of the Matrimonial Causes Act, 1950, and applicable to Scotland also, under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 2, was already the law. The Scottish courts in that case considered the argument that there should be reciprocity in regard to recognising the exercise of a similar jurisdiction but held that the Act of 1949 did not empower the Scottish courts to recognise decrees of divorce other than those pronounced by the court of the husband's domicile. However, I have to apply English and not Scottish law on this question of jurisdiction.

- There was a later case to which counsel has drawn my attention, *Dunne v. Saban* (formerly *Dunne*) (5) ([1954] 3 All E.R. 586) and I have to consider the facts and judgment in that case. It was an undefended petition presented in 1954 by a husband for a declaration that his marriage had been validly dissolved by a court in Florida in the United States of America in November, 1953. The marriage took place in England in February, 1950, the husband then having his domicile of origin in England. In June, 1951, the couple went to the United States of America and the husband acquired a domicile of choice in the State of Florida. At the end of 1952 he returned to England and reverted to his domicile of origin. His wife refused to return here, and in or about July, 1953, by which time she had been resident in Florida for about two years, she instituted divorce proceedings there on the ground of what was alleged to be cruelty, namely, that he had left her and said that he did not intend to see her again. A decree was made accordingly by the Florida court. The petition in England was really brought to ascertain the husband's legal position. It was urged on behalf of the husband on the English petition that as the English court recognised a wife's ordinary residence here for the purpose of jurisdiction it should recognise the same in Florida, and that, though only ninety days' residence was required there to found jurisdiction as compared with three years here, nevertheless the principle of comity laid down in *Travers v. Holley* (2) applied. On behalf of the Queen's Proctor it was argued that the principle expressed in *Travers v. Holley* (2) was obiter, and that therefore there could be no derogation from the test of the husband's domicile. DAVIES, J., accepted this view and said ([1954] 3 All E.R. at p. 591) that the observations of the Court of Appeal in *Travers v. Holley* (2) were directed to a case where the extraordinary jurisdiction of the foreign court corresponded almost exactly with the extraordinary jurisdiction exercised by the English court, and that he was far from satisfied that the jurisdiction exercisable by the Florida court was anything like the jurisdiction of the English court. He, therefore, dismissed the petition for a declaration.

- Coming back to the present case, I have had the evidence of Mr. Holmsten, a Finnish barrister qualified to state the Finnish law as to matrimonial causes and jurisdiction. He had examined the proceedings in Finland, and asserted that the substituted service of the wife's petition by advertisement during the war was in accordance with the practice of the Finnish competent court when the respondent could not personally be given notice, and that the decree was valid and final in Finnish law. He said that the Finnish courts, like the English courts, are under a duty to be sure that they have jurisdiction in divorce. On the point whether natural justice had been complied with in granting a divorce against a man who had not been given notice of the proceedings, it is established that in this country notice by advertisement to an absent party must be accepted as notice and therefore this court can have nothing to say against the Finnish decree on the score of an absence of natural justice as the practice is much the

same in both countries. Counsel pointed out that the same view in similar circumstances was taken by PEARCE, J., in *Igra v. Igra* (6) ([1951] P. 404). A

Mr. Holmsten said that under the Finnish Marriage Law of 1929, art. 76, desertion for a year previous to the petition was a ground for divorce. He made it clear today that there is no definition of domicile in Finnish statutory law any more than there is in English statutory law, but he did say that it is well established that the Finnish conception of domicile is the principal place of residence, and intention to reside permanently does not enter into the Finnish conception. B
The Finnish Act of Dec. 5, 1929, with regard to Family Relations, c. 2, para. 8 (b), provides that if both spouses, or one of them, are foreign nationals, or is a foreign national, proceedings for divorce can be commenced if the spouses had last lived together in Finland but the defendant spouse has deserted the other or has left the country after the grounds for divorce have come into existence. C
Therefore by Finnish law he said there was jurisdiction to hear the wife's case there. But there was a proviso under para. 10 of that chapter to the effect, in the present case, that if desertion was not a ground of divorce in England, of which the husband was a national, the Finnish court would have been unable to exercise jurisdiction. Mr. Holmsten also told me that if a Finnish national husband deserted his wife in England in the same circumstances and she obtained D
a divorce in England the Finnish courts would recognise the decree. There is a further provision in para. 8 that if in the country of which a spouse is a national the courts of that country only can dissolve his marriage, proceedings can only be commenced in Finland if there is not a competent court to deal with the matter in the country of the national. This does not prevent a Finnish citizen E
from commencing proceedings for dissolution of marriage in Finland; as the wife was a British national at the time of the divorce proceedings in Finland this provision does not apply.

The question is, having regard to the Finnish law, can I apply the principle in *Travers v. Holley* (2)? I find it necessary to go into that case in some detail. An English couple were married in England in 1937 and in the same year they emigrated to New South Wales, where the husband, according to the finding, F
adopted a domicile of choice. A child was born to them in August, 1938, and in September, 1939, on the war beginning, the husband's business collapsed, and in 1940 he left his wife to go to another place in New South Wales. In 1941 he joined the Australian forces and in 1943 he was transferred to the British forces. On Aug. 23, 1943, the wife petitioned for divorce in New South Wales on the ground of his desertion. The husband did not defend the case and in G
November, 1944, the wife got her decree absolute. They both married again after that decree, and in 1952 the husband was granted in this country a decree nisi, that is to say against his first wife, on the ground that the Australian decree was invalid for lack of jurisdiction and that the wife had, therefore, committed adultery by the continuation of her union with her second husband. The Court of Appeal by two to one (SOMERVELL and HODSON, L.JJ., JENKINS, L.J., dissenting) held that the husband had acquired a domicile of choice in New South Wales and therefore the 1944 decree was valid. In the course of the judgments SOMERVELL, L.J., pointed out ([1953] 2 All E.R. at p. 796) that under the New South Wales section the date for jurisdiction was when the husband deserted the wife in August, 1940, being already domiciled in New South Wales; that in English law, the date of desertion is the relevant date*, though in general the I
relevant date is that of the petition, and that (*ibid.*, at p. 797):

"On principle . . . our courts in this matter should recognise a jurisdiction which they themselves claim."

JENKINS, L.J., was not satisfied that the husband acquired a domicile of choice in New South Wales, and in that he agreed with Mr. Commissioner GRAZEBROOK,

* See s. 18 (1) (a) of the Matrimonial Causes Act, 1950.

- A Q.C., but he added (*ibid.*, at p. 799) that if his colleagues' contrary decision was right, that the husband did acquire a domicile of choice in New South Wales, then that court properly exercised jurisdiction and their decree would stand. HODSON, L.J., found a domicile of choice in New South Wales also, but he said (*ibid.*, at p. 799) that it was not necessary to decide when that was abandoned as it was after the date of desertion. He said that s. 13 of the Matrimonial Causes Act, 1937, now incorporated in s. 18 (1) (a) of the Matrimonial Causes Act, 1950, corresponded in substance with the New South Wales provision. Then he cited the well-known statement in the judgment in *Le Mesurier v. Le Mesurier* (7) ([1895] A.C. 517 at p. 528) by LORD WATSON:

C "... a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority."

HODSON, L.J., first of all said about that ([1953] 2 All E.R. at p. 800):

- D "... what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court."

His Lordship added (*ibid.*):

- E "... where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves."

- F Does the decision in *Travers v. Holley* (2) involve the grounds of divorce being substantially the same? I think not. The basis of jurisdiction does not depend on the grounds, unless under the private international law rules governing the jurisdiction of a court it is limited to pronouncing a decree only where the law of the domicile or the nationality of the spouse provides substantially the same ground. As I have pointed out, the Finnish court is governed by this rule, and the fact of desertion is a ground common to both English and Finnish laws. It was a coincidence that in *Travers v. Holley* (2) the prescribed period of desertion to afford the remedy of divorce was the same, but this aspect of the matter did not enter into the *ratio decidendi* of the Court of Appeal. It is quite clear that in general a decree of divorce of a competent foreign court must be recognised in this country although the ground of divorce in the foreign country is not one which would be effective in the English court: see, for instance, *Mezger v. Mezger* (8) ([1936] 3 All E.R. 130); *Armitage v. A.-G.*, *Gillig v. Gillig* (9), ([1906] P. 135 at p. 141). Having carefully considered the judgments in *Travers v. Holley* (2), I deem that the principle laid down there was binding and not merely obiter, though at first sight it might have appeared to be obiter. As I have already indicated, the Court of Appeal in *Travers v. Holley* (2) in effect found that the relevant date for fixing jurisdiction was at the time of the desertion, when the husband was still domiciled in New South Wales, and not at the time of the divorce proceedings.

- I In all these cases I apprehend that the court has to look at the realities. In the present case the parties had not only last lived together in Finland when the husband was held to have deserted the wife. They were, in fact, domiciled in Finland according to English law at the date of the desertion. The wife, moreover, had been continuously resident in Finland for many years immediately preceding the divorce. I am told that subsequent to the divorce she moved to Sweden, where she is still living; but the fact that she has changed her residence since the decree really does not affect this issue. The fact that only six weeks'

or sixty or ninety days' residence suffices in certain states in the United States of America to found jurisdiction seems to me to be beside the point if in fact there had been, say, two years' residence or more, or even less, if the residence is genuine and bona fide and not merely for the purpose of getting a divorce in a convenient court. The necessity laid down by statute in England for three years' residence, in the case of a wife whose husband is domiciled abroad, is probably due to the notion that our courts should not be used for the convenience of birds of passage and that the court had to satisfy itself that the petitioning wife had chosen her home in England, though by operation of law her domicile was that of her husband domiciled abroad, and living either abroad or in England. It is true that in *Travers v. Holley* (2) the period of desertion prescribed was the same as in the laws of both England and New South Wales—three years—whereas in Finnish law one year's desertion suffices for a decree. But, in the present case, the desertion, as found by the Finnish court, was for far more than three years, and surely the principle of comity and reciprocity laid down in *Travers v. Holley* (2) must be applied?

I do not say that if there were a case in which a wife went into residence abroad only for a short time, whether it were ninety days or even a year with the mere intention of obtaining a divorce, the English court would recognise such decree of divorce. *Gatty & Gatty v. A.-G.* (10) ([1951] P. 444) is an illustration to the contrary; in that case an Englishman domiciled in England went to live in one of the states of the United States of America for over the period prescribed by the state law for jurisdiction in order to obtain what he believed at the time to be a final decree of divorce. Each case must be dealt with according to the facts and the law of the place where a decree is granted. In the present case I am satisfied that the principle in *Travers v. Holley* (2) applies and I make the declaration prayed for.

Declaration accordingly.

Solicitor: *J. A. H. Powell* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION (PROBATE)

PRACTICE DIRECTION.

Administration of Estates—Grant of administration—Deceased domiciled abroad—

Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 29.

On application for an order for a grant under r. 29*, any affidavit of law should refer to the facts and state the law applicable, but this must be supported by adequate evidence (normally an affidavit, or statement in the oath, by the applicant) as to the facts themselves.

B. LONG,

February 19, 1957.

Senior Registrar.

* For the Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 29 (grant where deceased died domiciled outside Great Britain), see 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 297; and as regards the procedure, see 16 HALSBURY'S LAWS (3rd Edn.) 263, para. 490.

R. v. SHARP AND ANOTHER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Hinchcliffe, J.J.),
February 11, 15, 1957.]

Criminal Law—Affray—Evidence—Self-defence—Whether direct evidence of persons being put in terror necessary.

The appellants were convicted on a count charging them jointly with having in a certain public street and highway unlawfully fought and made an affray. The evidence was that a police constable found a large crowd assembled watching a fight between the appellants on the opposite pavement. They were still aiming blows at each other, but appeared to be exhausted and their faces and clothes were covered with blood. One of them had a severe cut from a razor on his head and the other had had part of his left ear bitten off; two of his teeth had been knocked out, and he had a black eye and a cut lip. Each of the appellants blamed the other for starting the fight and the appellant S. alleged that he had only acted in self-defence. The jury were directed (i) that if they should find that reasonable people might have been intimidated or frightened by the conduct of the appellants that would be sufficient in law although there was no direct evidence of any one being put in terror and (ii) that it was immaterial who started the fight or who was to blame and that the question of self-defence did not arise. On appeal,

Held: (i) on a charge of making an affray, viz., fighting between two or more persons in a public place to the terror of the Queen's subjects, it was sufficient, in the absence of direct evidence that any subject of the Queen was put in terror, to show that the circumstances were such that reasonable people might be intimidated or frightened, but

(ii) where a man merely defends himself and does not attack there is not an affray, and therefore the question whether one of the appellants was merely defending himself should have been left to the jury; the conviction would, therefore, be quashed.

Observations on the evidence necessary to be called on a charge of riot (see p. 579, letter G, to p. 580, letter A, post).

Appeal allowed.

[As to the crime of making an affray, see 10 HALSBURY'S LAWS (3rd Edn.) 584, para. 1086; and for cases on the subject, see 15 DIGEST 641, 642, 6821-6829.

As to the defence of self-defence, see 10 HALSBURY'S LAWS (3rd Edn.) 743, para. 1429; and for cases on the subject, see 15 DIGEST 828, 829, 9078-9089.]

Cases referred to:

- (1) *Field v. Metropolitan Police Receiver*, [1907] 2 K.B. 853; 76 L.J.K.B. 1015; 97 L.T. 639; 71 J.P. 494; 15 Digest 646, 6887.
- (2) *London & Lancashire Fire Insurance Co., Ltd. v. Bolands, Ltd.*, [1924] A.C. 836; 93 L.J.P.C. 230; 131 L.T. 354; 29 Digest 419, 3268.
- (3) *Wise v. Dunning*, [1902] 1 K.B. 167; 71 L.J.K.B. 165; 85 L.T. 721; 66 J.P. 212; 15 Digest 642, 6829.
- (4) *Lansbury v. Riley*, [1914] 3 K.B. 229; 83 L.J.K.B. 1226; 109 L.T. 546; 77 J.P. 440; 14 Digest (Repl.) 570, 5702.

Appeals.

These were appeals against convictions by Ronald Edward Sharp and Michael Patrick Johnson, who, on Dec. 4, 1956, were convicted before the Recorder of London (SIR GERALD DODSON) at the Central Criminal Court of having in a

public street and highway unlawfully fought and made an affray, and were each sentenced to twelve months' imprisonment. A

E. Clarke for the appellant Sharp.

D. H. Farquharson for the appellant Johnson.

Alistair Morton for the Crown.

Cur. adv. vult. B

Feb. 15. **LORD GODDARD, C.J.**, read the judgment of the court: These appellants were convicted at the Central Criminal Court before the Recorder of London on a count charging them jointly with having in a certain public street and highway, to wit the Highway, Stepney, unlawfully fought and made an affray. They were each sentenced to twelve months' imprisonment. They appeal on a certificate granted by the recorder, the ground being whether, in the absence of any direct evidence that anyone was put in terror, it is sufficient if there is proof that the fight was between two persons in a public place and of such a nature as might well intimidate or frighten reasonable people. They have also delivered notices of appeal raising a question of law as to the direction given by the recorder to the jury that the defence of self-defence was immaterial and irrelevant and that it was immaterial who started the fight or who was to blame for it. D

The evidence was that on a day last September shortly after noon a police constable found a large crowd assembled at the junction of Wapping Lane and the Highway, Stepney, watching a fight between these two appellants who were fighting on the opposite pavement. They were still aiming blows at each other with their fists but appeared to be exhausted. Their faces and clothes were covered with blood. The appellant Johnson had a severe cut on the head. The officer separated them and Johnson then gave him a razor with which he said the appellant Sharp had cut him and which he had taken from him. The officer then went after Sharp and stopped him and found part of his left ear had been torn or bitten off, two of his upper teeth had been knocked out and he had a black eye and a cut lip. Each of the appellants made statements; Johnson admitted he stopped Sharp with whom he had had a previous quarrel and said: "Now what about it, now you are on your own", and that then Sharp attacked him with the razor and he admitted he had bitten Sharp. The latter, whom it is, perhaps, only fair to say is to some extent disabled by poliomyelitis, admitted that he had the razor but said that he used it only in self-defence when attacked by Johnson. That being the evidence it was objected that it did not support the charge of making an affray because no evidence was given that any person was put in terror, and the question that we have to decide is whether it is necessary to call at least one person to say that he or she was put in fear by the conduct of the appellants, or whether it is enough, as the recorder held, that the circumstances were such that the jury might find that reasonable people might well be intimidated or frightened. E F G H

It is remarkable what a lack of authority there is with regard to this offence. There seems to be no reported case which deals with it. It is barely mentioned in *HALE**. *COKE*† devotes a chapter in his *THIRD INSTITUTE* to private fights, duels and affrays; he says that an affray is a public offence to the terror of the King's subjects and that it is inquirable in theleet as a common nuisance, and a perusal of the paragraphs which deal with the subject certainly suggest that, in his opinion, the fact that a combat in public is a great breach of the royal peace is ipso facto an affright and terror to the subjects. *BLACKSTONE*‡ in Book IV, p. 145, described the offence as the fighting of two or more persons in a public place, to the terror of the King's subjects, and evidently considers that those I

* *HALE'S PLEAS OF THE CROWN*.

† *COKE'S INSTITUTES*, Third Part, c. 72, p. 157.

‡ *BLACKSTONE'S COMMENTARIES*.

- A taking part in a duel can be indicted for an affray. That would also seem to negative the necessity of calling evidence to prove that someone was actually put in terror as duels were generally, one would suppose, fought with as little publicity as possible and those present in the capacity of seconds or surgeons would, of course, not be put in fear. The author who devotes most attention to the matter is HAWKINS*, Vol. I, c. 28. He lays down that there may be an
- B affray when there is no actual violence, as when a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people. This, he says, was always an offence at common law and dealt with by many statutes. He then quotes in particular the Statute of Northampton, 2 Edw. 3, c. 3†. Dealing with that statute he says‡ that no wearing of arms is within the meaning of this statute unless it be accompanied with such
- C circumstances as are apt to terrify the people. The wearing of unusual or dangerous weapons in public is only one species of affray and, in our opinion, it is open to a jury to find that the circumstances amount to an affray although no person is actually called to say that he was put in terror. Just as the mere wearing of a sword in the days when this was a common accoutrement of the nobility and gentry would be no evidence of an affray while the
- D carrying in public of a studded mace or battle axe might be, so if two lads indulge in a fight with fists no one would dignify that as an affray, whereas if they used broken bottles or knuckle dusters and drew blood a jury might well find it was, as a passer-by might be upset and frightened by such conduct. It is perfectly true that, before the Indictments Act, 1915, an indictment for affray would have alleged that what was done was to the great terror and
- E disturbance of divers liege subjects, and since that Act the mere allegation of an affray imports terror and disturbance, but, in our opinion, this averment is no more than one which alleges that the circumstances involve a breach of the Sovereign's peace, that it was a real disturbance of the peace by two persons fighting each other in public instead of settling their differences in the royal courts, or endeavouring by a display of force though without necessarily
- F using actual violence to overawe the public, which was what was aimed at by the Statute of Northampton. Indeed, we should have thought there could be no doubt on this matter were it not for the decision in *Field v. Metropolitan Police Receiver* (1) ([1907] 2 K.B. 853) where (ibid., at p. 860) the Divisional Court laid down what were the necessary elements to constitute a riot, one of which was force or violence displayed so as to alarm at least one person of
- G reasonable firmness and courage. From this it is deduced that evidence to that effect must be given, though not necessarily, we think, by calling a person to say: "I was terrified". It might be enough for a witness to say that persons appeared to be alarmed. Now it is true that affrays are usually classed along with unlawful assemblies, riots and routs as offences against the public peace,
- H but in this appeal we have to deal only with an affray. The word "riot" is a term of art and, contrary to popular belief, a riot may involve no noise or disturbance of the neighbours though there must be some force or violence. For instance, if three persons enter a shop and forcibly or by threats steal goods therein, technically they are guilty not only of larceny or robbery but also of riot—see *London & Lancashire Fire Insurance Co., Ltd. v. Bolands, Ltd.* (2) ([1924]
- I A.C. 836). It may be that the fifth element referred to in *Field's* case (1) may require reconsideration at some future time, for if disturbances such as necessitated the passing of the Public Order Act, 1936, should occur again or if there were a repetition of the Trafalgar Square riots which took place towards the end of the last century when most of the club windows in Pall Mall were smashed

* HAWKINS' PLEAS OF THE CROWN, Vol. I, c. 28, p. 487.

† 5 HALSBURY'S STATUTES (2nd Edn.) 448.

‡ HAWKINS' PLEAS OF THE CROWN, Vol. I, c. 28, p. 489.

by an angry mob it would seem superfluous if someone had to go into the witness-box and say that he or some passers-by felt, or appeared, afraid or apprehensive. We need give no final decision on this point so far as riots are concerned, but, in our opinion, there was in the present case evidence on which the jury could find that the appellants were guilty of an affray and on that matter the recorder's direction was right.

We must now turn to the second ground of appeal. It will be remembered that the appellant Sharp contended that he only acted in self-defence after he had been set on by the other appellant, and, apparently attempted to excuse the use of a razor because he was handicapped by his crippled condition. The appellant Johnson also seems to have endeavoured to justify his conduct in biting off his opponent's ear by the fact that he was attacked with a razor. Now as the recorder said, and we see no reason why he should not, one object in charging the appellants with an affray which is of necessity a joint offence, is that, in this class of case, each prisoner throws the blame on the other and there is a danger that, perhaps being disgusted with both and thinking each only got his deserts, a jury will acquit both if the charges are of the one wounding the other. The recorder directed the jury that it did not matter who started the fight or who was to blame and that in the present case no question of self-defence arose. Indeed, he said more than once and with emphasis that self-defence for the purpose of this case was quite immaterial. In our opinion, this goes too far. If two men are found fighting in a street one must be able to say the other attacked him and he was only defending himself. If he was only defending himself and not attacking that is not a fight and, consequently, not an affray. A man may well defend himself and then pass to the attack, which is very likely what happened here, or in repelling an attack he may use more than necessary force, and, again, that may be the case here as a razor was used. It appears to us inescapable that this raised questions for the jury. The appellant Sharp's case was that he was attacked by the appellant Johnson and that, as a partial cripple, he used the razor to protect himself. The jury might well have rejected this as extravagant, but we do not feel able to say that they must have done so on a proper direction. The facts are such that the court is strongly inclined to apply the proviso*, but we think on the whole that were we to do so we should be going further than we ought, and it is obvious that one cannot be convicted and the other acquitted. We reluctantly, therefore, quash the convictions.

But we have still a power that we think should be exercised, a power to exercise what is called preventive justice. Both these appellants have shown themselves to be violent and aggressive and, as such, to be blemishers of the peace. We, as Her Majesty's judges, are also justices of the peace for every county and we propose, therefore, to exercise the powers given by the Justice of the Peace Act, 1361 (34 Edw. 3 c. 1)†, and which have been confirmed by the well-known decisions in *Wise v. Dunning* (3) ([1902] 1 K.B. 167), and *Lansbury v. Riley* (4) ([1914] 3 K.B. 229). We order each of them to enter into a recognisance and to give a surety in the sum of £50 to keep the peace and be of good behaviour for twelve months, and, in default, to go to prison for six months.

Convictions quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Solicitor, Metropolitan Police.*

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

* I.e., the proviso to s. 4 of the Criminal Appeal Act, 1907; 5 HALSBURY'S STATUTES (2nd Edn.) 929.

† 14 HALSBURY'S STATUTES (2nd Edn.) 709.

THE COURT OF PROTECTION

PRACTICE DIRECTION.

Trust and Trustee—Appointment of new trustees—Appointment in place of person of unsound mind.

Pursuant to my powers under r. 147 (1) of the Management of Patients' Estates Rules, 1934*, I hereby direct that as from Mar. 1, 1957, every originating summons relating to express trusts constituted by a written document or to the statutory trusts shall be entitled in the matter of the relevant trusts and in the matter of the patient and in the matter of the Trustee Act, 1925, and accordingly the following paragraph shall be substituted for para. (3) (ii) of Form A of the schedule to the said rules:—

(ii) Relating to land held on the statutory trusts:—

53 Vic. C.5

and Amending Acts

195...

No....

In the matter of the Statutory Trusts (*defining them*)

and

In the matter of . . . (*Patient*)

and

In the matter of the Trustee Act, 1925.

RAYMOND JENNINGS,
Master.

11th February, 1957.

For the assistance of practitioners a comprehensive precedent† of a summons under s. 54 of the statute‡ is given below. As regards applications under s. 36 (9)§ of the statute, the titles appearing in the precedent would require to be adapted by substituting “(Section 36 (9))” for “(Section 54)”.

The entitlement of applications under s. 128 of the Lunacy Act, 1890||, is not affected by this notice.

Solicitors are reminded that in suitable cases the fees of counsel for settling applications and appearing in support thereof will be allowed.

Form of Originating Summons under s. 54 of the Trustee Act, 1925

53 Vic. C.5

and Amending Acts

19...

No....

(a) [In the Matter of the Trusts of (the Will dated the19.. and the Codicil thereto dated the19.. of deceased) (a Settlement dated the19.. and made between etc.) (a Conveyance dated the19.. and made between etc.) (an Assent dated

* For r. 147 of the Management of Patients' Estates Rules, 1934 (S.R. & O. 1934 No. 269), see 17 HALSBURY'S STATUTORY INSTRUMENTS 34. The statutory trusts referred to are those defined in s. 35 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 491); and, in relation to intestacy, are those arising by virtue of s. 46 of the Administration of Estates Act, 1925 (9 HALSBURY'S STATUTES (2nd Edn.) 752), cf., Intestates' Estates Act, 1952, s. 1, s. 4. The amended s. 46 is printed in 32 HALSBURY'S STATUTES (2nd Edn.) 123-125.

† This precedent was issued with the practice direction printed above, as also was the note published above. Compare, for a form of order, etc., 13 ENCY. COURT FORMS 113.

‡ I.e., Trustee Act, 1925, s. 54; 26 HALSBURY'S STATUTES (2nd Edn.) 136.

§ I.e., Trustee Act, 1925, s. 36 (9); 26 HALSBURY'S STATUTES (2nd Edn.) 109.

|| 17 HALSBURY'S STATUTES (2nd Edn.) 1115.

.....19.. under the hands of and as personal representatives ofdeceased)] (See Note (1) below).

- (b) [In the Matter of the Statutory Trusts arising under the Law of Property Act, 1925, relating to the property comprised in a Conveyance dated *etc.*] (See Note (2) below).
- (c) [In the Matter of the Statutory Trusts arising under the Administration of Estates Act, 1925, on the intestacy ofdeceased who died on the19..]

and

In the Matter of A.B. (*Patient*)

and

In the Matter of the Trustee Act, 1925 (Section 54)

Let all Parties concerned attend *etc.* on the application on behalf of the above-named A.B. (*Patient*) by C.D. of in the county of..... the Receiver of his income appointed by Order dated the 19.. and....., of..... in the county of.....the continuing trustee of the above-mentioned (*will*) (*settlement*) (*conveyance*) (*assent*) (*statutory trusts*) (*or as the case may be*) for an Order:—

1. That.....ofor some other fit and proper person may be appointed a new trustee of the said (*will*) (*settlement*) (*conveyance*) (*assent*) (*statutory trusts*) (*or as the case may be*) in substitution for the said A.B. and to act jointly with the said.....the continuing trustee thereof.

2. That any necessary vesting order may be made.

3. That the reasonable and proper costs of the applicants and of the respondents of incident to and consequent upon this application be taxed and be paid by the new trustees out of the property or funds subject to the said trusts or the proceeds of sale thereof.

Dated the day of 19..

Taken out byof..... solicitor for the applicants.

To.....of.....

NOTES

(1) This will include the ordinary case where land is conveyed to two or more persons on an express trust for sale for themselves beneficially. No description of the property is normally required in the title.

(2) This will include the case where land is conveyed to two or more persons beneficially without an express trust. As in the case of an express trust, no description of the property is normally required.

A BEHRENS AND ANOTHER v. BERTRAM MILLS CIRCUS, LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), December 3, 4, 5, 6, 7, 13, 14, 17, 18, 19, 21, 1956, January 30, 1957.]

Animal—Liability for keeping dangerous animals—Elephants—Burmese circus elephants frightened by barking dog—Dog illicitly brought into fun fair booth by licensee without knowledge of circus owners—Booth knocked down by elephants—Midgets inside booth injured—Elephants not acting viciously—Whether circus owners liable for damages.

Damages—Mental shock—Fun fair booth knocked down by elephant—No physical injury to plaintiff who was inside booth—Whether damages recoverable for shock.

Damages—Measure of damages—Loss of joint earnings—Husband and wife performing midgets—Act not joint one, but husband exceptionally dependent on wife—No work done by husband during wife's incapacity although husband fit to work—Whether husband entitled to damages in respect of loss of half the joint earnings during period of wife's illness.

The defendants held a circus each year for which they rented part of a building. A fun fair was run in conjunction with the circus, in the same premises, and while the defendants retained general control over the fun fair, they granted licences to amusement caterers to provide entertainment there. W. held a licence from the defendants to set up a booth in the fun fair in which the two plaintiffs, who were midgets and were husband and wife, were exhibited. The plaintiffs put up half the money for the booth and took half the takings. The booth was situated in a corridor which led from the circus to the main part of the fun fair, beyond which the defendants had a menagerie where they kept six Burmese elephants who performed in their circus; to reach the circus, the elephants had to pass along the corridor where the booth was. Neither W. nor the plaintiffs knew, at the time when the licence was granted, that elephants would be passing their booth. On the day in question, W. had a small dog with him in the booth, although it was the defendants' rule that animals were not allowed into the circus or fun fair. When the elephants came along the corridor the dog ran out from the booth barking, and frightened one of them who went after the dog in the direction of the booth followed by another elephant. As a result, the booth was knocked down by the elephants and the plaintiff wife who was inside with her husband was seriously injured. Her husband, although not physically injured, suffered a considerable shock and went to bed for a week after the accident; thereafter he was fit to work.

The earnings of the plaintiffs were paid to them jointly, their expenses were paid jointly and the benefit of their earnings was shared equally between them. The act which they performed at music halls or when on exhibition was not a joint one, in that the husband could get work without the wife, but they were exceptionally dependent on each other, because they were midgets. When they were on tour they usually lived in a caravan parked near to their work in which they spent most of their time, as it was necessary that the public should not see them except at performances. The total period of the wife's incapacity for work was eight months after the accident, and during this period the husband, although himself fit and able to obtain work, chose to stay with her.

In an action by the plaintiffs for damages,

Held: (i) the defendants were liable in damages for the following reasons—

(a) the defendants were under an absolute duty so to confine and control elephants kept by them that the elephants did no injury (dictum of LORD MACMILLAN in *Read v. J. Lyons & Co., Ltd.*, [1946] 2 All E.R. at p. 476, applied), because elephants were a species that in law were within the class

of dangerous animals, animals *ferae naturae* (*Filburn v. People's Palace & Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258, followed), and the injury had in fact been caused by the elephant while temporarily out of control (see p. 590, letter H, and p. 591, letter B, post);

(b) thus it was no defence either that the elephants concerned were not dangerous in fact (see p. 588, letter C, post), or that the injury or damage caused did not flow from any vicious act of the elephant, but was the result of the elephant's reaction to fright (see p. 589, letter E, and p. 590, letter C, post), or that the injury was caused by the wrongful act of a stranger, viz., of W. (*Baker v. Snell*, [1908] 2 K.B. 825, explained and followed; see p. 594, letter F, post);

(c) nor did the maxim *volenti non fit injuria* afford a defence as the plaintiffs had no reason to suspect, when they engaged the booth, that elephants would come near, and when subsequently they knew that elephants would pass there was no obvious danger from them (*Clayards v. Dethick & Davis* (1848), 12 Q.B. 439 applied).

(ii) as regards damages—

(a) the total damages of both plaintiffs for loss of joint earnings for eight months should, in the circumstances, be apportioned equally between them, although the wife's part in the exhibition was less than her husband's;

(b) the husband was entitled only to one week's loss of his earnings for incapacity to earn due to ill health from nervous shock (*Owens v. Liverpool Corpn.*, [1938] 4 All E.R. 727, applied; see p. 596, letter H, post);

(c) although, therefore, the husband could not recover the half of the eight months' loss of joint earnings apportioned to him, yet he was entitled to damages for the period while he was fit to work and his wife was unfit, because his refusal to go on tour without his wife was, in the exceptional circumstances of the present case, reasonable and, if he had gone on tour, he would have been entitled to compensation for the cost of necessary domestic help and for the loss of his wife's society (*Burgess v. Florence Nightingale Hospital for Gentlewomen Management Committee*, [1955] 1 All E.R. 511, distinguished).

Observations on dicta and grounds of judicial decisions (see pp. 593, 594, post).

[As to liability for injuries by dangerous animals, see 1 HALSBURY'S LAWS (3rd Edn.) 666, para. 1272; and for cases on the subject, see 2 DIGEST 236-239, 238-244.]

As to the recovery of damages for nervous shock, see 11 HALSBURY'S LAWS (3rd Edn.) 278, para. 460; and for cases on the subject, see 17 DIGEST (Repl.) 122, 123, 333-339, and 36 DIGEST (Repl.) 196, 197, 1032-1039.]

Cases referred to:

- (1) *Read v. Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 36 Digest (Repl.) 83, 452.
- (2) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, 458.
- (3) *Wormald v. Cole*, [1954] 1 All E.R. 683; [1954] 1 Q.B. 614; 3rd Digest Supp.
- (4) *Filburn v. People's Palace & Aquarium Co., Ltd.*, (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 2 Digest 238, 243.
- (5) *McQuaker v. Goddard*, [1940] 1 All E.R. 471; [1940] 1 K.B. 687; 109 L.J.K.B. 673; 162 L.T. 232; 2nd Digest Supp.
- (6) *Knott v. London County Council*, [1934] 1 K.B. 126; 103 L.J.K.B. 100; 150 L.T. 91; 97 J.P. 335; Digest Supp.
- (7) *Parker v. Oloxo, Ltd & Senior*, [1937] 3 All E.R. 524; 36 Digest (Repl.) 87, 464.

- A** (8) *Glasgow Corpn. v. Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 1943 S.C. (H.L.) 3; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 36 Digest (Repl.) 58, 317.
- (9) *Besozzi v. Harris*, (1858), 1 F. & F. 92; 175 E.R. 640; 2 Digest 238, 241.
- (10) *Clayards v. Dethick & Davis*, (1848), 12 Q.B. 439; 116 E.R. 932; 36 Digest (Repl.) 154, 809.
- B** (11) *Reardon Smith Line, Ltd. v. Australian Wheat Board*, [1956] 1 All E.R. 456; [1956] A.C. 266.
- (12) *Baker v. Snell*, [1908] 2 K.B. 352; *affd.* C.A., [1908] 2 K.B. 825; 77 L.J.K.B. 1090; 99 L.T. 753; 2 Digest 240, 254.
- (13) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, 334.
- C** (14) *Hale v. Jennings Bros.*, [1938] 1 All E.R. 579; 36 Digest (Repl.) 286, 352.
- (15) *Owens v. Liverpool Corpn.*, [1938] 4 All E.R. 727; [1939] 1 K.B. 394; 108 L.J.K.B. 155; 160 L.T. 8; 17 Digest (Repl.) 123, 337.
- (16) *Burgess v. Florence Nightingale Hospital for Gentlemen Management Committee*, [1955] 1 All E.R. 511; [1955] 1 Q.B. 349; 3rd Digest Supp.
- (17) *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K.B. 370; 85 L.J.K.B. 1289; 115 L.T. 129; 80 J.P. 321; 2 Digest 234, 226.
- D**

Action.

This was an action for damages by a husband and wife, Mr. and Mrs. J. H. W. Behrens, in respect of injuries which they sustained on Jan. 2, 1954, when a booth in which the plaintiffs were being exhibited in a fun fair adjoining a circus held by the defendants, Bertram Mills Circus, Ltd., was knocked down by one of the defendants' elephants with the result that the booth fell on Mrs. Behrens (referred to hereinafter as the wife), causing her serious physical injuries, and, causing shock to Mr. Behrens (referred to hereinafter as the husband).

The defendants held a circus each year, and for this purpose they rented the Grand Hall at Olympia, London, and the annexe behind it. The main entrance to Olympia led into the Grand Hall. The circus ring and a theatre occupied that half of the hall nearer to the main entrance; the other half of the hall and the annexe contained a fun fair. Public access to the fun fair was obtained by the main entrance. A gallery ran round the Grand Hall, and the space underneath it, which was outside the theatre, formed a corridor, with small booths on either side of it which gave access to the main part of the fun fair. The passage-way between the booths was some thirteen feet wide and was primarily intended for the use of the public. The defendants operated the circus themselves, but not the fun fair. Although they retained general control of the fun fair, they granted concessions to different amusement caterers to set up various forms of entertainment there. At the further end of the annexe, beyond the fun fair, the defendants had a menagerie where they kept animals for show, including the animals who performed in the circus. Among these were six Burmese elephants. There were two performances of the circus on weekdays, and three on Saturdays, and at each performance the elephants were led from the menagerie to the circus ring and back again, on two separate occasions, once to take part in the grand parade round the circus ring, and, the second time, to perform their particular act. The route which the elephants took from the menagerie to the circus ring was along the passage-way between the booths.

The plaintiffs were dwarfs, or "midgets" as they were known in the amusement trade. The husband was only thirty inches high, and was uncommon in that he was perfectly proportioned; he claimed to be the smallest man on earth. The wife was thirty-six inches high and not perfectly proportioned. She was trained to play certain musical instruments with which she contributed to any act which the plaintiffs performed at music halls. Until 1949 the plaintiffs had appeared mainly in music halls, although they had also appeared with three circuses. In 1953 they went on tour with a Mr. Whitehead, who

acted as their manager. On this tour they exhibited themselves in a booth, for admission to which a fee was charged to the public.

In August, 1953, the defendants granted to Mr. Whitehead a licence to occupy a booth in the fun fair adjoining the defendants' circus at Olympia, for the purpose of exhibiting the plaintiffs. Mr. Whitehead paid the defendants £172 10s. for the licence, and the terms on which the plaintiffs and Mr. Whitehead worked were that the plaintiffs put up half the money required for the booth and took half the takings from it. They regarded themselves as partners with Mr. Whitehead, although, in law, they were not partners. The booth occupied by the plaintiffs and Mr. Whitehead was in the corridor under the gallery on one side of the passage-way along which the elephants passed on their journeys between the menagerie and the circus ring. The booth had an exit and an entrance, between which was a paybox where Mr. Whitehead sat.

On the day of the accident, Jan. 2, 1954, Mr. Whitehead had arranged to get circus tickets for his two children, and to meet them, at 2 p.m., in the foyer of the main entrance to Olympia. The children duly arrived at the entrance together with a small Pomeranian dog called Simba, which belonged to Mr. Whitehead's daughter. Mr. Whitehead was unable to get circus tickets, and so he took the children to the fun fair and left them to wander around there. He then returned to the plaintiffs' booth with the dog Simba. Simba was put underneath the paybox counter in the booth, and its lead was attached to one of the legs of Mr. Whitehead's chair. The circus had already begun, and the elephants had made their first journey to and from the circus ring. They again came out of the menagerie to go to the circus ring to perform their act. They were walking in single file in their usual manner, with the trainer walking beside the leading elephant and a groom walking beside each of the remaining elephants. As the third elephant in the procession, called Bullu, was passing the plaintiffs' booth, the dog Simba ran out snapping and barking. Bullu trumpeted with fright, Simba turned back towards the booth, and Bullu went after her, followed by the elephant in front of Bullu. As a result, the front of the booth and other parts of it were knocked down and the wife, who was inside the booth with her husband, was seriously injured. The dog was killed. The trainer quickly got the elephants back into line, the whole incident having taken only a few seconds, and the elephants performed their act, as usual. Neither of the plaintiffs was touched by any of the elephants.

As a result of the accident the wife suffered the following injuries: fracture of the right arm, resulting in a shortening of the arm and restriction of its movement, fracture of five ribs (which healed well), a fracture of the lower part of the sacrum, and displacement of the coccyx. The last fracture united but caused her constant discomfort and pain. She came out of hospital on Mar. 10, 1954, and on June 12, 1954, she was examined by an orthopaedic surgeon, who then stated that she was fit to do light work which did not entail the skilled use of her arms. She was medically examined again in 1955, when it was stated that her general health had been detrimentally affected by the accident. She was again examined in 1956. At the time of this action, the wife was able to play musical instruments to the extent of providing supplementary interest while her husband was on the stage, although she could not play as well as she had done before the accident. It was unnecessary to admit the husband to hospital after the accident, although he was very distressed on the day after the accident, and thereafter he went to bed for a week. As a further result of the accident, he suffered aggravation of an existing chest complaint.

The plaintiffs did not resume work until Apr. 1, 1956 (two and a quarter years after the accident), although in May or June, 1954, and at about the same time in 1955, they received offers of music hall work similar to that which they had previously done. The plaintiffs refused these offers, but it was not established that the plaintiffs rejected work for which they knew they were fit merely

A because they thought that acceptance might prejudice their claim for damages in this action.

Prior to the accident the plaintiffs were paid jointly at the rate of about £25 weekly; their expenses were, however, heavy and their net earnings were between £40 and £50 a month. Their takings and expenses in respect of their work were dealt with jointly and no part of the net earnings was appropriated as the special property of one or other of them. The act which the plaintiffs performed at music halls was not really a joint one; the husband was the main attraction as the supposedly smallest man on earth, and his perfect proportions were uncommon if not unique. His wife provided diversions of a musical kind, which could have been supplied in some other form, and her part in the act was subsidiary. Further, her musical act did not form part of the exhibition work which the plaintiffs were doing at Olympia and previously. The plaintiffs were, however, exceptionally dependent on each other because they were dwarfs. The husband was particularly dependent on his wife, and his dependence on her was increased by the fact that it was usual for them to live in a caravan which was parked near to their place of work and in which they had to spend most of their time, as he could not mingle with the public when he was being exhibited or was appearing in shows.

Harold Brown, Q.C., and F. B. Purchas for the plaintiffs.

M. D. Van Oss for the defendants.

Cur. adv. vult.

Jan. 30. DEVLIN, J., read a judgment in which he stated the facts which led up to and resulted in the accident which gave rise to the plaintiffs' claim, and continued: The plaintiffs rely on three causes of action, trespass, breach of the absolute duty laid on the keeper of a dangerous animal to confine and control it, and negligence. Counsel for the plaintiffs has not pursued before me the cause of action in trespass, while reserving his right to do so in a higher court.

The second cause of action, generally known as the scienter action, is the one on which counsel for the plaintiffs chiefly relied. Since one of the defendants' submissions goes to the root of that form of action, I propose to begin by stating just what I take its basis to be. Before doing this I must acknowledge my indebtedness to PROFESSOR GLANVILLE WILLIAMS, who in his book, LIABILITY FOR ANIMALS (1939), has dealt with the whole subject in such detail and with such clarity as to make it possible for me at least to hope that I can successfully grapple with this antiquated branch of the law and also to omit from this judgment much of the elaboration that would otherwise have to be there.

A person who keeps an animal with knowledge (scienter retinuit) of its tendency to do harm is strictly liable for damage that it does if it escapes; he is under an absolute duty to confine or control it so that it shall not do injury to others. All animals *ferae naturae*, that is, all animals which are not by nature harmless, such as a rabbit, or have not been tamed by man and domesticated, such as a horse, are conclusively presumed to have such a tendency, so that the scienter need not in their case be proved. All animals in the second class, *mansuetae naturae*, are conclusively presumed to be harmless until they have manifested a savage or vicious propensity; proof of such a manifestation is proof of scienter and serves to transfer the animal, so to speak, out of its natural class into the class *ferae naturae*. In his book, LIABILITY FOR ANIMALS (1939), at p. 265, PROFESSOR GLANVILLE WILLIAMS has traced the origin of "this primitive rule", as LORD MACMILLAN described it in *Read v. J. Lyons & Co., Ltd.* (1) ([1946] 2 All E.R. 471 at p. 476). No doubt, in its time it was a great improvement on the still more primitive notion that only the animal was "liable" for the harm which it did. But now this sort of doctrine with all its rigidity—its conclusive presumptions and categorisations—is outmoded and the law favours a flexible and circumstantial approach to problems of this sort. Four

years ago, a committee* appointed by the Lord Chancellor and presided over by LORD GODDARD, C.J., recommended that the scienter action should be abolished and that liability for harm done by an animal should be the same as in the case of any other chattel; it should depend on the failure to exercise the appropriate degree of care, which might in the case of very dangerous animals be "so stringent as to amount practically to a guarantee of safety": per LORD MACMILLAN in *M'Alister (or Donoghue) v. Stevenson* (2) ([1932] A.C. 562 at p. 612). I wish to express the hope that Parliament may find time to consider this recommendation, for this branch of the law is badly in need of simplification.

The particular rigidity in the scienter action which is involved in this case—there are many others which are not—is the rule which requires the harmfulness of the offending animal to be judged, not by reference to its particular training and habits, but by reference to the general habits of the species to which it belongs. The law ignores the world of difference between the wild elephant in the jungle and the trained elephant in the circus. The elephant *Bullu* is, in fact, no more dangerous than a cow; she reacted in the same way as a cow would do to the irritation of a small dog; if perhaps her bulk made her capable of doing more damage, her higher training enabled her to be more swiftly checked. I am, however, compelled to assess the defendants' liability in this case in just the same way as I would assess it if they had loosed a wild elephant into the fun fair. This is a branch of the law which, as LORD GODDARD, C.J. (quoting BLACKBURN, J.) said recently in *Wormald v. Cole* (3) ([1954] 1 All E.R. 683 at p. 686), has been settled by authority rather than by reason. But once the fundamental irrationality is accepted of treating circus elephants as if they were wild, I think it is possible to determine sensibly in the light of the scienter rule the other points on liability which arise in this case.

The defendants submit five answers to the scienter action. They are: (i) that the elephants are not *ferae naturae* within the meaning of the rule; (ii) that the rule does not impose liability for every act that an animal does if it escapes control, but only for those acts which are vicious and savage, which the action of *Bullu* was not; (iii) that the plaintiffs' injuries were caused by their own fault; (iv) that the *maxim volenti non fit injuria*—that is, that the plaintiffs accepted the risk—applies to them; (v) that it is a good defence to liability under the rule if the action of the animal is caused by the wrongful act of a third party, in this case Mr. Whitehead and the dog *Simba*.

The first submission is, in my judgment, concluded so far as this court is concerned, by the decision of the Court of Appeal in *Filburn v. People's Palace & Aquarium Co., Ltd.* (4) ((1890), 25 Q.B.D. 258), which held that, as a matter of law, an elephant is an animal *ferae naturae*. Counsel for the defendants sought to distinguish this case on the ground that the elephants belonging to the defendants are Burmese elephants and he submits that it is open to me to hold that, while elephants generally are *ferae naturae*, Burmese elephants are not. In my judgment, it is not open to me to consider this submission. It is not stated in *Filburn v. People's Palace & Aquarium Co., Ltd.* (4) what the nationality of the elephant was with which the court was there dealing, and the case must be regarded as an authority for the legal proposition that all elephants are dangerous. The reason why this is a question of law and not a question of fact is because it is a matter of which judicial notice has to be taken. The doctrine has, from its formulation, proceeded on the supposition that the knowledge of what kinds of animals are tame and what are savage is common knowledge. Evidence is receivable, if at all, only on the basis that the judge may wish to inform himself. This was clearly settled by the Court of Appeal in *McQuaker v. Goddard* (5) ([1940] 1 All E.R. 471), where CLAUSON, L.J., said (*ibid.*, at p. 478):

* See the Report on the Law of Civil Liability for Damage done by Animals (1953) Cmd. 8746.

- A "The reason why the evidence was given was so that it might assist the judge in forming his view as to what the ordinary course of nature in this regard in fact is, a matter of which he is supposed to have complete knowledge."

B Common knowledge about the ordinary course of nature will extend to a knowledge of the propensities of animals according to their different genera, but cannot be supposed to extend to the manner of behaviour of animals of the same genus in different parts of the world. Nor can one begin a process of inquiry which might lead in many directions (for example, I am told that female elephants are more docile than male, and that that is why circus elephants are usually female) and be productive of minute subdivisions which would destroy the generality of the rule.

- C The defendants' second contention raises a point of doubt and difficulty. It may be approached in this way. The reason for imposing a specially stringent degree of liability on the keeper of a savage animal is that such an animal has a propensity to attack mankind and, if left unrestrained, would be likely to do so. The keeper has, therefore, in the words of LORD MACMILLAN in *Read v. J. Lyons & Co., Ltd.* (1) ([1946] 2 All E.R. 471 at p. 476), "an absolute duty to confine or control it so that it shall not do injury . . .". If, however, it escapes from his control, is he liable (subject, of course, to the rules on remoteness of damage) for any injury which it causes, or only for such injury as flows naturally from its vicious or savage propensity? Counsel for the defendants submits that it is the latter part of this question which suggests the correct answer and that the rule of absolute liability applies only when an animal is acting savagely and attacking human beings. On the facts of this case, he submits that Bullu was acting, not viciously, but out of fright; she was seeking to drive off the small dog rather than to attack it; it may be that she or another elephant trampled on the dog (there is no conclusive evidence of that, and it might have been crushed by falling timber) but there is nothing to show that she trampled on it deliberately. Certainly she never attacked the wife, who was injured only indirectly. In short, if Bullu could be treated as a human being, her conduct would be described, not as vicious, but as quite excusable.
- F It does not, to my mind, necessarily follow that the scope of the rule is co-extensive with the reason for making it. It may equally well be argued that, once the rule is made, the reason for making it is dissolved and all that then matters are the terms of the rule. That would certainly be the right approach in the case of any statutory rule of absolute liability. Is it so in the case of this rule of common law? There appears to be no authority directly in point. Counsel for the defendants derives the chief support for his contention from an argument which may be summarised as follows. If an animal *mansuetæ naturæ* manifests a vicious tendency, the *scienter* rule applies to it as if it were *feræ naturæ*. The law has often been put in that way, for example, by LORD WRIGHT, in *Knott v. London County Council* (6) ([1934] 1 K.B. 126 at p. 139). How is the principle applied? Suppose that a large dog collides with a child and knocks him down, that is an accident and not a manifestation of a vicious propensity and the *scienter* rule does not apply at all: if the dog bites a child, it becomes *feræ naturæ* and the strict rule thereafter applies. It would, however, seem to be unreasonable that the strict rule should require the dog to be kept under complete restraint. Suppose that its keeper muzzles it and that while muzzled the dog playfully or accidentally knocks a child down, ought the keeper to be liable? There is a good deal of authority, referred to by PROFESSOR GLANVILLE WILLIAMS*, to show that the keeper is not liable; and the learned author considers that the damage must have in some way been intended by the animal, that its benevolence or its *mens rea* is relevant and that,

* See GLANVILLE WILLIAMS ON LIABILITY FOR ANIMALS (1939) 314, 315.

at least in the case of harmless animals, the rule is that the injury must be the result of a vicious propensity. A

This is an impressive argument. It does not seem to me, however, that the logic of the matter necessarily requires that an animal which is savage by disposition should be put on exactly the same footing as one which is savage by nature. Certainly, practical considerations would seem to demand that they should be treated differently. It may be unreasonable to hold the owner of a biting dog responsible thereafter for everything that it does; but it may also be unreasonable to limit the liability for a tiger. If a person wakes up in the middle of the night and finds an escaping tiger on top of his bed and suffers a heart attack, it would be nothing to the point that the intentions of the tiger were quite amiable. If a tiger is let loose in a fun fair, it seems to me to be irrelevant whether a person is injured as the result of a direct attack, or because, on seeing it, he runs away and falls over. The feature of this present case which is constantly arising to blur the reasoning is the fact that this particular elephant, Bullu, was tame; but that, as I have said, is a fact which must be ignored. She is to be treated as if she were a wild elephant, and, if a wild elephant were let loose in the fun fair and were stampeding around, I do not think that there would be much difficulty in holding that a person who was injured by falling timber had a right of redress. It is not, in my judgment, practicable to introduce conceptions of mens rea and malevolence in the case of animals. B C D

The distinction between those animals which are *ferae naturae* by virtue of their genus and those which become so by the exhibition of a particular habit seems to me to be this: that in the case of the former it is assumed (and the assumption is true of a really dangerous animal such as a tiger) that whenever they get out of control they are practically bound to do injury, while in the case of the latter the assumption is that they will do injury only to the extent of the propensity which they have peculiarly manifested. It would not be at all irrational if the law were to recognise a limited distinction of this sort while holding that both classes of animals are governed by the same *scienter* rule. In the case of dangerous chattels, for example, the law has recognised, although it is not perhaps now of much importance, the distinction between chattels that are dangerous in themselves and chattels that are dangerous when used for certain purposes; and animals *ferae naturae* have frequently been compared with chattels in the former class; see, for example, per HILBERY, J., in *Parker v. Oloxo, Ltd. & Senior* (7) ([1937] 3 All E.R. 524 at p. 528), and per LORD WRIGHT in *Glasgow Corpn. v. Muir* (8) ([1943] 2 All E.R. 44 at p. 52). E F G

As I have said, there is really no authority on this point. There are, indeed, not many cases which have dealt with an animal that is *ferae naturae* by genus as distinct from disposition. In such cases as there are—*Besozzi v. Harris* (9) ((1858), 1 F. & F. 92) and *Filburn v. People's Palace & Aquarium Co., Ltd.* (4)—the rule was stated in the widest terms; but in these cases the court was dealing with an attacking animal, so that the point did not arise. Nevertheless, in my judgment, they laid down the principle which I should follow; and I think that the statement of the law by LORD MACMILLAN, in *Read v. J. Lyons & Co., Ltd.* (1) ([1946] 2 All E.R. 471 at p. 476) which I have quoted, namely, that there is “an absolute duty to confine or control [a dangerous animal] so that it shall not do injury” needs no qualification. H

This conclusion is supported by *Wormald v. Cole* (3). I do not rely on that decision as an authority which is directly in point because it concerned the rule of absolute liability for cattle trespass, and these rules of absolute liability, while similar in effect, have different origins; but it furnishes strong support by way of analogy. In that case the plaintiff, when she was trying to get straying cattle out of her garden, was injured, not because they had attacked her, but because in blundering about they had knocked her down. It was argued that the plaintiff could not recover because her injuries were not the result of any I

A vicious action on the part of the cattle. This argument was rejected by the Court of Appeal. LORD GODDARD, C.J., pointed out ([1954] 1 All E.R. at p. 688) that in many cases it would be impossible to say with certainty whether the injuries were caused by vice, or playfulness, or by mere accident.

It follows that, subject to any special defence, the defendants are liable for any injury done while the elephant was out of control. It does not follow (I say this because of a point that was raised in the argument) that, if an elephant slips or stumbles, its keeper is responsible for the consequences. There must be a failure of control. Here, however, there was such a failure, albeit a very temporary one. It follows also that the ordinary rule on remoteness of damage applies. It was not suggested that, if an animal which is out of control knocks over a structure and injures a person the other side of it, that is not, under the ordinary rule, a consequence of the failure of control.

The third point taken by the defendants is that the injuries were due to the plaintiffs' own fault. This defence is of a nature well recognised in this class of case and there are many cases in which liability has been successfully contested on the ground that the savage animal was teased or provoked by the plaintiff. I see no reason why the same sort of defence should not prevail where the fault of the plaintiff does not amount to recklessness of this sort, but is failure of due diligence to look after his own safety. The facts said to constitute the defence in this case are pleaded in para. 6A of the re-amended defence:

"Further or in the alternative the matters complained of were caused or contributed to by the negligence of the plaintiffs and each of them in that they permitted the said dog to be in or near to the said booth well knowing that dogs were not permitted upon the circus premises and/or that dogs were likely to alarm or excite the elephants."

In my judgment, this plea breaks down completely on the allegation that the plaintiffs permitted the dog to be in or near the booth. Even if I were to assume that the plaintiffs knew of the presence of the dog and to assume likewise the other allegations in the paragraph, there is nothing at all to sustain the allegation of permission. Mr. Whitehead was not in their employ and they had no power to control him in any way. Conceivably, it might be said that, if the presence of the dog amounted to an obvious danger, anyone who knew of it, whether he had power to order the dog off or not, ought in the interests of his own safety to have reported it to someone who had the necessary authority; but no one puts the danger as high as that.

The fourth contention of the defendants is a plea of *volenti non fit injuria*, based on the allegation that the plaintiffs accepted any risk inherent in the passage of elephants past their booth. There is no evidence that either the plaintiffs or Mr. Whitehead knew or had any reason to suspect when the licence was granted that the elephants would come anywhere near their booth. Counsel for the defendants, however, submits that the time when the licence was entered into is not the decisive time, or not the only decisive time. He submits that, when the plaintiffs discovered, as of course they did at the beginning, that the elephants passed the booth, their decision to remain amounted to an assumption of the risk. The situation at this later point of time raises quite different considerations. The plaintiffs had then to decide, in the light of their knowledge of the conditions under which it would have to be exercised, not whether they would acquire a right, but whether they would continue to exercise a right for which they had already paid. It is not *per se* a defence that the plaintiffs were engaged in exercising a right. The pursuit of one's own rights may sometimes be so foolhardy that the reasonable man should desist and seek another remedy. If a man is on the highway and he sees elephants approaching in procession, the law does not require him to elect between turning down a side street or accepting the risk of their misbehaviour if he goes on: but if he sees

them stampeding and remains where he is because he considers that he has as much right to the highway as they have, he might fail to recover. I take the law on this point as that laid down in *Clayards v. Dethick & Davis* (10) ((1848), 12 Q.B. 439). In that case the defendants made an open trench outside the plaintiff's stable and told him that he must put up with it. The plaintiff attempted to get his horse out by means of planks over the trench and was advised by the defendants not to do so because it was dangerous. An accident occurred and the plaintiff was held entitled to recover. He was not bound to refrain from exercising his rights because there was some danger. As PATTESON, J., put it (*ibid.*, at p. 446):

"The whole question was, whether the danger was so obvious that the plaintiff could not with common prudence make the attempt."

The same principle has recently been considered in the Privy Council in *Reardon Smith Line, Ltd. v. Australian Wheat Board* (11) ([1956] 1 All E.R. 456 at p. 461). It cannot here be contended that the passing of the elephants created an obvious danger; indeed, the case as pleaded by the defendants is that the risk was very small. This plea fails.

The last of the defendants' contentions is that they are freed from liability by the wrongful act of a third party. This point appears to be concluded against them by the decision of the Court of Appeal in *Baker v. Snell* (12) ([1908] 2 K.B. 825), in which it was held by a majority that the intervening act of a third party was no defence. But counsel for the plaintiffs, perhaps because he had his eye on a place where *Baker v. Snell* (12) would naught avail him, or perhaps because he feared that I might be deterred from following the decision by the volume of criticism that has since flowed over it, gave it no place in the van of his argument—non tali auxilio, except, of course, in the alternative. He preferred to rely on general principles, rather than on any specific authority, for his chief submission on this point. He submitted that the liability in respect of a savage animal was based on the rule in *Rylands v. Fletcher* (13) ((1868), L.R. 3 H.L. 330). That rule allows as a defence the act of a third party only if it is the act of a stranger; and a licensee is not, he submitted, to be regarded as a stranger. Mr. Whitehead was a licensee and, therefore, his intervention afforded no excuse.

There are in the authorities numerous dicta to suggest that the liability for savage animals is a branch of the rule in *Rylands v. Fletcher* (13). In his book *LIABILITY FOR ANIMALS* (1939), at p. 352, note 4, PROFESSOR GLANVILLE WILLIAMS has collected the cases. These dicta may have to be reconsidered in the light of what was said in *Read v. J. Lyons & Co., Ltd.* (1) ([1946] 2 All E.R. 471), particularly per VISCOUNT SIMON (*ibid.*, at p. 474). Whether or not the two rules stem from a common principle, it would, no doubt, be legitimate in formulating the exceptions, if any, to the liability for savage animals to look at exceptions that have already been established under other rules of strict liability. But, whether the process be one of analogy or one of derivation, it must be remembered that the underlying conditions for the two kinds of liability are different. One is based on the possession of an animal and the other on the occupation of land. If, in relation to the former, the holding of a licence is to have any materiality, it must refer to some licensed custodian of the animal, such as the potman in *Baker v. Snell* (12). The fact that in this particular case the defendants not only were the keepers of the elephant but had also rented the premises on which the animal was at the time of the accident and licensed the third party to be on them is wholly irrelevant to any question of liability in the scienter action. If the defendants had granted a concession for the performance of the circus or the keeping of a menagerie as well as for the fun fair, and, accordingly, the elephant had been kept by some other defendant, it could not possibly be relevant in an action against him to show that the defendant and a third party were both concessionaires or licensees of the same

A licensor. It cannot make any difference in principle if the keeper of the animal happens also to be the licensor. In my judgment, therefore, if the rule in *Rylands v. Fletcher* (13) is to be applied, Mr. Whitehead must be deemed for its purposes to be a stranger.

Counsel for the plaintiffs relied on *Hale v. Jennings Bros.* (14) ([1938] 1 All E.R. 579), particularly the observations of SLESSER, L.J., at p. 583. If in this case I were dealing with liability which arose out of the occupation of land, these dicta would be in point. For the reasons which I have given, I think that they are here irrelevant in determining the status of Mr. Whitehead. I do not mean that the relationship of licensor and licensee is necessarily irrelevant on consequential issues of fact. Accepting Mr. Whitehead as a stranger, it would still be necessary for the defendants to show that they took all reasonable precautions to prevent him or any other stranger from interfering with their animals; and it might well be that reasonable precautions would include, since they happened incidentally to be licensors, using their powers under the licence, to control his conduct, for example by forbidding dogs. That, however, would raise another point which would go to an issue of negligence. That is an answer to the third-party defence which could arise on the facts and in that light I shall refer to it again, but, in my judgment, Mr. Whitehead's status as a licensee does not of itself dispose of that defence as a matter of law.

I turn to *Baker v. Snell* (12). In that case the defendant was a publican who owned a dog known by him to be savage. It was the duty of his potman to let the dog out early in the morning and then chain it up again. On the occasion in question the potman brought the dog into the kitchen where the plaintiff, who was a housemaid in the employment of the defendant, was at breakfast and saying: "I will bet the dog will not bite anyone in the room", let it go saying: "Go it, Bob". The dog then flew at the plaintiff and bit her. In the county court the judge held that the act of the potman was an assault for which the defendant was not liable and he non-suited the plaintiff. The non-suit was attacked on two grounds. It was contended that the defendant was liable as the keeper of the dog and that the intervening act of the potman, even if he had been a stranger, would be no defence. Secondly, it was contended that, if the intervention did provide a good ground of defence, nevertheless, since in this case the intervener was the defendant's servant and acting within the scope of his employment, the defendant must be liable on that ground. A new trial was ordered both in the Divisional Court ([1908] 2 K.B. 352) and on appeal by the Court of Appeal and in both courts the judges were unanimous; but they were not unanimous in their reasons. In the Court of Appeal, all three of the lords justices agreed that the question whether or not the potman was acting in the course of his employment was one of fact which ought to have been left to the jury and that a new trial must be ordered on that score. COZENS-HARDY, M.R., and FARWELL, L.J., considered also, as had SUTTON, J., in the court below ([1908] 2 K.B. 352 at p. 355), that the defendant was liable as the keeper of the animal and that the intervention of the potman, even if not acting in the course of his employment, created no defence. Even on this view a new trial was necessary as it was not open to the Court of Appeal to assess the damages. On this point KENNEDY, L.J., disagreed, sharing the view expressed by CHANNELL, J., in the Divisional Court.

It is not, I think, disputed that, if the reasoning of COZENS-HARDY, M.R., and FARWELL, L.J., is binding on me, I must dismiss without further inquiry a defence based on the act of Mr. Whitehead. Counsel for the defendants submits that the gist of the decision was the order for a new trial on the grounds on which the lords justices were unanimous and that the observations of the Master of the Rolls and FARWELL, L.J., on the other point should be treated as obiter. This question depends, I think, on the language used by COZENS-HARDY, M.R. It is well established that, if a judge gives two reasons for his decision, both are

binding. It is not permissible to pick out one as being supposedly the better reason and ignore the other one; nor does it matter for this purpose which comes first and which comes second. The practice of making judicial observations obiter is also well established. A judge may often give additional reasons for his decision without wishing to make them part of the ratio decidendi; he may not be sufficiently convinced of their cogency as to want them to have the full authority of precedent, and yet may wish to state them so that those who later may have the duty of investigating the same point will start with some guidance. This is a matter which the judge himself is alone capable of deciding and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preference.

COZENS-HARDY, M.R., first dealt with the judgment of CHANNELL, J., and agreed with his view that the scope of the potman's employment ought to have been left to the jury. He said ([1908] 2 K.B. at p. 828):

"I entirely adopt that view, and that, no doubt, is in itself a sufficient reason for affirming the decision of the court below, but as a matter of wider interest has been raised, and as it has been dealt with by both CHANNELL and SUTTON, J.J., I think it right to state, shortly, my view on the point."

If this passage had stood by itself, I think that I should have probably construed it as signifying that the Master of the Rolls did not wish—as would be quite natural in a case where there was a considerable conflict of judicial opinion—to give the force of precedent to views which were not necessary to the decision in the case. But after he had considered the other point and expressed his view about it, he said this (*ibid.*, at p. 832):

"On these authorities, and in accordance with what in my judgment is settled law, I think that the matter ought to go down for a new trial, not merely on the ground stated by CHANNELL, J., though I agree that is sufficient, but also on the ground as to which he expressed some doubt, but on which SUTTON, J., appears to have based his decision."

In this final sentence of his judgment I think that COZENS-HARDY, M.R., was clearly basing his decision on the two grounds and that it is not open to me to choose between them. I have said that this point depends on the language of COZENS-HARDY, M.R., because I think that it is plain from the language used by FARWELL, L.J., that he gave as the principal ground for his judgment that the wrongful act of a third person was no defence.

Accordingly, I hold this contention, viz., that the wrongful act of a third party is a good defence to liability under the scienter rule, which is the last of the defendants' contentions, to be concluded against the defendants by authority which binds me. The result is, therefore, that the rule of strict liability applies and the defendants must compensate the plaintiffs for their injuries.

I have reached this conclusion on the law without having to go very deeply into the facts and, indeed, on the basis of facts which were almost all undisputed. There was, however, a good deal of dispute on other questions of fact which may become relevant if different conclusions are reached on the law. I shall, by way of any appendix to this judgment, set out my findings on these points in case they may be material hereafter; but before I do that I must deal with the assessment of damages which also raises some difficult questions of fact and law.

[HIS LORDSHIP described the injuries suffered by the wife*, and continued:] The item in the claim for damages which gives rise to most difficulty, both on the facts and on the law, is the claim for loss of earnings. I cannot, however, give joint damages and it will be necessary for me to consider how far each of the plaintiffs individually has suffered a financial loss as the result of his or her injuries respectively. It will also be necessary for me to consider whether the husband is entitled in law to recover for financial loss caused to him as a

* A summary statement of the injuries and earnings is at p. 586, letter G, to p. 587, letter B, ante.

A result of the injuries which his wife sustained. Before I do this I think it would be convenient, in order to get at the true facts about the loss of earnings, to put these matters momentarily on one side and consider how far the accident affected their joint earning power.

[HIS LORDSHIP considered the facts and, after saying that he accepted the submission of counsel for the defendants that the plaintiffs' act was not a joint act and that diversions other than those provided by the wife could have been arranged for the husband's act, continued:] I am also satisfied, however, that it would not be reasonable to expect the husband to go touring or to go round fairgrounds and exhibitions by himself and without the company of his wife. The plaintiffs live in a strange world and the bond between them must be much stronger even than the ordinary tie of matrimony. [After referring to medical examinations of the wife in 1955 and 1956, HIS LORDSHIP said that, beyond a statement made in the medical report in 1955, which was not repeated in the report of 1956, that her general health was detrimentally affected, there was nothing to show to what extent, if at all, she was unfit to accompany her husband on his tours. HIS LORDSHIP continued:] I think that the discomfort which the wife has while sitting and possibly some deterioration in her general health might make the help which she can give to her husband in his professional life more arduous than it would otherwise have been, and that this is a proper consideration in estimating the appropriate figure for her general damages; but I am satisfied that there is no evidence on which I could find that her incapacity lasted until Apr. 1, 1956, the date on which the plaintiffs first commenced work after the accident.

E There is one remaining factor in the plaintiffs' joint earning power to be considered. Even if the case for the joint act had been fully made out and even if I had held that the husband's career on the stage was finished, it would still have been open to him to earn his living by exhibition at fun fairs and the like as he was doing at Olympia at the time of the accident. I am satisfied that while exhibition work might not be so congenial to the husband and while his having to resort to it more extensively in the future than in the past might be an element (if legally relevant) to be taken into account in assessing general damages, no case has, in any event, been made out for the contention that his wife's injuries put an end to his professional livelihood. For these reasons I am satisfied that no diminution in joint earning power has been proved after the time when the wife was up and about again and fit to accompany her husband on his travels.

G Any liability on the defendants for loss of earnings must, therefore, come to an end as soon as she was fit to accompany her husband. Treating them as joint earners, they could then have got work at the pre-accident remuneration. In the face of the evidence that the wife was fit for light work in the middle of June, 1954, and in the absence of any evidence that she was unfit to go with her husband on tour, I find it impossible to say that the defendants' liability for loss of earnings can extend much beyond that date. I think that the plaintiffs were entitled to some period after recovery to look around for work; but if I fix the total period of incapacity at eight months, I think that that is as much as I can do. I assess the joint loss of earnings for that period at £360.

H I must now proceed to consider in what proportion this special damage is recoverable as between the two plaintiffs, and whether the husband has a good cause of action in respect of the whole of his proportion, and what sums should be awarded to each plaintiff individually as general damages.

I I shall take the wife first. She received half the benefit of the joint earnings and may, therefore, be taken to have been paid half. It is, in my judgment, nothing to the point to submit that, as her part of the act was much smaller than that of her husband, she was, commercially speaking, worth less than half. So long as the arrangement was a genuine one and husband and wife, rightly or wrongly, regarded their contributions as being of equal value, the loss to the

wife is a loss of what she was getting and not of what she would have got if her husband had been disposed to drive a harder bargain. This approach to the subject affects the wife's general damage as well as her special, and in the case of the general damage it works for the advantage of the defendants. I am satisfied that in the future as in the past her husband will continue to rate the support that he gets from the wife as being worth half the joint earnings; therefore, so long as he is alive and working her disablement will not cause her any professional loss. I think that her damages, both special and general, must be assessed on this basis. Accordingly, I award £180 as special damages to the wife.

The wife's general damages must be substantial. Her injuries were considerable and they have left some permanent effects of pain and discomfort. I have to take into account that the discomfort, if not pain, which her injuries continue to cause her may well make her work with her husband more arduous and I have to assess her damages in the light of the arduous work which she has to do if by her support of her husband she is to earn her share of the joint takings. I have also to consider that her ability to earn her own living, if her husband should die, has been diminished by her inability to perform a musical act on her own. I assess her general damages at £2,750.

I turn now to the husband's claim. Can he be compensated for the loss of half the joint earnings? That raises one question of law and another is raised in the assessment of the general damages. I shall take the latter first. The real claim presented by counsel for the plaintiffs is for fright. An elephant coming over the top of a booth would be a terrifying thing even for an ordinary man, and, although the husband asserts that he was not frightened, I am satisfied that the shock must have been considerable. I should like to award him a substantial sum under this head but I am satisfied that I cannot do so except to the extremely limited extent that the shock resulted in physical or mental harm. I think that that is clearly the effect of the authorities. When the word "shock" is used in them, it is not in the sense of a mental reaction but in a medical sense as the equivalent of nervous shock; *MACKINNON, L.J.*, in *Owens v. Liverpool Corpn.* (15) ([1938] 4 All E.R. 727), refers to it (*ibid.*, at p. 730) as being "ascertainable by the physician" and (*ibid.*, at p. 731) as "the form of ill health known as shock". I appreciate that it is now becoming increasingly difficult to define the boundaries of mental ill health. Without infringing the general principle embedded in the common law that mental suffering caused by grief, fear, anguish and the like is not assessable, *Owens v. Liverpool Corpn.* (15) goes as far as any court can go and I cannot accept the invitation of counsel for the plaintiffs to attempt an extension of what is there said.

[*HIS LORDSHIP* referred to the husband's medical history after the accident and to the fact that the husband went to bed on the day after the accident and remained there for a week, and continued:] I think it would not be unreasonable if I were to treat that, namely, the week in bed, as some form of nervous prostration which amounted to ill health. The husband was thus unable to earn money during that period, although that would probably have been impossible anyway owing to the destruction of the booth; the defendants were not, however, concerned to explore this minutely. I assess the damages under this head at £25. [*HIS LORDSHIP* referred to the evidence that the shock suffered by the husband had had a detrimental effect on an existing chest complaint, and said:] I should have thought it likely that, in the case of a man over sixty years of age, minor chest troubles might begin, in any event, to get slightly worse. Here again, however, the defendants have not been disposed to niggle, and I assess the damages under this head at £50. Apart from loss of earnings, the items of special damage particularised in the statement of claim have been agreed to amount to £235, and the defendants are willing to accept that these items are all properly chargeable by the husband without going into their responsibility for them in law.

- A There is, therefore, left only the husband's claim for loss of half the joint earnings. I take £10 of this loss as being included in the figure of £25 which I have already awarded in respect of his own physical incapacity. The balance of £170 depends on whether he is entitled to compensation in respect of the period when he was fit to work and his wife was not. If the husband's loss consisted simply of the fact that the loss of his wife's musical talent made the joint act less valuable to him, I should hold that he could not recover. I decided that way in *Burgess v. Florence Nightingale Hospital for Gentlewomen Management Committee* (16) ([1955] 1 All E.R. 511), where a similar point arose under the Fatal Accidents Act, 1846. But that is not the point here. I have found as a fact that the husband has proved no loss under that head. His loss lies in the fact that his wife would, if he had gone on tour, have been unable to give him the society and domestic help which only she as a wife could give. In *Burgess v. Florence Nightingale Hospital for Gentlewomen Management Committee* (16) it was not suggested that the arrangement between the parties in that case depended in any way on the relationship of husband and wife.

- If the husband during his wife's incapacity had gone on tour, he might have had to have paid someone to take her place on the stage and he would also have had to have paid someone to look after him in the caravan. The first payment he could not have recovered from the defendants; on the facts he would have sustained no loss, since he would not have had to have paid his wife her share of the earnings and she would have her own independent claim for the loss of that share; in law the loss, if he had sustained it, would not be recoverable. But the second payment he could have recovered, and, I think, have added to it a claim for compensation for the loss of his wife's society which no substitute domestic help could give. If she could not be with him in her customary place, it would not, to my mind, matter that that place was a caravan and not the ordinary matrimonial home. It would not be merely an impairment of the consortium, but a total, though temporary, loss of it. In fact, however, he did not go on tour. He preferred to stay at home and accept the loss of earnings; and in the very peculiar circumstances of this case I have held that his choice was a reasonable one. Can he then recover his loss of earnings as damages? To hold that he can may be breaking new ground in this type of action, but I can see no reason in principle why he should not be thus compensated. The assessment of damages must be governed by those principles which apply generally in the law of tort and, provided he acts reasonably, he must be put in as good a position, so far as money can do it, as if the wrong had not been done to him. I repeat that on the facts this is a most exceptional case, turning on the exceptional need which the husband had for the support of his wife as a wife. Because of that I think that he is entitled to recover. The result is that there will be judgment for the husband for sums totalling £480, and for the wife for £2,930.

- H [HIS LORDSHIP then considered further issues of fact which were not necessary for his judgment in view of his decision on the law but which might become necessary in the event of a different view of the law being taken by an appellate court.]

Judgment for the plaintiff husband for £480 and for the plaintiff wife for £2,930.

Solicitors: *Chalton Hubbard & Co.*, agents for *Marsh & Ferriman*, Worthing (for the plaintiffs); *William Charles Crocker* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

HAYFIELD v. HAYFIELD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), January 25, 1957.]

Divorce—Maintenance of wife—Variation of order—Re-marriage of wife—Husband's application to vary—Affidavit sworn by wife as feme sole—False affidavit—Conduct to be considered in varying maintenance—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 28 (3).

Conduct which falls within the meaning of "conduct of the parties" and which has to be considered for the purpose of applications for maintenance under s. 19 (2) and (as shown in *J. v. J.*, [1955] 2 All E.R. 85, 617) under s. 19 (3) of the Matrimonial Causes Act, 1950, can properly be taken into account when considering "all the circumstances of the case" on an application for variation of maintenance under s. 28 (3) of that Act.

In 1944 the wife's marriage was dissolved and she obtained an order for maintenance at the weekly rate of £5. On Dec. 12, 1955, the husband gave notice of application under s. 28 (3) of the Matrimonial Causes Act, 1950, to vary the order on the ground that his means had decreased. In an affidavit sworn by the wife on Jan. 16, 1956, in reply to that application she described herself as "Vera Irene Hayfield of 23 Waverley Avenue, Twickenham . . . feme sole" and deposed that she had worked at a hotel until 1950, since when she had been engaged in looking after her invalid mother and had been unable to undertake any employment, and that she was, therefore, entirely dependent on the maintenance which she received from the husband. During 1956, the husband made inquiries which disclosed that the wife had re-married. The wife then filed further affidavits in which she stated, in effect, that she had re-married on Dec. 6, 1951, and that her husband was a coach driver and lorry driver. It also appeared that for some time between 1950 and March, 1956, the wife had been managing a café. By notice dated Dec. 13, 1956, the husband applied that the original order for maintenance should be discharged. On Jan. 11, 1957, the registrar reduced the maintenance from £5 to £1 10s. a week with effect from Aug. 13, 1956. The husband appealed, contending that in deciding the appropriate figure for the wife's maintenance the court should take into account (i) "overpayments" made by the husband between Dec. 6, 1951, and the date of his application, i.e., Dec. 12, 1955, owing to the wife's failure to disclose her re-marriage and (ii) her attempt in the present proceedings to mislead the court.

Held: (i) since neither the Matrimonial Causes Rules, 1950, nor the practice of the Divorce Division required either a wife or a husband to disclose during the currency of a maintenance order any change in their status or means, any non-disclosure by the wife in the present case prior to Dec. 12, 1955 (the date of the husband's application to vary the maintenance order) would not be taken into account; but

(ii) the conduct of the wife after Dec. 12, 1955, when by her affidavit of Jan. 16, 1956, she in fact produced for herself a prolongation of the period during which she was receiving £5 weekly under the order of 1944, fell within the ambit of "the circumstances of the case" to which, by s. 28 (3) of the Matrimonial Causes Act, 1950, the court must have regard on an application to vary or discharge an order for maintenance; and the sum which the husband would be ordered to pay for maintenance would be reduced to £1 weekly as from Dec. 12, 1955, credit being given for any payments already made since that date.

[As to the circumstances to be considered on application to vary a maintenance order, see 12 HALSBURY'S LAWS (3rd Edn.) 445, 446, para. 1001; and for cases on the subject, see 27 DIGEST (Repl.) 623, 624, 5823-5836.

For the Matrimonial Causes Act, 1950, s. 19 (2), s. 28 (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 407, 415.]

A Summons.

This was an appeal by the husband by summons dated Jan. 15, 1957, to set aside an order of Mr. Registrar KINSLEY, dated Jan. 11, 1957, whereby on the husband's applications for discharge or variation of an order for maintenance made in favour of the wife on Dec. 29, 1944, the order was varied by reducing the amount payable by the husband from £5 a week to £1 10s. a week with effect from Aug. 13, 1956.

B The husband had applied by notice of application dated Dec. 12, 1955, for a variation of the order of 1944 and by notice of application dated Dec. 13, 1956, he had applied for the discharge of the order of 1944. The summons asked also for the order of 1944 to be discharged or the maintenance thereunder to be reduced to a nominal sum. The appeal was adjourned into open court. The facts appear in the judgment.

R. J. A. Temple, Q.C., and J. C. Llewellyn for the husband.

D. P. F. Wheatley for the wife.

SACHS, J.: This appeal was adjourned into court at the request of counsel for the wife. The husband is appealing against the learned registrar's order of Jan. 11, 1957, whereby the maintenance to be paid to the wife was reduced from £5 a week less tax to £1 10s. a week with effect from Aug. 13, 1956. It is contended on behalf of the husband that this order should be discharged or reduced to a nominal sum, for reasons to which I will refer subsequently. It should be mentioned at the outset that counsel for both parties were in agreement as to the figures at which the registrar assessed the means of the parties, and neither side seriously quarrels with those figures. Accordingly, I need say only that subject to relatively modest adjustments I have assumed the figures to be correct.

The marriage between the parties was dissolved by a decree dated Jan. 27, 1944, which was made absolute on Aug. 9, 1944. On Dec. 29, 1944, an order was made that the wife be paid maintenance at the rate of £5 a week. That amount was duly paid to the date of the application of Dec. 12, 1955, on which the learned registrar adjudicated on Jan. 11, 1957. The payments were made to the wife in the name which she bore as petitioner, viz., Vera Irene Hayfield, and the husband throughout that period was unaware that the wife had come to use any other name. When he issued his application he did so because his average income for the three relevant years had dropped well below the figure at which it stood when the 1944 order was made.

G In reply to that application, the wife on Jan. 16, 1956, swore an affidavit commencing with the words:

"I, Vera Irene Hayfield of 23 Waverley Avenue, Twickenham in the County of Middlesex feme sole . . ."

H Then by para. 4 she swore that she had been employed on general duties at "The King's Head", Rudgwick in the County of Sussex until 1950, when the business was sold, and she continued with these words:

"Since then I have been engaged in looking after my invalid mother and unable to undertake any employment. I am therefore entirely dependent upon the maintenance which I receive from the [husband]."

I From that affidavit any court would infer that it was being asked to accept as true that the wife had not re-married, and that since 1950 she had neither been able to undertake, nor undertaken, any work. Further, on that footing she asked by para. 6 of the affidavit that the amount payable by the husband should be increased.

Later in 1956 the husband on employing an inquiry agent, got to know that the wife had in fact re-married, that she had had two children by her second

husband, and that the second husband and the wife had been living for periods together at 23 Waverley Avenue. By further affidavits filed for the wife it then appeared that the second marriage took place on Dec. 6, 1951, when, incidentally, she still gave her address as being the King's Head. It is also stated in these affidavits that her second husband is a coach driver. I am asked to accept that his main employment is in summer at some undisclosed remuneration, and that from November, 1956, he has been employed as a lorry driver at £9 15s. a week. The second husband, however, has filed no affidavit of his income, and, indeed, no figures of what the wife has actually received from him are mentioned in any affidavit of hers. A B

It has been suggested in those affidavits that the marriage between the wife and her second husband is not a success, but it is apparent that he and the wife are in fact living under the same roof, and it is in evidence that he is likely to be paying to her £5 a week for, as it is put, "the housekeeping". It is also now in evidence on the wife's own admission (in an affidavit sworn on Jan. 2, 1957) that at some period or periods since 1950 she has been managing a café known as "The Scotch Café" at Grayshott. She states that that was sold in March, 1956, and so the *prima facie* inference is that she was still managing it or had shortly previously been managing it when she swore her affidavit of Jan. 16, 1956. I should perhaps mention that after the inquiry agent had reported to the husband certain correspondence not unnaturally passed between the solicitors for the respective parties. The wife's solicitors by letter disclaimed all previous knowledge of her re-marriage, and stated that it came to them as "a complete surprise". In that letter they said: "We have impressed upon our client the seriousness of her failure to disclose to us the fact of her re-marriage." C D E

Some attempts have been made on behalf of the wife to justify the contents and tenor of the affidavit of Jan. 16, 1956, and various points have been urged at one time or another, in correspondence, in affidavits and in argument, to uphold its nature, and even at one time to suggest that there was nothing much to be criticised about the way in which she insisted for so long on being paid her £5 a week under the old order. Further, neither the wife in her affidavits nor anyone on her behalf has apologised to this court for the deceptive words in that affidavit. I look with but little favour on the way in which this aspect of the matter has been treated. Having now re-read the offending passages in the affidavit of Jan. 16, 1956, as indeed it was necessary to do when once the matter was adjourned into open court, and having considered them in the context of all the circumstances, I have no doubt that they afford an instance not merely of lack of candour but of flat and deliberate perjury. As regards the later affidavits filed on behalf of the wife, they naturally have to be scanned with great caution, and with due regard to matters on which they are silent. F G

I will now deal with the main contentions put forward by counsel for the husband concerning the manner in which all these factors should be taken into account. First, he took the point that in deciding the appropriate figure for a new order allowance should be made for the way in which the wife had concealed or refrained from disclosing her re-marriage to her second husband at all times prior to the making of the application on Dec. 12, 1955, and that accordingly account should be taken of what he suggested were "over-payments" from the date of her re-marriage in December, 1951, to the date when the husband made this application. Secondly, he argued that the way in which at the outset of the present proceedings the wife had by her first affidavit not only concealed her re-marriage from her husband and from the court, but had also attempted generally to mislead the court was a matter of which account should be taken. Those matters, he argued, came under the heading of "conduct of the parties" which under the Matrimonial Causes Act, 1950, s. 19 (2) (3)* can be taken into H I

* See *J. v. J.* ([1955] 2 All E.R. 85, 617).

- A account. That conduct, of course, refers to matters which have occurred at any time up to making the original order for maintenance; but it was submitted, and I think rightly, that that same conduct, or conduct of the same type, can properly be taken into account as being part of "all the circumstances of the case" referred to in s. 28 (3) which relates to variations of maintenance, and counsel for the wife concedes, again I think rightly, that "conduct" in s. 19 includes conduct in relation to financial matters.

- Now, as regards the first point of counsel for the husband, there is nothing in the rules or practice of this division which requires a wife unless expressly so ordered to make disclosure during the currency of a maintenance order of a change in her status or means. Similarly, no such obligation is laid on the husband. It is true, unfortunately, that this may on occasions provide a premium for some artifice which avoids attracting the attention of the opposite spouse to changes in circumstances. Nevertheless I do not think that anything which the wife did before the application date (Dec. 12, 1955) can be taken to be conduct that falls within the ambit of the relevant words in s. 19 (2) or s. 28 (3) —whatever criticism may be levelled at those who take advantage of the legal position to extract or evade the payment of moneys without moral justification in circumstances where frankness on their part would result in a quite different position as to those payments. As regards, however, the course of the proceedings started by this application of the husband, the way in which the wife by her affidavit produced in practice a prolongation up to August, 1956*, of the period during which she was receiving £5 a week, certainly to my mind falls within the ambit of the "circumstances" referred to in s. 28 (3). I would have taken the same view if I had been able to use the words "lack of candour" instead of "perjury" in relation to the relevant affidavit.

- Returning now to the order appealed from, it is clear from what both counsel agreed in the course of argument in chambers that the learned registrar applied in a rigid form what used to be called the one-third rule to the figures which I have mentioned. To my mind, however, cases of re-marriage, such as the present one, are inherently not of a type to which the one-third rule ought to be applied as a rigid yardstick. Using the wide discretion which the court has in such matters, I have come to the conclusion that the wife should as from the date of the husband's application have £1 per week, a figure arrived at before making any allowance for what I might call the conduct point. The fact being, as her counsel conceded, that the wife had received money to which she would not have been entitled if she had been candid in her original affidavit, I was at one stage inclined by reason of that conduct to discharge the registrar's order absolutely, and on other occasions may well be persuaded to take that course when a wife displays a lack of candour which results in her attracting sums of money which she would otherwise not have received. The justice of the present case will, however, be met if I do not permit her to be in a better position in any shape or form by reason of that affidavit of hers than she would have been if it had been a proper one. That course meets the practical situation in which due regard must be had to payments made since the date of the relevant application which she is unable to refund. It may be that I am being too lenient in not visiting on her some other financial consequences for the way in which she has got money wrongly, but in all the circumstances I will do no more than date the reduction to £1 a week to start from Dec. 12, 1955, and order credit to be given for any payments made since that date.

That leaves me with one other unpleasant duty. When once the court has given full consideration to an affidavit such as that of Jan. 16, 1956; when it then appears from further affidavits filed on behalf of the wife herself that its nature is as above stated and when the payment of money was actually secured

* There was evidence before the court that weekly payments of maintenance of £5 weekly were not regularly paid after Aug. 13, 1956.

by the wife by aid of that affidavit, I do not think that I have any alternative A
but to send the papers to the Director of Public Prosecutions.

Order accordingly.

Solicitors: *Young, Jones & Co.*, agents for *Heckford, Norton & Co.*, Letchworth (for the husband); *How, Davey & Lewis* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.] B

C

D

PROBATE, DIVORCE AND ADMIRALTY DIVISION (PROBATE)

E

PRACTICE DIRECTION.

Administration of Estates—Grant of administration—Attorney—Further grant to attorney administrator.

Where an attorney administrator* seeks a concurrent grant in another estate in his capacity of personal representative this further grant will not be issued F
without inspection of the power of attorney. A power in general terms appointing the attorney for all purposes will be accepted as establishing his right to apply for the further grant; but if the power is a limited one confined to obtaining the first grant, a further power extending the attorney's duties to obtaining the further grant will be required.

B. LONG,
Senior Registrar.

February 19, 1957.

* As regards the grant of administration to an attorney, see Non-Contentious Probate Rules, 1954 (S.I. 1954 No. 796), r. 30; 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 298 and 16 HALSBURY'S LAWS (3rd Edn.) 241, para. 447.

A HUGHES v. WAITE AND OTHERS.

[CHANCERY DIVISION (Harman, J.), January 30, 31, 1957.]

Mortgage—Possession of mortgaged property—Mortgagor not in occupation—Person in occupation under agreement with mortgagor—Agreements made before mortgagor had any title to mortgaged premises—Payment of lump sums to mortgagor by tenant said to be rent for a specified period—Whether payments constituted rent or a fine—Whether tenancy binding on mortgagee—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 99 (6), s. 205 (1) (xxiii).

In 1955 the plaintiff entered into negotiations with W. for the sale to W. of a dwelling-house. Before obtaining possession and before completion of his purchase, W., on Aug. 20, 1955, obtained £20 from M., giving him in return a receipt as follows: “Application for unfurnished accommodation. Received from [M.] the sum of £20 as deposit on middle floor” in the said dwelling-house. W. similarly obtained money on Aug. 23, 1955, from C. who obtained a similar receipt except that the money was described as being “in respect of advance rent . . . top flat” and as a “holding deposit”. On Aug. 31, 1955, C. paid a further sum to W. which was said to represent the balance of three years’ inclusive rent in advance for the top flat. In a letter to C., W. said that the following points were confirmed: (i) the tenancy was to commence after completion of the conversion of the house into flats; (ii) the rent was a weekly one; (iii) should C. vacate the flat on one week’s notice any balance of rent would be refunded. On Sept. 3, 1955, M. paid further money to W. (described as a further deposit), and on Sept. 9, 1955, he paid a further sum, which W. purported to receive as stakeholder. On Sept. 24, 1955, W. also obtained money from Mrs. D., giving her a receipt in which the money was described as “holding deposit on middle flat”. The sale of the house to W. was completed on Oct. 26, 1955. On the same day, W. executed a charge in the Land Registry form in favour of the plaintiff to secure part of the purchase money, and on Nov. 14, 1955, the transfer and the charge were registered under the Land Registration Act, 1925. There was no evidence of a contract having been entered into before the date of the transfer. M., C., and Mrs. D. (hereinafter called “the occupants”) were let into possession on Nov. 5, 1955, Oct. 31, 1955, and Nov. 21, 1955, respectively. W. paid nothing to the plaintiff by way of interest or capital in respect of the mortgage, and the plaintiff, as mortgagee, now sought possession against the occupants, of whose interests in the premises the plaintiff had, until May, 1956, no knowledge.

Held: the plaintiff was entitled to an order for possession for the following reasons:

(i) whatever was the effect as between W., and the occupants, of the transactions between them, no tenancies had been granted by W. in exercise of his statutory powers of leasing as a mortgagor because the arrangements were made before W. had any title to the property and before he had possession, and no estoppel operated against the plaintiff; the occupants were, therefore, vis-à-vis the plaintiff merely occupiers on sufferance.

(ii) even if the occupants were entitled as against W. to tenancies, the grant of these tenancies would not have been a valid exercise by W. as mortgagor of the power of leasing conferred by the Law of Property Act, 1925, s. 99, because they contravened s. 99 (6) as (a) the tenancies were not granted at a rent, notwithstanding that the money paid was calculated by reference to rent for a number of weeks or years, and (b) the payments constituted fines within s. 205 (1) (xxiii) of the Act of 1925.

[As to leases granted by a mortgagor ultra vires, see 23 HALSBURY'S LAWS A (2nd Edn.) 332, para. 495; and for cases on the subject, see 35 DIGEST 335-337, 776-793.]

For the Law of Property Act, 1925, s. 99 and s. 205 (xxiii), see 20 HALSBURY'S STATUTES (2nd Edn.) 641, 839.]

Cases referred to:

- (1) *Alliance Building Society v. Shave*, [1952] 1 All E.R. 1033; [1952] Ch. 581; 3rd Digest Supp. B
- (2) *City Permanent Building Society v. Miller*, [1952] 2 All E.R. 621; [1952] Ch. 840; 3rd Digest Supp.

Adjourned Summons.

The mortgagee of a dwelling-house issued an originating summons under R.S.C., Ord. 55, r. 5A, against the mortgagors and against the three persons in occupation of the house claiming possession of the mortgaged premises. The three occupants claimed to be tenants of the mortgagors. Each of the occupants had paid a lump sum, or lump sums, to the mortgagors and had received in return a receipt or receipts variously describing the payments as "deposit", "advance rent", "holding deposit", and "balance of three years' inclusive rent". Each of the occupants now claimed that they were entitled to tenancies which were good against the mortgagee. C D

Harold Christie, Q.C., and *P. R. Oliver* for the plaintiff, the mortgagee.

The first three defendants, the mortgagors, did not appear.

P. Ingress Bell, Q.C., and *W. D. Collard* for the last three defendants, the occupants. E

HARMAN, J.: This is an application by a person having a registered charge asking for possession of certain mortgaged property. The summons was taken out under R.S.C., Ord. 55, r. 5A, and issued against the first three defendants, who are mortgagors under a registered instrument (and to whom I will refer as "the Waites"), and three further persons, who are admitted to be in possession of the three flats of which the mortgaged property is comprised. R.S.C., Ord. 55, r. 5A, speaks of "Delivery of possession . . . by any other person in, or alleged to be in possession of the property". F

No service has been effected on the first and second defendants. There has been service on the third defendant, and there is an affidavit of service, which will be filed in due course, but he does not appear. The three persons in possession (who are referred to herein as "the occupants") have entered appearances, and are represented before me. I am proposing to go on without requiring service on the first two defendants who have been keeping out of the way, and against whom substituted service was applied for on the authority of the decision of *WYNN-PARRY, J.*, in *Alliance Building Society v. Shave* (1) ([1952] 1 All E.R. 1033). If I make an order for possession, it will be against those in possession only and will not affect such rights, if any, as the Waites have under their mortgage. G H

It used to be recognised that a mortgagee might take possession as a matter of course, and it is only in recent years that the housing shortage and the Rent Restrictions Acts between them have made what seems to be a difficulty in this matter. In the old days mortgagees kept out of possession because they did not want to have to account as mortgagees in possession on the footing of wilful default, but the opposite has come about in these days. The only way in which a mortgagee can realise his security to advantage is by obtaining vacant possession and selling as mortgagee. I

This case is another illustration of what appears to be a rather prevalent rascally practice among persons, at any rate in London, who trade on the credulity of members of the public perhaps desperately in want of a house over their heads. These persons extract large sums of money from members of the

- A public calling the payment "rent in advance", or something of that sort, and promising them, if they pay that down at once, that they shall have, either immediately or in the future, a so-called tenancy of a flat, or a house, or part of a house. Such a case was dealt with by me, and by the Court of Appeal, in *City Permanent Building Society v. Miller* (2) ([1952] 2 All E.R. 621) in which the facts in many ways were like the present case.
- B In the present case the plaintiff became the registered owner of the property No. 136, Burnt Ash Hill, Lee, in 1948. In 1955 she negotiated with the Waites to sell the property to them, and she sold it to them on Oct. 26, 1955. On that same date they executed in her favour a charge in the Land Registry form to secure £1,100, which was part of the purchase money. That was the first occasion, so far as I know, that the Waites had any interest in the property.
- C There is no evidence that they had anything in the nature of a contract earlier than that. The conveyance and the mortgage or charge operated in equity until put on the register on Nov. 14, 1955, which was the first occasion on which a legal interest was created in the Waites. That derives from the Land Registration Act, 1925, s. 19. Long before the Waites had any interest in the property, they had started to deal with it. It was empty, and was being converted into
- D three flats. The Waites, who carried on an estate agency business under the name of Waites Estates, in Sydenham, disposed of the accommodation to the occupants long before they had any interest in it themselves. In point of time the earliest of the gulls was the defendant Meyrick, who, on Aug. 20, 1955, put down £20, and got a receipt on a printed form headed "Waites Estates" followed by

- E "Application for unfurnished accommodation. Received from Mr. D. Meyrick the sum of £20 as deposit on middle floor, 136, Burnt Ash Hill."

That receipt was signed illegibly on behalf of one of the Waites.

- The next to be caught was the defendant Collins, who paid £25 on Aug. 23, 1955, and got a like receipt, except that it is said to be paid "in respect of advance rent, 136, Burnt Ash Hill, top flat". The sum is also described as a "holding deposit".
- F

- The defendant Duignan did not come on the scene until a month later when she put down £200, and obtained a receipt in which the money was described as "holding deposit on middle flat". Therefore by Sept. 24, 1955, the Waites had caught their three fish and had got a deposit from each of them. There
- G was no suggestion when possession was to be given. The flats were evidently not in a finished condition at the time. The documents described "Waites Estates" as acting as stakeholders, they did not purport to be owners at all, and they made a charge called a ten guineas letting fee, not payable until the tenant was accepted and received the key. There were, I notice, these words: "At the end of the advance term, rent to be paid weekly or by mutual arrangement". There is no written evidence of what "the advance term" was supposed to be, but the occupants have sworn affidavits in which they suggest, in what are to me suspiciously similar terms, on the part of each of them, that each made an oral agreement for a weekly tenancy, or, alternatively, for a term of three years, and thereafter weekly at an inclusive rent calculated at a rate of so much a week payable as to the first three years in advance and thereafter weekly. In support of those assertions they produce the documents which I have in part described.
- H
- I

The defendant Meyrick was induced to part with a further £100 on Sept. 3, 1955, described as a further deposit, and with £281 14s. on Sept. 9, 1955, not described at all, purporting to be received by the Waites as stakeholders. The defendant Collins parted with £250 18s. on Aug. 31, 1955. That is said to represent the balance of three years' rent in advance "top flat, 136, Burnt Ash Hill", and the rent is "inclusive". So that there is a suggestion in the

defendant Collins' case that the money was rent. Moreover, he received on Sept. 9 a letter from one of the Waites in which it is said that these receipts make a total of £276 18s. A

"representing three years' advance rent on the above flat. We also confirm the following points as requested by yourself:—1. The tenancy to commence after the completion of conversion and decorations of flat. 2. The tenancy is a weekly one. 3. Should you vacate the flat on one week's notice any balance of rent shall be refunded. Please note that any other points are clearly stated on receipt. Assuring you of our best attention at all times." B

The decorations were finished. The Waites had acquired, as I have said, by Nov. 14, 1955, a legal estate: they let the occupants into possession, the defendant Meyrick on Nov. 5, 1955, the defendant Duignan on Nov. 21, 1955, and the defendant Collins on Oct. 31, 1955. C

The Waites, having obtained these comparatively large sums, paid nothing whatever on the mortgage which they had created, and the plaintiff was minded, not unnaturally, by May, 1956, to exercise her remedy as mortgagee and take possession. When she came to do so she found these three defendants in occupation saying that they were tenants and, moreover, they had paid all the rent that was due from them for three years, and that nothing therefore was payable to her at all. It is said that that is the effect of the law on what has happened. The Waites are, as I understand it, being sought by the police, but that is cold comfort to any of the other parties to this suit. The question is: which of two defrauded parties ought to suffer? D

Before 1881 a mortgagor could create no tenancy at all valid against his mortgagee, but in and since that year the mortgagor while in possession has had statutory powers of creating certain leases, and under the Law of Property Act, 1925, s. 99, the mortgagor has wide powers. For instance, he can create an occupation lease of fifty years. The leases authorised by s. 99 (3) (i) are occupation leases E

"for any term not exceeding twenty-one years, or, in the case of a mortgage made after the commencement of this Act, fifty years." F

Sub-section (5) provides: "Every such lease shall be made to take effect in possession not later than twelve months after its date". Sub-section (6) provides: G

"Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken." H

Sub-section (7) provides that every such lease shall contain a condition of re-entry. Under sub-s. (17) "lease" must be construed to extend and apply, as far as circumstances admit, to any letting and to any agreement, whether in writing or not, for leasing or letting. So that the mortgagors, the Waites, had a power, when in possession, which could not have been, at any rate, at the earliest before Oct. 26, 1955, to create leases valid against the mortgagee. I

It is said that they have done so in favour of the occupants. It is said that the arrangements, which I have briefly described, whereby the Waites extracted these moneys from these unfortunate occupants, had the effect of giving them promises which perhaps were not good contracts, but amounted, so to speak, to offers to create in their favour weekly tenancies extending over three years in consideration of the payment of these lump sums which were quantified by reference to the rackrent of the property over those three years. It is said that, even if there were no valid agreement to that effect, when the Waites let their victims into possession the Waites became disentitled by estoppel from denying the rights of the persons in possession, and that the mortgagee is bound by that

A condition of things, and is bound to treat the occupants as having proper leases of the flats which they respectively occupy.

I think that it is true that the court would have striven to help the occupants against the Waites to obtain some kind of satisfaction, they having been let into possession on the faith of these promises. But, of course, that does not apply to the plaintiff. She was no party to these promises and no estoppel affects her. I cannot see how the fact that it is possible that the Waites were precluded from denying that they had made proper agreements can preclude the plaintiff from denying that no proper agreement was made. These bargains, so far as they were bargains, were made long before the Waites were in possession, and long before, as it appears, they had any interest in the property, legal or equitable or at all. They were, therefore, not exercising the powers exercisable by a mortgagor because the Waites were not then mortgagors. The bargains were agreements, if they were agreements at all, to let these people into possession at some time. There was no date or term fixed for the time when possession should begin. No doubt when possession was taken the court would have implied some kind of agreement between the occupants and the Waites that the occupants should have possession, and possibly on the terms that they should remain there for three years on the strength of the sums that they had paid, or that they should remain there from week to week and get back any proportion of the sum remaining in the landlord's hands if the occupation came to an end before the three years had expired; but I cannot see that this gave the occupants any estate or interest in the property as against the plaintiff. They did not pay a weekly or other periodical rent so as to create a periodical tenancy between them and anybody at all. In my judgment, they were merely occupiers on sufferance of the three flats which they now occupy. That being so, they have no answer to the plaintiff's claim for possession.

I may be wrong about that. Supposing, then, that the occupants did have some bargain with the Waites which entitled them as against the Waites to tenancies, were these tenancies which the Waites had power as mortgagors to grant after they became mortgagors. In my judgment plainly they were not; as I see it they were not tenancies at a rent at all. It is true that the amount of money extracted from each of the unfortunate occupants was calculated by reference to so many weeks' rent, or so many years' rent, of the flat to be occupied, but I think that there is no suggestion of any periodical payment of rent such as is bound to be provided for in a lease created by a mortgagor. It is clear that if the mortgagor is to have the power of leasing, it must be a power which he must exercise as much for the mortgagee's as for his own benefit. He is to reserve the best rent that can reasonably be obtained, and not to take any fine. So far as I can see no rent at all was reserved under these so-called agreements. Lump sums were paid down—and they did not pass the first test.

On the question whether a fine was taken, in my opinion it clearly was. These sums could only be described as premiums or foregifts. What is a fine? It is defined in the Law of Property Act, 1925, s. 205 (1) (xxiii), as including a premium or foregift. In my judgment these payments were clearly foregifts—sums paid entirely in advance. If I agree with my landlord to pay him a rent which is not the rackrent, and to pay down the difference between the rent agreed and the rackrent as a lump sum in advance, that is a premium, as I think everybody will agree. But it is argued that if I agree to pay the whole sum in advance, that is not a premium. That does not appear to me to be reasonable at all. The requirement of paying the whole rent in advance is not an exercise of the mortgagor's power. Supposing the Waites had the powers of mortgagors to grant leases, they never exercised them. I am to some extent supported in this opinion by the views of, at any rate, two of the lords justices in *City Permanent Building Society v. Miller* (2), and I do not wish to retract the view which I apparently there formed, namely, that to take the whole rent in advance is to

take a fine and is not within the power of a mortgagor under the Law of Property Act, 1925, s. 99. A

I therefore propose to make a decree in favour of the plaintiff for possession within twenty-eight days from the completion of the order.

Order accordingly.

Solicitors: *James & Charles Dodd* (for the plaintiff); *Mills, Lockyer & Co.* (for the last three defendants). B

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

NOTE.

R. v. HACKER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Hinchcliffe, J.J.), February 11, 1957.]

Criminal Law—Demanding money with menaces—Committal for trial should be to assizes—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 30—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 10. D

Application for leave to appeal against conviction.

The applicant, Dennis John Hacker, was tried before Andover Borough Quarter Sessions and was convicted of demanding money with menaces contrary to s. 30 of the Larceny Act, 1916*, and was sentenced to four years' imprisonment. The applicant had been sent for trial to quarter sessions under s. 10 of the Magistrates' Courts Act, 1952†. The Court of Criminal Appeal refused leave to appeal. E

LORD GODDARD, C.J.: This court desires to say that the case was admirably conducted by the learned recorder, and his summing-up was as good as could be desired but, generally speaking, a case of this gravity, blackmail, ought not to go to quarter sessions but ought to be sent to assizes. It is true that the appellant was charged with an offence under s. 30 of the Larceny Act, 1916, which imposes a maximum sentence of five years' imprisonment, and not with an offence under s. 29 of that Act which imposes a maximum sentence of life imprisonment; but, as a general rule, a case of this nature should go to assizes. I hope that magistrates will take note of what I say, namely, that charges of demanding money with menaces ought to be sent for trial to assizes and not quarter sessions unless there is some compelling reason to take the latter course. F

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*] G

* 5 HALSBURY'S STATUTES (2nd Edn.) 1030.

† Section 10 (1) of the Magistrates' Courts Act, 1952, provides: "The magistrates' court before which any person is charged with an offence may, instead of committing him to be tried at the assizes or quarter sessions for a place to which but for this section he might have been committed, commit him to be tried at the assizes for some other place or, if the offence is triable by quarter sessions, at the quarter sessions for some other place, if it appears to the court, having regard to the time when and the place where the last-mentioned assizes or quarter sessions are to be held, to be more convenient to commit the accused to those assizes or quarter sessions with a view either to expediting his trial or saving expense: . . ."

Section 11 provides: "Where a magistrates' court commits a person for the trial of an offence triable by quarter sessions, then, if the court is of opinion that there are circumstances that make the case an unusually grave or difficult one . . . the magistrates' court may commit him for trial before a court of assize."

A

CADE v. CADE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 30, 31, 1957.]

B

Divorce—Cruelty—Desertion—Neglect of wife and child by husband—Course of conduct amounting to cruelty causing spouse to leave matrimonial home—Whether conduct amounting to desertion can be cruelty.

Divorce—Desertion—Course of conduct amounting to cruelty and causing spouse to leave matrimonial home.

C

The parties were married in 1951 and there were three children of the marriage, all of whom were girls. The third child was born in July, 1956. The husband was found to have shown a callous indifference to his wife and children and neglect towards them from the beginning of 1956 until the wife left him on Sept. 6, 1956. In particular he stayed out of their home on most evenings until late at night or early in the morning, leaving his wife and children alone in the house, despite her complaint to him of this conduct; and persisted in it even when the birth of the third child was imminent, although he knew that she was frightened of being left alone. After the birth of the third child, he ignored the child; he registered the child with a name which his wife had not chosen or agreed, and refused to sleep with his wife. In August after refusing one day to take his wife and children out, he left them until 2 a.m. the following morning, and told his wife that he had finished with her and the children. On Sept. 2 he again refused to take the wife and children out, and himself stayed out until the early hours of the morning, and told his wife that he had lost interest in her and wanted a separation. He then ignored her and the children completely, and on Sept. 6 she left him. A few days later she wrote to him saying that if he could amend his ways and treat her and the children in an affectionate manner she would be very pleased. He replied that it would be best to separate. There was medical evidence of a deterioration in the wife's health over the period from September, 1955, to October, 1956. The wife applied for a separation order on the grounds of the husband's persistent cruelty and desertion.

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Held: (i) the husband had persisted in a course of callous indifference to the wife and neglect of her in spite of her objection to his conduct and of his knowledge of her condition and the effect on her health, and his conduct amounted to cruelty.

Simpson v. Simpson ([1951] 1 All E.R. 955), *Waters v. Waters* ([1956] 1 All E.R. 432) applied.

H

(ii) the same conduct could constitute expulsive conduct founding a charge of constructive desertion and could be an element of conduct founding a charge of cruelty (observations of SACHS, J., in *Carpenter v. Carpenter*, [1955] 2 All E.R. at p. 451, considered), and in the circumstances the husband was guilty of constructive desertion of the wife.

I

[**Editorial Note.** The view that desertion of itself could not be cruelty derived support from a dictum in *Carpenter v. Carpenter* ([1955] 2 All E.R. at p. 451, letters H, I), where, however, the point had been conceded. It is intimated clearly in the present case that the view that desertion, particularly constructive desertion, cannot be cruelty or an ingredient in a charge of cruelty, is not acceptable (see p. 617, letter C, p. 619, letters C to F, post).

As to the relationship between cruelty and desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 250, 251, para. 464; and as to a course of conduct constituting cruelty, see *ibid.*, 272, para. 520, note (f), and 273, para. 520, note (g); and for cases on the subject, see 27 DIGEST (Repl.) 303, 304, 2493-2508.]

Cases referred to:

- (1) *Simpson v. Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; 27 Digest (Repl.) 299, 2447.
- (2) *Waters v. Waters*, [1956] 1 All E.R. 432; [1956] P. 344.
- (3) *Jamieson v. Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.
- (4) *Lang v. Lang*, [1954] 3 All E.R. 571; [1955] A.C. 402; 3rd Digest Supp.
- (5) *Carpenter v. Carpenter*, [1955] 2 All E.R. 449; 3rd Digest Supp.
- (6) *Lauder v. Lauder*, [1949] 1 All E.R. 76; [1949] P. 277; 27 Digest (Repl.) 306, 2537.
- (7) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 27 Digest (Repl.) 408, 3369.
- (8) *Parkin v. Parkin*, unreported.

Appeal.

The husband appealed against an order of the justices for the county borough of Great Yarmouth, dated Oct. 31, 1956, whereby they found him guilty of persistent cruelty towards the wife, of desertion, and of wilful neglect to provide reasonable maintenance for her and the three children of the marriage.

The justices found that the allegations set out in certain written particulars of the husband's persistent cruelty were substantially proved. These were: (1) between the months of January, 1956, and Sept. 4, 1956 (a) displaying a callous indifference to his wife and children, (b) staying out of the matrimonial home most evenings until late at night, or the early hours of the morning, leaving the wife and children alone in the house; (2) on May 26, 1956, staying in an adjoining public house all afternoon and on his return to the matrimonial home at tea time telling his wife that she was no wife to him; (3) after the birth of the third child on July 13, 1956 (a) displaying a callous indifference, (b) refusing to sleep with his wife, (c) registering the child's name as "Josene" well knowing that it was not the name chosen by the wife; (4) on Aug. 5, 1956 (a) refusing to take his wife and children out but taking some person from the public house to London, (b) telling his wife that he had finished with her and the children, (c) leaving his wife and children alone until 2 a.m. the following morning; (5) on Aug. 6, 1956, staying in bed all morning, going to the public house at lunch-time, staying in bed all afternoon and going out on his own in the evening; (6) on Sept. 2, 1956 (a) staying in bed all morning, going to the public house at lunch-time and, after refusing to take his wife and children out, taking out in his van some person from the public house during the afternoon and leaving his wife and children alone in the house until 10.35 p.m., (b) telling his wife that he had lost interest in her and the children and he would like to have a separation; and (7) on Sept. 3, 4 and 5, 1956, treating his wife and children with callous indifference by ignoring them completely.

The justices ordered that the wife be no longer bound to cohabit with the husband and ordered him to pay to the wife £5 per week for her maintenance and £1 10s. per week for the maintenance of each child—a total sum of £9 10s. per week.

K. G. Jupp for the husband.

K. B. Campbell for the wife.

LORD MERRIMAN, P.: I am asking COLLINGWOOD, J., to give the first judgment.

COLLINGWOOD, J.: This is a husband's appeal from an order of the justices for the county borough of Great Yarmouth, made on Oct. 31, 1956, when they found him guilty of persistent cruelty, desertion and wilful neglect to provide reasonable maintenance, and made an order for the payment of £5 a week for the maintenance of the wife and £1 10s. in respect of each of the children of the marriage, the custody of those children being given to the wife and no

A objection to that course being taken at the hearing. That is a total of £9 10s. per week. The justices also inserted a non-cohabitation clause in the order, such clause being asked for in the wife's summons. The present appeal is against all those matters, including the amount of the order.

The parties were married on Dec. 8, 1951, and they lived at a house, No. 32, Westlode Street, in Spalding. There are three children of the marriage, all girls, the first born on Aug. 22, 1952, the second on Apr. 18, 1954, and the third on July 13, 1956. On Sept. 6, 1956, the wife left her husband and went to her mother's. Her case shortly is that from the beginning of 1956 the husband consistently neglected her and the children, that he spent at first most of his time and finally all of his time at the public house next door, the "Butcher's Arms", with the proprietor or licensee of which public house he was friendly.

C Let me say at once that there is no suggestion of insobriety, but it is alleged that he spent his time, extending frequently into the early hours of the morning, with these friends next door. She complained of this and asked him to make earlier returns home. He knew, according to the evidence, that she was nervous of being left alone, and it must be remembered that on July 13 she gave birth to this last child, so that her condition during the spring and summer of the year

D 1956 was one of pregnancy and later of advanced pregnancy. The husband, however, took no notice; he was out very often until after midnight, and sometimes until 2 or 3 o'clock in the morning. Even when the birth of the baby was imminent and the wife made it clear to him that she was frightened of being left alone he still went, his excuse to her being that he would only be next door, and that she could telephone to him if she were in any trouble. When she asked

E him to help her with the children he not only refused but told her to clear out. On one occasion, she said, there was a space of six days during which he spoke to her three times only.

When on July 13 the child was born, he ignored it, and he admits this. He resented its sex, apparently. Despite the fact that it was ill shortly after birth he continued to ignore it. A trivial matter, but it was one of the matters of

F which the wife made complaint, is that he gave the child the name, which the wife considered peculiar, of Josene, and he did this behind her back, although she had told him of another name, Wendy Jane, which she desired to be given to the child. This name of Josene seems to be one of the repercussions of his disappointment that the child was not a boy, because he said that the name Joseph had been current in the family for the past century, and I suppose that

G this was the nearest to Joseph he could get for a girl. After the birth of the child he refused to sleep with his wife any more, and when she complained of that his answer was that he was quite all right where he was in the other room. One or two dates the wife speaks of specifically. One is a Sunday, Aug. 5, 1956, not very long after the child was born. He went off early in the afternoon with the neighbours, the Evanses, and was away until 2 o'clock the following morning.

H The following day he told his wife that he had finished with her and the children, and had lost interest in them. Early in September again, she says, he was out all day with the Evans family. She said to him "Have you still lost interest in us all?" and he said yes, that was right; then she asked him if it would be best if they separated and he said yes, and for three days he did not speak either to her or to any of the children. On Sept. 6 she left and went to her parents,

I not at that time, she said, intending to go for ever, but expecting to return after she had been there a fortnight. On a date which is not clear, but a few days after she had left and prior to Sept. 12, she wrote this letter to him:

"Dear Joe, No doubt you won't be surprised at receiving this letter—with what you told me last Sunday—and on a previous occasion that you have lost all interest in myself and the children, and you think yourself it better that we should part. Well, Joe, I have put up with a lot for the last few months and I feel I cannot stand it any longer. It is up to you now to

decide, which way you choose—as you know of my affection for you. If however you wish to amend your ways and treat me and the children in a proper affectionate manner I should be very pleased, but otherwise I'm afraid we will have to come to an understanding regarding a separation. I will await until next Saturday for a reply. From your loving wife, Pauline."

The reply, sent by the husband on Sept. 12, was as follows:

"Dear Paul, As we cannot get along now, I think it would be best for all concerned to separate. Awaiting your reply. Joe. P.S.: Sending the £5 to you on Friday."

A few weeks afterwards she went with her father to the house, where they found that the locks on the back and the front doors had been changed.

The husband's reply to that case of the wife is that he agrees he did spend this time with the Evanses next door. He says the house was not properly looked after, and his wife's cooking was not up to his standard; that he got meals with the Evanses, with whom, apparently, he fed practically every night, which were more acceptable meals than his wife provided for him. He agreed that he had refused to sleep with her, and said that he had felt like that six months before, and he agreed that he used to refuse to take his wife out when he went out in the evenings, or for excursions, because he had promised to take the neighbours out in preference to taking her. There is one passage to which I will refer in his evidence. After he had referred to his giving this name of Josene to the child because, he said, he thought Wendy Jane was silly, he said:

"I did not tell wife I was going to do it. I knew it would upset her. Correct I refused to sleep with her. I had felt like that six months before. Had not meant to have third child. I was hoping it was going to be a boy, but that was not at the bottom of my attitude towards her. I was naturally disappointed it was a girl."

Later in his evidence he said:

"It may be I ignored my wife and the children for the next four days [after the incident of Sept. 2]. I was not really surprised she said she could not go on like that any longer. She was saying we would have to live apart. I did not mind which way it was, whether I lived with her or not. I do not want her to return. She said in a letter she would like to come back. My solicitor told me of the letter but I would not have her back. My main reason was I had not any interest in her."

On that material the justices made the order to which I have already referred, and they give their reasons, as follows:

"We find the [wife] has substantially proved the allegations set out in the written particulars of persistent cruelty (a copy of which is annexed hereto) put in by the [wife]. Indeed, except as to the periods which on certain occasions elapsed between midnight and the [husband's] return to the matrimonial home, they were substantially admitted. The [husband] had some kind of explanation for the allegation relating to his journey to London on Aug. 5. After making allowances in the [husband's] favour in these respects, we consider that the [husband's] conduct amounted to persistent cruelty. We find that the [husband] had received a letter from the [wife] and had sent a letter in reply (copies of which are also attached) and that as from the date of the reply [Sept. 12] the [husband] has been in a state of desertion from his wife. His 'intention to desert' was further evidenced by his statement in court that he does not wish to have his wife back. We find from the accounts produced by the [husband] it appeared that taking the average for the three calendar years ended Apr. 5, 1956, his annual income may be taken to be £900 . . ."

A They say how that figure is arrived at. I need not discuss that at the moment, because it is clear that the matter will have to go back to them with regard to that part of their finding. Then there are appended the particulars of the persistent cruelty to which the justices referred. They are:

B “ (i) Between the months of January, 1956, and Sept. 4, 1956: (a) Displaying a callous indifference to his wife and children. (b) Staying out of the matrimonial home most evenings until late at night, or the early hours of the morning, leaving the wife and children alone in the house. (ii) On May 26, 1956, staying in an adjoining public house all afternoon and on his return to the matrimonial home at tea time telling his wife that she was no wife to him. (iii) After the birth of the third child on July 13, 1956: (a) Displaying a callous indifference. (b) Refusing to sleep with his wife. (c) Registering the child's name as Josene, well knowing that it was not the name chosen by the wife. (iv) On Aug. 5, 1956: (a) Refusing to take his wife and children out but taking some person from the said public house to London. (b) Telling his wife that he had finished with her and the children. (c) Leaving his wife and children alone until 2 a.m. the following morning. (v) On Aug. 6, 1956, staying in bed all morning, going to the said public house at lunch time, staying in bed all afternoon and going out on his own in the evening. (vi) On Sept. 2, 1956: (a) Staying in bed all morning, going to the said public house at lunch time and after refusing to take his wife and children out, taking out in his van some person from the said public house during the afternoon, and leaving his wife and children alone in the house until 10.35 p.m. (b) Telling his wife that he had lost interest in her and the children and he would like to have a separation. (vii) On Sept. 3, 4 and 5, 1956, treating his wife and children with callous indifference by ignoring them completely.”

With regard to those findings it was first submitted on behalf of the husband that that conduct cannot in law amount to cruelty. It was submitted that even if one accepts, as the justices did accept, the whole of the wife's allegations, all that they amounted to on the husband's part was passive conduct, and that there was no evidence here of any deliberate intention on his part to injure his wife, and that in default of such evidence such conduct could not amount to cruelty. One of the phrases used by learned counsel was that an intention to injure the wife was requisite here as a matter of law in order to “tilt the scales” and change this conduct from conduct which could not be cruelty into conduct which could. In my opinion that is not so. Counsel for the wife has referred to a number of cases which, in his submission and in my opinion, show that conduct of this character can amount to cruelty. *Simpson v. Simpson* (1) ([1951] 1 All E.R. 955), *Waters v. Waters* (2) ([1956] 1 All E.R. 432) and *Jamieson v. Jamieson* (3) ([1952] 1 All E.R. 875) are the three principal cases to which learned counsel referred. Let me say at once that it was not suggested, and one will not look at the cases to find, that the kind of conduct alleged in those cases is precisely the same kind of conduct as here. It would be a remarkable thing if any two cases coincided to the last degree in the conduct which was alleged to be cruelty; but I think that the conduct in *Simpson v. Simpson* (1) was properly described as the same kind of conduct. The summary of the facts given by LORD MERRIMAN, P., in his judgment, was as follows ([1951] 1 All E.R. at p. 959):

I “. . . the wife's case may be summarised briefly as follows: The husband had kept her short of money in spite of a solicitor's letter and until the local probation officer had intervened; he had closed the account at the stores at which she was accustomed to deal without informing the wife that he had done so, and in such a way as to humiliate her; that he had ‘made her life a hell’, in support of which she said that he had compelled her to keep an account of her household expenses; that he used to keep food which he had bought for himself locked up in the garage, and had on more than one

occasion brought food and asked her to cook it for him—‘an egg, but he did not get one for me’; that he had refused to take her for a holiday or to take her out in his new car; that he had put the purchase of the car, partly used for his municipal duties, before the provision of new curtains or furniture for the home; and that, generally speaking, he neglected her by staying out of the house, except at week-ends, from the time he left in the morning until 11 o’clock at night, and was taciturn and unfriendly and took no notice of her; there was no affection or love and that, as his own evidence showed, he had not realised that their unhappy relationship was telling on her health; and that he had told her to go on several occasions, one of which was quite recent. She added that when she had been in bed for three days during the war the husband had never gone near her. On the other hand, it was admitted that there had been no violence of any kind.”

LORD MERRIMAN, P., sums that up (*ibid.*):

“In other words, generally speaking, her complaint was of stinginess, lack of affection and attention, callous indifference, taciturnity and selfishness.”

If one leaves out the attribute of stinginess all the rest are to be found in the present case.

In *Waters v. Waters* (2) a number of other decisions were referred to. In that case LORD MERRIMAN, P., said that if a reasonable man would know—if the particular husband must know (for emphasis) that a continuance in the course of conduct complained of would have an injurious effect on his wife’s mental health, such conduct would in the absence of rebutting evidence amount to mental cruelty, just as an intention (even though it conflicted with his desire) to drive the wife out would be found where the conduct of the husband towards his wife was such that a reasonable man would know—that the husband must have known—that in all probability it would result in her departure from the home. In that case a wife’s case of persistent cruelty and constructive desertion before a court of summary jurisdiction was a complaint of extreme boorishness on the part of her husband, of unbearable taciturnity, of a deliberate refusal to co-operate over the running of the home and finance, and of personal uncleanness of a very marked character persisted in, in spite of the wife’s protests, to the extent that it became, in effect, nauseating; there was a complete indifference to her health, which was affected, and to her protests against the adverse effect on her of his conduct. Again, if one excludes the uncleanness which the husband showed in that case all those words apply, in my opinion, to the present case. The passage to which I particularly wish to refer is where, having set out the facts, and the arguments which had been put forward, LORD MERRIMAN, P., said ([1956] 1 All E.R. at p. 434):

“It is a case of extreme boorishness, of, as she says, unbearable taciturnity, deliberate refusal to co-operate over the running of the house, the finance, the small-holding, and so on, and personal uncleanness of a very marked character, persisted in, in spite of protests on her part, to the extent that it became, in effect, nauseating. She alleges a complete indifference to her own state of health, to her own protests that what was happening was, ‘getting her down’, a callous neglect of her when she had an accident while driving the pony-cart and was in hospital, and then, on her return home, at first an indifference, no making welcome of her or anything of that sort, but, when the husband finally went to see her in her bedroom, she alleges that he made a most opprobrious and offensive remark which suggested that the accident was due to her having taken too much to drink [There is no suggestion of that in the present case]. The result was that she was heading, so she says, for a nervous breakdown; in this she was to some extent corroborated by the doctor.”

A Pausing there for one moment, a similar complaint was made in the present case, that the doctor was not saying her obvious condition of ill-health was and could only be due to the conduct of her husband of which she complained. I shall refer to the doctor's evidence later.

The President continues (*ibid.*, at p. 436):

B "That brings me to the justices' reasons. In finding the complaints not proved and dismissing the application, they say: 'The husband and wife were ill-suited to each other owing to the wife's superior intelligence and the husband's mode of life particularly in matters of cleanliness. The wife immediately after the marriage realised that the marriage was a ghastly mistake by reason of his habits, lack of intelligence and physical condition —(a disease affecting both legs)'. I have not mentioned the disease. It is one of the things on which the wife lays some stress, but it is impossible to know precisely what it was that was complained of; she merely talked about it as some horrible disease of the legs. The point really, as I think, is that she begged him to be treated for it, and he simply refused. In that sense it is more or less in the same category as his personal uncleanness, which, according to her, consisted of such things as washing in the kitchen sink, in spite of the fact that there was a bath in the house . . ."

Then the President deals with other matters of unseemly behaviour, and goes on (*ibid.*):

E ". . . I do not think that it was only his habits or lack of intelligence which caused her to say that. I think that it was, as she puts it, the whole treatment to which she was being subjected. Then there comes the first of three corresponding statements about the justices' approach to the matter, and it is here that I think one has to consider whether they have not misled themselves by that approach. They say: 'The husband had no intention of being cruel to his wife, but owing to his limited intelligence and set habits was not able to conform to the standards of life which his wife expected, or provide the companionship which she desired'. That I think may be said, on the evidence as it stands, to do less than justice to the contrast between the husband's behaviour before marriage and his alleged behaviour after marriage. However that may be, that is all put to illustrate the fact that the husband is said to have had no intention of being cruel."

G That, of course, is one of the allegations in the present case. The President goes on (*ibid.*, at p. 437):

H "I will begin with the statement that the husband had no intention of being cruel. The importance, in certain cases, of intention to injure, was dealt with in *Jamieson v. Jamieson* (3) ([1952] 1 All E.R. 875), and the way in which it was dealt with there is not the less important because, in what was acknowledged to be a thin case of alleged cruelty, the case had not been allowed to go to proof. It was a Scottish case. It was emphasised over and over again that the whole matter must be taken together, that one must not deal with this allegation and that allegation and say that neither of them could possibly amount to cruelty; one had to take the whole story, having regard to the character and susceptibilities of the parties, and so forth. Admittedly the averments were very near the line, but what was held to be decisive in that case was that the whole of the alleged misconduct was conditioned by the intention of the husband to bend the wife to his will; that was the decisive averment. LORD NORMAND said (*ibid.*, at p. 877): 'The Lord President [LORD COOPER], I think, reaches the crux of the case when he says that "where the cruelty is of the type conveniently described as 'mental cruelty', the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the

victim." I do not propose to go into that because I wish to avoid the discussion of hypothetical cases and because I am of opinion that actual intention to hurt may have in a doubtful case a decisive importance, and that such an intention has been averred here. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. My noble and learned friends have discussed the averments in the opinions which they will deliver and which I have had the advantage of reading, and they have shown that the appellant has averred a case of actual intention to hurt, wilfully persisted in after the injury to the appellant's health was apparent to the respondent. These averments are, in my opinion, relevant, and they are, I think, supported by sufficiently specific instances of the respondent's alleged cruelty. I, therefore, agree that the action should go to proof'. That is a long way from saying that actual intention is necessary to a charge of cruelty, even to a charge of mental cruelty, for although he found that actual intention was alleged, as, indeed, did all the other Lords who sat on the case, he approved what the Lord President said, that the guilty spouse in a mental cruelty case must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim."

LORD MERRIMAN, P., went on (*ibid.*, at p. 438):

"Before I cite *Lang v. Lang* (4) ([1954] 3 All E.R. 571) I should like to refer to what LORD TUCKER said in his short opinion in *Jamieson v. Jamieson* (3). After pointing out the wisdom of judges having, as they always have, refrained from attempting a comprehensive definition of cruelty, he says ([1952] 1 All E.R. at p. 887): 'It is, in my view, equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of LORD KEITH) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies . . . In the present instance I think that the averments of knowledge, intention, and persistence remove this case from the area of doubt in which it might otherwise have lain in the absence of such averments'."

Pausing there, I will deal with those requisites, knowledge, intention, and persistence or indifference, as they apply to the present case. Knowledge: it is quite clear that the husband knew of his wife's condition. He must have known, because he was told of her objection to the course of conduct which he was following. Persistence: that is the gravamen of her charge, that it went on night after night. Indifference: indifference which the justices here have stigmatised as callous indifference, a word which learned counsel for the wife says is really an understatement. His intention appears from his own evidence.

Further, it was submitted that in the present case the particulars of cruelty which I have read are really particulars of desertion, not an actual act of desertion but desertion in a sort of inchoate form, and it was submitted that desertion cannot itself be one of the ingredients of cruelty. In support of that proposition we were referred to *Carpenter v. Carpenter* (5) ([1955] 2 All E.R. 449). That was a decision of SACHS, J., and the passage relied on was this (*ibid.*, at p. 451):

"The remedy for desertion is laid down by s. 1 (1) (b) of the Matrimonial Causes Act, 1950. Desertion, of course, often creates great distress and

- A always does so if the wife was and remained in love with her husband. Here again counsel for the wife conceded very properly that desertion was not of itself cruelty. Indeed, otherwise it would be only too easy to stultify the intention of the legislature that there must be three years' desertion in order that a petition for divorce may be properly grounded. I emphasise desertion of itself lest I be construed as saying that the act which constitutes desertion could never become an ingredient in a charge of cruelty, as for instance where the desertion took place just when the deserted spouse was critically ill."
- B

In my opinion that case does not support the proposition that simple desertion cannot in any circumstances be regarded as constituting cruelty. In fact, the learned judge himself gives an instance where it can be.

- C The present is not, in my opinion, a case of simple desertion at all. It is a case of constructive desertion, and it is impossible to draw the line between conduct which constitutes expulsive conduct in a charge of constructive desertion and conduct which constitutes an ingredient in a charge of cruelty. Very often the two are mixed so that it is impossible to extricate one from the other. It is true that the finding of the justices is
- D

"that the [husband] had received a letter from the [wife] and had sent a letter in reply . . . and that as from the date of the reply the [husband] has been in a state of desertion",

- but that merely means, in my opinion, "There is a date which puts it beyond question that this husband is in a state of desertion, because, having received this letter asking him to give some sort of guarantee of a reformation in his behaviour he wrote that short peremptory letter 'As we cannot get along now, I think it would be best for all concerned to separate. Awaiting your reply' ". That was his reaction to her request that she should have some promise of reform, given which she was quite prepared to return. That letter clearly in the opinion of the justices was merely a confirmation of the evidence which the wife had given of his conduct, which was calculated to drive her from the home. It cannot be anything else, having regard to the fact that in the line before the justices say "We consider that the defendant's conduct amounted to persistent cruelty".
- E
- F

- The next submission was that there was no evidence here of injury to the wife's health. I can deal with that very shortly. First of all there is the evidence of the doctor, who was the first witness called. He said that he had known the complainant for about eight years. He saw her on Aug. 27, 1955, for a condition consequent on pregnancy. She had a backache and generally poor health. Then:
- G

- "Oct. 6, 1956, giddy, nervous giddiness, sways with eyes shut; anxious, worried; condition compared with previous years considerably worse. Leucorrhea. Whole condition poor, debilitated. Not so good this year as last year."
- H

- He then referred to a condition of trichomonas of the vagina which had arisen after the childbirth, and which he said was likely to be prolonged if there was any damage at birth—he said later on, in cross-examination, that there was no difficulty over the childbirth—and he finished his examination in chief by saying "If in ill health or worried, leucorrhea becomes worse". In his cross-examination he said:
- I

"Any woman who has a child is liable to similar conditions. Nervous or worried, not always that mother dries up if woman is breast-feeding."

That clearly was the doctor's negative answer to the question put to him: "Does not the fact that this woman is breast-feeding negative your suggestion that there is present any condition of worry?" In my opinion that evidence of

the doctor is evidence of apprehension of injury to the wife's health, having regard to the condition in which she was. It is only necessary for me to refer to one or two passages in the wife's own evidence. She speaks of the time before the baby was born, and says that she was nervous and upset—

"Husband took no notice. I cried myself to sleep . . . Husband staying out late made me very nervous and upset. Husband saw me crying but took no notice."

Finally she speaks of a loss of weight which she sustained, and she said that that was due to worry.

The only other matter which remains is the question of the amount. It is common ground that the justices were in error in taking a part of the remuneration of the husband as being a figure of £480. The error arises from the fact that he receives a salary, he being one of three partners, of what till the last year was £416 a year, but has now become, apparently, £474. It was on the basis of £416 that the justices reached the figure at which they arrived. Their error in the other direction is that they said his share of profits was £480, and they have arrived at that figure by failing first to deduct from the total profits the figure which would be necessary to pay the salaries of the three partners. It has been submitted on behalf of the husband that if this order stands it is really asking him to pay more than he actually receives. It is impossible, in my view, for us to go into these figures. Various arguments have been put forward, by counsel on each side, as to the considerations which should be taken into account in arriving at the correct figure. No doubt those considerations will be heard before the justices, and in my opinion it is impossible to arrive at that figure by any method other than by submitting it to the justices for reconsideration. For these reasons, therefore, in my opinion, this appeal should be allowed on the question of quantum and the case remitted to the justices to determine the amount of the order for maintenance.

LORD MERRIMAN, P.: I entirely agree, but out of deference to the careful and forceful argument of counsel for the husband I wish to add one or two observations. I will deal first with the point last mentioned by COLLINGWOOD, J., and in addition with the submission of counsel for the husband that we not merely should deal with the question of the amount but also should refer back the very question whether there was wilful neglect at all, because, he truly said, it might work out that the figure which the husband was admittedly paying to the wife was on any view of the matter sufficient, and, therefore, could not amount to wilful neglect. I follow the point, but in my opinion it is enough for us to say that there is sufficient evidence, even taking into account the undoubted mistake to which COLLINGWOOD, J., has referred, that at the time immediately preceding her complaint the husband was not paying a reasonable amount to the wife, and that it was open to the justices to find wilful neglect. I should not myself, therefore, be prepared to send the case back on that issue, but the justices will not be bound, in discussing the question of amount, by any figure arrived at on the wrong basis. They should consider the whole matter *de novo*, and arrive at what is a proper basis.

I want to deal for a moment with another matter which was mentioned. As I understood it, the argument was this: The finding of desertion must be a finding of simple desertion, for this reason, that the wife had admittedly left the matrimonial home on Sept. 6, 1956, whereas the justices have founded their decision that desertion was proved on the letter written by the husband on Sept. 12. I entirely agree with COLLINGWOOD, J., that this is not a case of simple desertion by the husband. It is plainly a case of constructive desertion, and the submission to the contrary effect confuses the legal conception of what is constructive desertion with the evidence by which it is proved. The wife left home, according to the finding of the justices, because, in effect, she could not put up with the

- A treatment to which she had been subjected. That the husband knew about the effect that that treatment was having on her to my mind is past dispute, and I am not going to repeat the conclusive arguments to that effect which COLLINGWOOD, J., has already mentioned. The proof positive that that was so is provided by the fact that he wrote in that letter on Sept. 12, that that is what he did intend. That is the sum and substance of it. That does not mean that he deserted on Sept. 12. It does mean, and this is the real inference that should be drawn, that he is confessing on Sept. 12, that he had intended to disrupt the marriage and drive his wife out. In effect, just as in *Lauder v. Lauder* (6) ([1949] 1 All E.R. 76) and *Jamieson v. Jamieson* (3) ([1952] 1 All E.R. 875) the conduct complained of was characterised by the intention to bend the wife to the husband's will, so in the present case, the conduct was characterised by and
- C based on his set determination, as I think, to drive the wife out.

- In other words, it is the clearest possible case of constructive desertion. We were referred to a passage in the judgment of SACHS, J., in *Carpenter v. Carpenter* (5) ([1955] 2 All E.R. 449 at p. 451) which COLLINGWOOD, J., has already read. With the greatest possible respect to SACHS, J., I think that it may be rather a dangerous pronouncement. I do not myself accept the view that desertion cannot
- D be cruelty. In my opinion it does not in the least follow from the fact that, by contrast with cruelty, the remedy of divorce is only given for desertion which has lasted for three years before the presentation of the petition, that desertion per se cannot be cruelty. Desertion is an offence apart altogether from its duration—*Beard v. Beard* (7) ([1945] 2 All E.R. 306). I think that the learned judge himself provides an example in which desertion might well be cruelty, and not merely an
- E ingredient in cruelty. Even if there were nothing else in a case but the fact that the wife to the knowledge of the husband was lying seriously ill in the home, and that, with that knowledge, and without excuse, he left her, with the result that her health deteriorated and she became dangerously ill, on principle I cannot see why that should not also be conduct of a kind which was calculated to cause danger to life, limb or health, bodily or mental. However that may be, these
- F cases can be dealt with as they arise. I think there is one other criticism which should be directed to that passage. It fails, if I read it correctly, to distinguish between simple desertion and constructive desertion. In my opinion—indeed I should say it is a commonplace—constructive desertion and cruelty are constantly, in substance, the same thing, proved by the same evidence. In that sense, at any rate, it cannot be true to say that desertion can never be cruelty.
- G Then it was said in the present case that whereas the particulars given were all particulars of cruelty, it is impossible for us to take them, found as they are to be substantially proved by the justices, as a plain case of constructive desertion. It is said that we cannot do that because the justices have held that desertion began on Sept. 12. I have dealt with the question of what sort of desertion it was. I do not agree with that argument because it seems to me that when there
- H is the evidence one is entitled, indeed directed, by the rules to draw any inference which ought to have been drawn by the justices, and if authority is necessary for this I think that I find it in a later passage in the judgment which COLLINGWOOD, J., has so fully discussed in *Waters v. Waters* (2) ([1956] 1 All E.R. 432). I was there discussing what had been said in *Lang v. Lang* (4) ([1954] 3 All E.R. 571) and said ([1956] 1 All E.R. at p. 441):

- I “ . . . in saying that there was no proof of wilful ill-treatment of the wife by the husband, and that he had not deliberately conducted himself so as to drive the wife away from the home, and making that the test, the justices have misdirected themselves, and on any view of this matter I think that the present case must go back on the issue of desertion. Although these observations [in *Lang v. Lang* (4)] were directed to cases of constructive desertion I know of no reason why precisely the same considerations should not be applied to mental cruelty. If a reasonable man would know, as this

husband did know, that continuance in the course of conduct complained of would have an injurious effect on his wife's mental health, what more is necessary? "

Then I refer to the passage in LORD NORMAND's opinion in *Jamieson v. Jamieson* (3) ([1952] 1 All E.R. at pp. 877, 878) which COLLINGWOOD, J., has already read, in which he likened intention and unwarrantable indifference as being the same things having the same legal effect.

If that is true, precisely the same must be true vice versa, and it must be just as legitimate to use for the purposes of constructive desertion evidence which goes to show, and which is accepted as showing, mental cruelty. We had the same argument addressed to us in *Parkin v. Parkin* (8) (not reported). The justices had in that case found cruelty, which was challenged but we eventually upheld the decision. The justices said: "It follows that the wife was abundantly justified in leaving home" and they therefore based their decision about desertion on that logical sequel. I said this:

"It is quite impossible to say that there is not evidence of a direction to leave, here, intended to be acted upon and never (as the magistrates thought) withdrawn, which operates as constructive desertion independently of whether a charge of cruelty is proved or not. It none the less supports the charge of constructive desertion that it happens itself to be part of the evidence which is put forward on the major charge. The thing seems to me to be perfectly simple, and if necessary I should be prepared to draw the inference which was not drawn by the magistrates that apart from cruelty altogether there was plain material for a finding of constructive desertion."

I should be prepared to do exactly the same thing in the present case if it were necessary, but for the reasons which COLLINGWOOD, J., has already given I do not think that it is necessary to draw that inference.

In my opinion this appeal must be allowed, and the order of the justices varied by striking out the amount. That will leave the complaint proved, and the matter will be referred back to a fresh panel of magistrates to approach this question of amount *de novo*.

Order accordingly.

Solicitors: *Smiles & Co.*, agents for *Mossop & Bowser*, Wisbech (for the husband); *Gardiner & Co.*, agents for *Ruddock, Middleton & Killin*, Great Yarmouth (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

A CORBETT v. CORBETT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), January 28, 29, 1957.]

Divorce—Desertion—Termination—Jewish bill of divorcement—Effect in English law—Consent of wife to be determined in the light of all the circumstances.
 B *Nullity—Foreign decree—Decree granted to wife on ground of religious incapacity—Wife domiciled in foreign country at date of marriage—Decree by court of country where marriage celebrated—Recognition of decree by English court.*

In 1936 the wife married one C. at the Latin patriarchate in Jerusalem. The wife was of the Jewish faith and was domiciled in Palestine at the date of the marriage. There was an annulment of the marriage in 1940 in Jerusalem, but the annulment was invalid by the local law. In December, 1942, the wife married the husband in Jerusalem the husband being also of the Jewish faith. In 1946, the district court of Jerusalem declared the marriage celebrated in 1936 to be invalid, because among other reasons, the wife according to her religious law had not the capacity to contract a marriage with a Christian. In 1952 the parties came to England and shortly afterwards the husband left the wife. The wife tried to persuade the husband to rejoin her but without success. He asked her to agree to a Jewish bill of divorcement; eventually she gave her consent and in December, 1952, the husband obtained a get (bill of divorcement) from the Beth Din in London. The parties remained on friendly terms and when the husband went to Canada they corresponded. In 1954 the wife wrote to the husband suggesting that they should resume life together in Canada, but the husband refused. On a petition by the wife for a declaration that the marriage in December, 1942, was valid and for a decree of divorce on the ground of the husband's desertion,

Held: (i) the marriage in December, 1942, was a valid marriage since the English courts would recognise the validity of the decree of the district court at Jerusalem in 1946, annulling the wife's earlier marriage with C., for the following reasons—

(a) the decree was that of the court having jurisdiction at the place where the marriage was celebrated (*Mitford v. Mitford & Von Kuhlmann*, [1923] P. 130, applied) and

(b) a marriage which one of the parties had not the capacity to contract would be regarded as void by English law, and since the English court assumed to itself nullity jurisdiction in relation to void marriages celebrated in England, it should concede the like jurisdiction to the district court at Jerusalem; and it was immaterial to consider the grounds of incapacity for which the district court had annulled the marriage.

(ii) the wife was entitled to a decree of divorce for the husband's desertion since the get had not legal effect in English law (dictum of JENKINS, L.J., in *Joseph v. Joseph*, [1953] 2 All E.R. at p. 712, applied) and the wife had never consented to the husband's leaving her or remaining apart from her.

Joseph v. Joseph ([1953] 2 All E.R. 710) distinguished on the facts.

[Editorial Note. The distinction between void and voidable marriages in relation to nullity jurisdiction, in so far as it is dependent on domicile of the wife, rests on the consideration that if the marriage is voidable the wife will have acquired her husband's domicile until the marriage is declared void, but if the marriage is one that was void from its inception, she will not have changed her domicile by virtue of the void marriage.

As to the jurisdiction of a foreign court to annul a void marriage, see 7 HALSBURY'S LAWS (3rd Edn.) 118, para. 208, note (o); and for cases on the subject, see 11 DIGEST (Repl.) 485, 1098-1101.

As to the effect of Jewish divorce obtained in England, see 12 HALSBURY'S LAWS (3rd Edn.) 253, para. 471, note (k); and for cases on the subject, see 3rd DIGEST Supp. to 27 DIGEST (Repl.) 2979 (d).]

Cases referred to:

- (1) *Mitford v. Mitford & Von Kuhlmann*, [1923] P. 130; 92 L.J.P. 90; 129 L.T. 153; Digest Supp.
- (2) *Scrimshire v. Scrimshire*, (1752), 2 Hag. Con. 395; 161 E.R. 782; 19 Digest 351, 1641.
- (3) *Roberts (falsely called Brennan) v. Brennan*, [1902] P. 143; sub nom. *Brennan (otherwise Roberts) v. Brennan*, 86 L.T. 599; 11 Digest (Repl.) 686, 6557.
- (4) *Joseph v. Joseph*, [1953] 2 All E.R. 710; 3rd Digest Supp.

Petition.

In this case the wife petitioned (i) for a declaration that the marriage celebrated between herself and the husband in Jerusalem on Dec. 13, 1942, was a valid marriage and (ii) for a divorce on the ground of the husband's desertion. The wife sought the exercise of the court's discretion in respect of her own adultery.

The husband was in Canada and the wife relied on s. 18 (1) (a) of the Matrimonial Causes Act, 1950, for the purpose of the court's jurisdiction. The petition had been served on the husband but the suit was undefended. The facts appear in the judgment.

John Latey for the wife.

BARNARD, J.: The parties were married on Dec. 13, 1942, in the part of Jerusalem which is now in the State of Israel, and was according to the rites of the Jewish faith. Before that marriage took place, the wife in this suit had married a man called Craig on Apr. 1, 1936, at the Latin patriarchate in Jerusalem. Both she and Craig thereafter resided in Jerusalem, and there is no doubt that the wife at the time she went through that ceremony of marriage was domiciled in Palestine, she being a refugee from Germany, apparently having come to Palestine with her father. The domicile of her then husband is not known. He appears to have been of Irish origin. Early in the year 1940, according to the evidence of the wife, that ceremony of marriage purported to have been annulled by an ecclesiastical court, the Latin patriarchate, and no doubt on the strength of that annulment the wife married her present husband in December, 1942. It appears to have been realised at some time after that marriage was purported to have been annulled that the annulment was ineffective, and on Jan. 16, 1946, the district court of Jerusalem declared the marriage celebrated on Apr. 1, 1936, to be invalid.

I had the advantage of hearing the evidence of Mr. Bentwich, who is not only a member of the English Bar but is very familiar with the law in Palestine. He was Attorney-General there from 1920 to 1931, and then on giving up that appointment he practised in the courts in Palestine until the British gave up their mandate and the State of Israel was created. He has given evidence to the effect that, having seen the certificate of the marriage which took place on Dec. 13, 1942, that certificate would be received as *prima facie* evidence of the marriage in the courts in Israel; and the same applies, for what it is worth, to the certificate relating to the ceremony of marriage which took place between the wife and Craig on Apr. 1, 1936. He has also given evidence to the effect that the purported annulment of that ceremony before the Latin patriarchate in Jerusalem would not be regarded as a valid annulment by the law of Israel; but, on the other hand, the judgment of the district court on Jan. 16, 1946, would be regarded as a valid annulment, and the district court, according to the law of Israel, has jurisdiction in nullity suits.

I do not find any difficulty in solving the first problem, which is whether or not the English courts can recognise the validity of the decree of annulment

A pronounced by the district court in Jerusalem. I have been referred by counsel for the wife to DICEY'S CONFLICT OF LAWS (6th Edn.) at p. 381, r. 73, and the appropriate part of the rule reads as follows:

B "The courts of a foreign country have jurisdiction to pronounce a decree of nullity of marriage if . . . (2) . . . the marriage was celebrated in such foreign country."

The note at p. 383 reads:

C "The second part of this rule means that the courts of a foreign country where the marriage was celebrated have, according to English law, a right to determine whether the ceremony constituted a valid marriage according to the laws of that country. This jurisdiction is independent of the domicile of the parties. Our rule cannot, however, be laid down as absolutely certain. English courts have assumed jurisdiction for themselves to determine the validity of a marriage celebrated in England, even in the case of parties not domiciled in England, and as long as they continue to do so, there is no apparent reason why they should not concede an analogous jurisdiction to the courts of a foreign country. The distinction between void and voidable marriages has not been discussed in relation to the jurisdiction of foreign courts, and, in *Mitford v. Mitford & Von Kuhlmann* (1) ([1923] P. 130) the only modern case in which a decree of the forum celebrationis was recognised, a voidable marriage appears to have been treated as though it was void."

E Now if we were to apply the English distinction between void and voidable marriages the marriage in question would obviously be regarded as void. I say that because of what appears towards the end of the judgment. The judge who decided this case said this:

F "In this case, therefore, I hold that as the marriage is invalid according to the canon law of the petitioner [Craig], the law of the church that celebrated the marriage, and as also according to the religious law of the respondent she had not the capacity to contract a marriage with a Christian, the marriage was invalid."

G Undoubtedly a marriage which one of the parties had not the capacity to contract would be regarded as a void marriage by English law. I need not say anything about incapacity, which was the ground for the annulment, because it is well established that if the English courts recognise the jurisdiction of a foreign court to annul a marriage, then the ground on which that marriage was annulled by the foreign court is wholly immaterial. It is also well established that the celebration of a void marriage in England, as distinct from a voidable marriage, is sufficient to confer nullity jurisdiction on the English courts, and in my view, which is also the view of the editor of DICEY'S CONFLICT OF LAWS (6th Edn.), it would be wholly illogical in those circumstances to refuse to recognise a similar jurisdiction exercised by the courts of a foreign country.

I *Mitford v. Mitford* (1), which was also brought to my notice by counsel for the wife, is a well known decision by SIR HENRY DUKE, P. In that case an Englishman had married a German woman in Germany. The marriage was valid at the time, according to the law of Germany, but the German court annulled the marriage on a ground which was not a ground by English law but which English law would regard as rendering a marriage voidable. SIR HENRY DUKE based his decision, I think, on two grounds: first, that the marriage in question was celebrated in Germany and, therefore, the courts of Germany had jurisdiction to annul the marriage; and, secondly, on the ground that both parties were resident in Germany after the ceremony and, I think, up to the time that proceedings were taken in Germany. I say that because SIR HENRY DUKE, P.,

refers ([1923] P. at p. 140) to what SIR EDWARD SIMPSON said in *Scrimshire v. A Scrimshire* (2) ((1752), 2 Hag. Con. 395 at p. 412), viz.:

“As both the parties by celebrating the marriage in France have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be, that it should be a marriage, or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage, or contract, ‘ad aliud examen’, to be tried by different laws than those of the place where the parties contracted.”

Then SIR HENRY DUKE adds this (ibid.):

“The reasons of the conclusion thus expressed seem to me to apply with full force in the present case.”

On the other ground, of residence, at the very beginning of the judgment, SIR HENRY DUKE refers ([1923] P. at p. 135) to what LORD ST. HELIER said in *Roberts (falsely called Brennan) v. Brennan* (3) ([1902] P. 143 at p. 144):

“In my view, residence—not domicile—is the test of jurisdiction in a nullity case. The jurisdiction of the ecclesiastical courts was based on the residence of the parties, and in suits for nullity this court follows the practice of the ecclesiastical courts, as prescribed by s. 22 of the Matrimonial Causes Act, 1857.”

There is some criticism of SIR HENRY DUKE’s judgment, because he did not distinguish between a void and a voidable marriage. It would be difficult for me, in the light of more recent authorities, to say that there is no such distinction as regards jurisdiction. Logically there should be no such distinction, for the decree is precisely the same, whether the marriage be void or voidable, and I have little doubt that that was SIR HENRY DUKE’s view. I have therefore no hesitation in coming to the conclusion that the English courts should recognise the decree of the district court in Jerusalem. That means that this ceremony of marriage entered into between the wife and Craig on Apr. 1, 1936, was an invalid marriage and therefore there was nothing to prevent her marrying the present husband, as she did, on Dec. 13, 1942.

There was one child of this marriage, a girl, born on Oct. 5, 1943. The wife has given me a history of her marriage. I need not go into the details. She seemed to me obviously to have been very fond of her husband. There was trouble because the husband at one time was associating with another woman, but the wife seems to have forgiven him. That was in 1947, after they had left Palestine and the husband had obtained a position with some oil company at Kuwait in the Persian Gulf. He gave up that appointment and apparently obtained some government post, and there was again trouble over another woman, who was his secretary. They came to the conclusion that life did not hold out much prospect in the Persian Gulf and in June, 1952, the family sailed for England; and from the evidence of the wife, which I see no reason to doubt, after they had arrived in England, her husband appears to have taken her and the child to some hotel near Victoria in London, and to have left them there, having made it clear that he was leaving them for good. On Dec. 18, 1952, both husband and wife being of the Jewish faith, the husband obtained a get from the Beth Din in London. The get was a Jewish bill of divorcement. This certified that the wife had received her get on Dec. 18, 1952, and that she was free to marry again in accordance with Jewish religious law after ninety clear days from the aforementioned date. I am also satisfied that the husband could not have obtained that bill of divorcement without the consent of the wife.

The next problem is whether or not the wife, by consenting to that bill of divorcement, terminated the husband’s desertion. There is a recent authority on this problem, *Joseph v. Joseph* (4) ([1953] 2 All E.R. 710) in which the Court of Appeal upheld an order made by Mr. Commissioner GRAZEBROOK, Q.C.,

- A dismissing a petition alleging desertion, on the ground that the wife had consented to a bill of divorcement and had brought the desertion to an end. As was pointed out to me by counsel for the wife, the facts in that case are totally different from the facts in the case now before me. In *Joseph v. Joseph* (4) it is abundantly clear that it was the wife who wanted the divorce and who stirred the husband into going to the Beth Din in London to obtain a bill of divorcement,
- B because she wanted it for a very special purpose. She had made up her mind to go to Shanghai, and she appeared to think, and it may have been on good grounds, that this bill of divorcement would be recognised as valid in Shanghai, and she desired to go there as a single woman. Subsequently she changed her mind and remained in England, and then took proceedings against her husband on the ground of desertion. All the lords justices (SOMERVELL, JENKINS and
- C HODSON, L.J.J.) refer to the fact that it was really the wife who initiated the proceedings, although the bill of divorcement could only be obtained by the husband.

- The facts in the present case are totally different. The wife told me in her evidence that soon after being deposited by her husband in this hotel in London she found a flat where she moved with her child, and both she and her husband
- D remained in touch with one another. She did her utmost to persuade him to rejoin her and try to make a success of the marriage, but the husband was adamant, and it was not very long before he was trying to persuade her to agree to a Jewish bill of divorcement. She said that this went on for two or three months, covering his visits to her and possibly her meetings with him, and finally she agreed, but she satisfied me that she only agreed as part of a policy of appeasement. She told me that she wanted to remain on friendly terms
- E with her husband and apparently she still thought that even in spite of her consenting to this bill of divorcement, there was a chance of their getting together again. She also said that she did not think that the bill of divorcement would really be of much use to him. The husband had told her that he wanted it because he wished to go to Canada, and it would help him with the Canadian
- F authorities if he were able to say that he was a single man. The story does not end there, because she actually saw him off when he sailed for Canada. Then she put forward the suggestion that if he got settled in Canada, would he not consider sending for her and the child, and I think that he replied that he certainly did not intend to do so. Even after the husband arrived in Canada she corresponded with him, writing friendly letters, certainly up to the summer
- G of 1954, when, she tells me, she wrote a letter suggesting that they should try life together again in Canada. The husband had notice to produce the letter, but apparently it does not exist. She said that she received an answer which was an emphatic No. The husband acknowledged the notice to produce. He says in his letter:

- H "I confirm that I have kept none of the correspondence received from my former wife, Rita Veronica, nor do I remember having received a letter from her requesting that she and my daughter . . . join me in Canada."

- It is an odd way of putting it. In my view it adds credence to what the wife has told me. It does not confirm the receipt of this particular letter, but it is obvious, I think, that her evidence must be right, that she had been suggesting a reconciliation, otherwise I do not think that he would have answered in that way: "nor do I remember having received a letter". If there had never been any suggestion at any time from the wife about joining him in Canada, I think that he would have been quite emphatic that he had never received any such letter.
- I

Although the wife was not in any sense the instigator of this bill of divorcement, there can be no doubt that she agreed to it, and by agreeing to it was the husband's desertion terminated? I have come to the conclusion, on the facts

of the present case, that it was not, because I notice that JENKINS, L.J., says this in his judgment ([1953] 2 All E.R. at p. 712):

"Counsel for the wife invited us to ignore the get given to the wife as a mere nullity having no effect in English law, either as a decree of divorce or as an agreement to separate. I agree with him that the get has neither operation."

It seems to me quite clear from that statement by JENKINS, L.J., that the Court of Appeal was not saying that in every case where there is a get desertion must terminate; otherwise the separation from then onwards would be, in a sense, a legal separation, an agreement between them to live apart, and JENKINS, L.J., says that the get has no such effect. I have come to the conclusion that where you have desertion running and then a bill of divorcement, the parties to the suit being of the Jewish faith, the court must consider the effect of the get in the light of all the surrounding circumstances of the particular case before the court.

It is clear from the evidence in the present case, that the wife never really consented to the husband leaving her and remaining separate from her. With a bill of divorcement which can only have a religious effect and no possible legal effect in this country, the court has to look at the facts of the case before it, and consider the circumstances in which the bill of divorcement came into existence. The court is also entitled to take into consideration what followed the bill of divorcement. I have therefore come to the conclusion in this particular case, in which I wholly accept the evidence given by the wife and in which the facts are totally different from the facts in *Joseph v. Joseph* (4), that in spite of this bill of divorcement the husband continued in desertion.

This is a discretion case, and I think the matters referred to in the discretion statement, after I had expressly asked the wife a few questions, bear out the contention that she was never really willing that this marriage should break up and that her husband should remain apart from her. She appears to have only committed adultery in the summer of 1954, with a friend whom she knew out in the Persian Gulf, and who had come home on leave, and got in touch with her. She told me that she only spent three nights with him at a hotel in London after she had heard from her husband that he emphatically refused to consider the proposition that she and the child should join him in Canada. She further told me that she was feeling very unhappy and that was how she came to commit adultery. In those circumstances, this would obviously be a proper case to exercise discretion in her favour, and the wife is therefore entitled to a decree nisi on the ground of desertion. There will also be a declaration that the marriage between the wife and the husband on Dec. 13, 1942, was a valid marriage.

Declaration and decree accordingly.

Solicitors: *Mead & Darby* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

A

YELLAND v. TAYLOR.

[COURT OF APPEAL (Jenkins, Morris and Sellers, L.JJ.), February 14, 1957.]

B

Rent Restriction—Possession—Reasonableness—Discretion of judge—Greater hardship on landlord—Landlord giving untrue evidence that accommodation furnished—Whether a proper consideration in deciding reasonableness of order—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5 c. 32), s. 3 (1).

C

A landlord brought an action against his tenant for possession of a dwelling-house which was within the Rent Restrictions Acts. He claimed possession on the grounds (a) that the letting was a furnished letting and therefore not within the protection of the Acts, (b) that he was able to offer alternative accommodation, and (c) that his was the greater hardship. The county court judge found that the landlord and his witnesses had lied to the court in seeking to substantiate the claim that the letting was a furnished one, and that the alternative accommodation offered to the tenant was not suitable; but the judge found that the greater hardship fell on the landlord. An order for possession was withheld, pursuant to s. 3 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as it was considered that it was not reasonable to make the order because the landlord and his witnesses had deliberately conspired to deceive the court. The landlord appealed.

D

E

Held: in deciding whether it was reasonable to make an order, on the ground of greater hardship, the lying conduct of the plaintiff in relation to another ground of his claim for possession could properly be taken into consideration, and the court would not interfere with the exercise of the judge's discretion.

Appeal dismissed.

F

[**Editorial Note.** This decision may be considered in conjunction with the decision of the COURT OF APPEAL in *Cresswell v. Hodgson* ([1951] 1 All E.R. 710), where also the court were concerned with what circumstances may be taken into consideration in determining whether it was reasonable to make an order for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1).

G

As to restrictions on the landlord's right to possession, see 20 HALSBURY'S LAWS (2nd Edn.) 329-334, paras. 392-399; and for cases on the subject, see 31 DIGEST (Repl.) 695-698, 7871-7894.

For the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 1048.]

Appeal.

H

This was an appeal by a landlord from an order of His Honour JUDGE BAXTER made at Uxbridge County Court on Nov. 27, 1956, whereby he refused the landlord possession of a dwelling-house.

C. Salmon for the landlord.

A. P. Fletcher for the tenant.

I

JENKINS, L.J.: This is an appeal by a landlord, Mr. Yelland, from an order of His Honour JUDGE BAXTER given at Uxbridge County Court on Nov. 27, 1956, whereby he refused the landlord possession of premises called "Norfolk Lea", Love Lane, Iver, of which the defendant, a Mr. Taylor, was the tenant.

There were three grounds on which the landlord sought possession. First and foremost, he said that this was a furnished letting and therefore not within the protection of the Rent Restrictions Acts. Alternatively, he said he was able to offer alternative accommodation, which would bring his claim for possession within the ambit of the learned judge's discretion under s. 3 (1) (b) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933; and, finally,

he claimed on the ground of greater hardship under s. 3 (1) (a) of, and para. (h) of the Schedule to, the Act of 1933. A

The learned judge heard the landlord and other witnesses. He came to the conclusion that the landlord was lying when he said that the house was let furnished, and that it was not let furnished. He went on to reject the alternative accommodation as not suitable; but he found that the facts showed that, in the circumstances of the case, the greater hardship fell on the landlord. So the landlord's case was, in the learned judge's view, made out on that ground, subject to the overriding consideration of reasonableness; but he went on to say, in effect, that he did not consider it reasonable to make an order, in view of the lying evidence on the landlord's side in regard to the letting being furnished. He gave a very short judgment and a supplementary judgment. I think I should read those: B C

"Held, not furnished—no furniture there. Accommodation at Ealing not suitable alternative accommodation. Reasonably wants place for own occupation. Balance of hardship in favour of landlord. Would probably have held reasonable to make an order but landlord and witnesses have lied about furniture. Not reasonable to make an order in case where deliberate attempt to deceive court." D

He was asked by counsel for the landlord to amplify that, because of the presence of the word "probably" in the sentence "Would probably have held reasonable to make an order". The learned judge complied with that request and made this supplementary note:

"I have been asked to consider whether I used word 'probably' in delivering the oral judgment. I think I did but its use had no real significance. I would have made an order if I had not been satisfied that the landlord and his witnesses had been lying about an essential matter: moreover their lies were of a type which showed they were part of a deliberate conspiracy to deceive the court. I accepted the evidence of the landlord as to his need for the accommodation, his wife's health and his efforts to find other accommodation for the tenant." E F

On that, counsel for the landlord submits that the learned judge had, in effect, no jurisdiction to refuse the landlord possession of the premises. Counsel says that the mere fact that the landlord misconducted himself before the court and told lies was beside the point; and the learned judge, having held that the balance of hardship was in favour of the landlord and having found in other respects that it was reasonable to make the order, should not have held it unreasonable to make the order on account of the landlord's lying. That, says counsel, is something altogether outside the purview of the Acts, the discretion vested in the judge being, in his submission, a discretion limited to matters concerning the circumstances of the parties, and so forth. I do not propose to attempt to define the scope of the court's discretion in these Rent Restrictions Acts cases, but it seems to me that one can at all events say this, that the interests of the parties are plainly relevant to the exercise of such discretion and, in my view, in a case of this sort, where the judge finds that a plaintiff landlord has sued a tenant, putting in the forefront a lying claim that the letting is a furnished letting, he is well entitled to hold it unfair to the tenant, and unreasonable from the tenant's point of view, that having successfully defeated that perjured claim, the tenant should be put in peril on a different ground if the lying plaintiff has a second string to his bow on which he can make out some sort of case. G H I

Accordingly, in my view, it cannot be said that this matter of the landlord's lying evidence is a matter which the judge could not take into consideration in determining whether it would be reasonable to make an order or not. That being so, there is an end of the case. In my view, it is very salutary that landlords should appreciate that, if they choose to found their claims for possession

A on evidence they know to be false, then when they ask the judge for an exercise of discretion to enable them to get possession on some other ground, the judge may think it right to refuse them that relief. In my view, this court should clearly not interfere in this matter; and the appeal fails and should be dismissed.

MORRIS, L.J.: I entirely agree.

B SELLERS, L.J.: I agree. I can see no ground at all for seeking even to disturb the judge's discretion. In my view, he took a very proper course in the circumstances which confronted him.

Appeal dismissed.

Solicitors: *Lees, Smith & Crabb* (for the landlord); *Julius White & Bywaters*, agents for *Turberville Smith & Co.*, Uxbridge (for the tenant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re WAITE'S SETTLEMENT TRUSTS.

D WESTMINSTER BANK, LTD. AND ANOTHER v. BROUARD AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), January 29, 31, February 8, 1957.]

E *Conflict of Laws—Powers of appointment—General powers—Power given by English settlement—Residuary gift by will of testatrix domiciled abroad—Whether valid exercise of power—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27.*

Power of Appointment—Exercise—General power—Power given by English settlement—Residuary gift by will of testatrix domiciled abroad—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 27.

F By a deed of appointment dated Aug. 28, 1924, exercising a power of appointment conferred by a settlement dated Sept. 1, 1874, one moiety of the trust funds subject to the settlement was appointed in trust for M.E.B. for life, and after her death on such trusts as she should appoint by deed or will, and, in default of and subject to such appointment, on trust for G., a daughter of M.E.B., absolutely. The settlement and the deed of appointment were governed by English law. M.E.B., by will dated Dec. 31, 1949, which she therein described as her last will concerning the personal estate which should belong to her at the time of her decease, made pecuniary and other bequests and gave "the rest residue and remainder of the portion of my personal estate whereof I have the disposal according to law to [E.] absolutely". On Feb. 21, 1954, M.E.B. died domiciled in Guernsey, and the question arose whether the residuary gift contained in her will was effective to dispose of the moiety of the trust funds subject to the settlement and deed of appointment. M.E.B.'s will complied in form with the requirements both of the law of Guernsey and of the Wills Act, 1837. On the evidence of the law of Guernsey that was before the court the bequest of residue to E. was by that law not an effective exercise of a general power of appointment and M.E.B. could dispose by will of only one half of her personal estate, the other half passing to M.E.B.'s children.

I **Held:** the residuary bequest to E. in M.E.B.'s will was effective by virtue of s. 27 of the Wills Act, 1837, as an exercise of M.E.B.'s general power of appointment under the deed of 1924 for the following reasons

(a) the question whether the bequest exercised the power was one of English law, and restrictions on the power of testamentary disposition under Guernsey law were irrelevant; and

(b) no contrary intention within the Wills Act, 1837, s. 27, appeared from M.E.B.'s will.

Re Mégret ([1901] 1 Ch. 547) and *Re Bald* ((1897), 66 L.J.Ch. 524) followed.

Re Pryce ([1911] 2 Ch. 286) distinguished; *Re Lewal's Settlement Trusts* ([1918] 2 Ch. 391) not applied.

[As to the execution of a power by the will of a testator domiciled abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 61, 62, para. 115; and for cases on the subject, see 11 DIGEST (Repl.) 413-418, 667-700.

For the Wills Act, 1837, s. 27, see 26 HALSBURY'S STATUTES (2nd Edn.) 1347.]

Cases referred to:

- (1) *Re Baker's Settlement Trusts*, *Hunt v. Baker*, [1908] W.N. 161; 11 Digest (Repl.) 414, 680.
- (2) *Re Simpson, Coutts & Co. v. Church Missionary Society*, [1916] 1 Ch. 502; 85 L.J.Ch. 329; 114 L.T. 835; 11 Digest (Repl.) 416, 690.
- (3) *Re Wilkinson's Settlement*, *Butler v. Wilkinson*, [1917] 1 Ch. 620; 86 L.J.Ch. 511; 117 L.T. 81; 11 Digest (Repl.) 416, 691.
- (4) *Re Strong, Strong v. Meissner*, (1925), 95 L.J.Ch. 22; 11 Digest (Repl.) 417, 693.
- (5) *Pouey v. Hordern*, [1900] 1 Ch. 492; 69 L.J.Ch. 231; 82 L.T. 51; 11 Digest (Repl.) 414, 677.
- (6) *Re Mégret, Tweedie v. Maunder*, [1901] 1 Ch. 547; 70 L.J.Ch. 451; 84 L.T. 192; 11 Digest (Repl.) 413, 669.
- (7) *Re Bald, Bald v. Bald*, (1897), 66 L.J.Ch. 524; 76 L.T. 462; 11 Digest (Repl.) 413, 668.
- (8) *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286; 80 L.J.Ch. 525; 105 L.T. 51; 11 Digest (Repl.) 418, 697.
- (9) *Re Lewal's Settlement Trusts*, *Gould v. Lewal*, [1918] 2 Ch. 391; 87 L.J.Ch. 588; 119 L.T. 520; 11 Digest (Repl.) 416, 692.
- (10) *Re Moore, Moore v. Moore*, [1901] 1 Ch. 691; 70 L.J.Ch. 321; 21 Digest 30, 180.
- (11) *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; 78 L.J.Ch. 254; 100 L.T. 54; 21 Digest 31, 185.
- (12) *O'Grady v. Wilmot*, [1916] 2 A.C. 231; 85 L.J.Ch. 386; sub nom. *Re O'Grady, O'Grady v. Wilmot*, 114 L.T. 1097; 21 Digest 31, 186.

Adjourned Summons.

The plaintiffs, Westminster Bank, Ltd., and Alfred Joseph Peters, as the present trustees of a settlement dated Sept. 1, 1874, applied to the court by originating summons for the determination of the following questions. First, whether on the true construction of the will of Mary Elizabeth Blizard, deceased, and having regard to her domicile being in the Island of Guernsey at the date of her death, her will operated as an effectual exercise of the general power of appointment conferred on her under a deed of appointment dated Aug. 28, 1924, (a) with regard to the whole of the one moiety of the trust funds subject to the trusts of the settlement appointed under the said deed of appointment, or alternatively (b) with regard to some and what part of the moiety. Secondly, whether the will did not operate as an effectual exercise of the powers with regard to any part of the moiety. Thirdly, whether according to the answers to the preceding questions and having regard to the domicile of Mary Elizabeth Blizard (a) the first defendant Elda Brouard, became entitled as residuary legatee under the will to the whole or any and what part of the moiety of the trust funds, or (b) the second defendant, Gwendoline Mary Farley, and the third defendant, George Percy Blizard, became respectively entitled to any and what parts of the moiety as legitimate partners under the law of Guernsey, or (c) the second defendant, Gwendoline Mary Farley, became entitled in default of appointment to the whole or any and what part of the moiety.

The deed of appointment dated Aug. 28, 1924, exercised powers of appointment conferred by two settlements, viz., the settlement dated Sept. 1, 1874, and another settlement dated Jan. 25, 1876. Each of these was made between the

- A same parties and the powers of appointment were similar and were exercised together in favour of the same persons. The originating summons related to the funds subject to one only of these settlements. The facts appear in the judgment.

H. Hillaby for the plaintiffs, trustees of the settlement.

- B *A. H. Bray* for the first defendant, the residuary legatee under the will of Mary Elizabeth Blizard.

G. B. H. Dillon for the second defendant, entitled in default of appointment, and entitled to share in a moiety of the personal estate of the testatrix under Guernsey law.

- C *Frank Gahan, Q.C., and J. G. Le Quesne* for the third defendant, entitled to share in a moiety of the personal estate of the testatrix under Guernsey law.

Cur. adv. vult.

- Feb. 8. **DANCKWERTS, J.**, read the following judgment: By two settlements, dated respectively Sept. 1, 1874, and Jan. 25, 1876 (which were in similar terms), made between Frederick Augustus Waite and Mary Elizabeth Waite, his wife, and certain trustees, trust funds and property were settled on trust (after the life interests of Mr. and Mrs. Waite and the survivor of them) for the children or remoter issue of Mr. and Mrs. Waite in such shares and with such future and executory or other trusts for the benefit of the said children and issue or some or one of them and with such provisions for their respective maintenance education or advancement at the discretion of the trustees or of any other persons or person and on such conditions with such restrictions as Mr. and Mrs. Waite should by any deed or deeds or writing or writings sealed and delivered with or without power of revocation and new appointment jointly appoint and, in default of such joint appointment and so far as any such joint appointment should not extend, then as the survivor of them should in like manner or by will or codicil appoint.

- F Mr. and Mrs. Waite had three children: George Augustus Phillip Waite, Mary Elizabeth who became Mrs. Blizard, and Alice Maude who became Mrs. Tubbs. Mrs. Blizard had two children: Gwendoline Mary, who became Mrs. Farley, and a son, George Percy Blizard. Mr. Waite died on Mar. 15, 1878, without the joint power of appointment having been exercised, and accordingly the power of appointment conferred by the settlements on the survivor became exercisable
- G by Mrs. Waite.

- By a deed-poll dated Aug. 28, 1924, Mrs. Waite appointed that the trustees for the time being of the settlements should after her death* and in the meantime subject to her life interests stand possessed of one moiety or half part of all the property and investments which then were or might by any means thereafter become subject to the trusts of the settlements or either of them on the following trusts that is to say: (i) On trust during the life of the said Mary Elizabeth Blizard to pay the income of such moiety to the said Mary Elizabeth Blizard for her separate use without power of anticipation. (ii) After the death of the said Mary Elizabeth Blizard, on such trusts for such persons and purposes generally as the said Mary Elizabeth Blizard should by deed revocable or irrevocable or by will or codicil appoint. (iii) And in default of and until and subject to any such appointment in trust for the said Gwendoline Mary Blizard (Mrs. Farley) absolutely.

Mrs. Mary Elizabeth Blizard made her will dated Dec. 31, 1949, which she described as her last will and testament concerning the personal estate which should belong to her at the time of her decease, and she declared that her domicile was in the Island of Guernsey where she had made her permanent home for many

* Mrs. Waite died on Apr. 16, 1926.

years. After giving legacies amounting to £890 and a number of other bequests, A by cl. 5 (21) she made the following bequest:

"The rest residue and remainder of the portion of my personal estate whereof I have the disposal according to law to the said Elda Brouard absolutely"

with an alternative gift to take effect if Mrs. Elda Brouard predeceased her (which did not happen). B

Mrs. Mary Elizabeth Blizard died on Feb. 21, 1954, domiciled in the Island of Guernsey (a widow) and letters of administration with her will annexed were granted in England on Mar. 19, 1955, to Westminster Bank, Ltd., as attorney for Westminster Bank Executor and Trustee Co. (Channel Islands), Ltd. (the executor named in the will), who had obtained probate of the will in Guernsey C on Feb. 27, 1954. As to form the will complied with the requirements of the Wills Act, 1837, as well as the law of Guernsey.

Two opinions were obtained from Mr. Charles Frossard, an advocate of the Royal Court of Guernsey, and exhibited to an affidavit by him. Mr. Frossard advised that trusts were foreign to Guernsey law and it was only in modern times that they had come into use. He also said that in his opinion there were no local laws or decided cases relating to the execution of powers of appointment. D After saying that "the courts of Guernsey look for guidance to English common law", and referring to HALSBURY'S LAWS OF ENGLAND* and some English cases prior to the Wills Act, 1837, Mr. Frossard remarked that there was not any Guernsey authority whatsoever laying down that a general power of appointment can be exercised by a residuary gift in a will. Accordingly Mr. Frossard E advised that under Guernsey law in his opinion: (i) The Waite trust fund could not be dealt with as forming part of the estate of Mrs. Mary Elizabeth Blizard deceased; (ii) the trust fund did not pass under the will to the residuary legatee; and (iii) the gift of the residue of the personal estate of Mary Elizabeth F Blizard, deceased, was not an effective exercise of a general power of appointment. In his second opinion, in answer to questions plainly directed wholly to the law of Guernsey, Mr. Frossard advised: (i) that the part of her personal estate which Mrs. Blizard could dispose of by will was one half share; (ii) that the persons entitled to the portion of her estate which she could not dispose of by will were the son as to half, and the daughter as to half; and (iii) he gave the reference to the relevant Guernsey law. It is perfectly clear that Mr. Frossard was advising purely G on the local law of Guernsey as he makes no reference to the Wills Act, 1837, and did not consider whether it had any application to the matters on which he was asked to advise. I do not think that it occurred to Mr. Frossard's mind that the matter might be governed by English law.

In these circumstances, it was contended on behalf of Mrs. Elda Brouard that s. 27 of the Wills Act, 1837, applied so as to make the residuary bequest in Mrs. H Blizard's will an effective exercise of the general power of appointment, with an alternative contention that, if the law of Guernsey prevented Mrs. Blizard wholly exercising the power, at any rate it was an effective exercise of the power as to half of the trust funds.

It was contended on behalf of Mrs. Farley, as the person taking in default of appointment under Mrs. Waite's deed-poll, that by reason of the terms of Mrs. Blizard's will, referring to "my personal estate whereof I have the disposal I according to law" in the residuary bequest, and the description of the will (at the beginning) as "concerning the personal estate which shall belong to me at the time of my decease", the operation of s. 27 of the Wills Act, 1837, was wholly excluded, so that the power was not exercised, and the trust funds devolved in default of appointment; alternatively it was contended that, if the Wills Act, 1837, had any application, the Guernsey law restricting testamentary

* 25 HALSBURY'S LAWS (2nd Edn.) 544.

- A disposition to one half applied, so that one half went in default of appointment. On behalf of George Percy Blizard, claiming under the law of Guernsey his legitimate share (one half of the portion which could not be disposed of by will), it was contended that s. 27 of the Wills Act, 1837, applied, but so that the appointment under the residuary bequest made the appointed funds one mass with Mrs. Blizard's other estate, and the portion which Mrs. Blizard could not bequeath by will (including part of the appointed property) devolved on the persons entitled under the law of Guernsey.

Now, the relevant provision of s. 27 of the Wills Act, 1837, is as follows:

- C " . . . and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

- D Where, as in the present case, the documents which create the power of appointment are English instruments, it is by reason of those English instruments that the power of disposition is created, and it might be expected that English law would be held to govern the question whether there has been an effective exercise of the power of appointment. Of course, if the exercise of the power is by will, there must be a will, and it is no doubt true that the construction of a will of personal property normally depends on the law of the domicile of the deceased testator. But it is well established that s. 27 applies to the will of a testator domiciled in some other country than England: *Re Baker's Settlement Trusts*, *Hunt v. Baker* (1) ([1908] W.N. 161); *Re Simpson, Coutts & Co. v. Church Missionary Society* (2) ([1916] 1 Ch. 502); *Re Wilkinson's Settlement*, *Butler v. Wilkinson* (3) ([1917] 1 Ch. 620); *Re Strong, Strong v. Meissner* (4) ((1925), 95 L.J.Ch. 22).

- F Whether the English power of appointment has been effectively exercised by Mrs. Blizard's will is, in my view, a matter of English law, and Mr. Frossard's views on the law of Guernsey appear to me to be irrelevant on this point. The terms of the residuary bequest in Mrs. Blizard's will are clearly a "bequest of personal property of the testator" in the words of s. 27 of the Wills Act, 1837. The reference at the beginning of the will to "the personal estate which shall belong to me" and in the residuary bequest to "the portion of my personal estate whereof I have the disposal according to law" are not in my view any indication of a contrary intention as mentioned at the end of the section.

- G The power of disposition being wholly derived from the operation of instruments regulated by the law of England, I find it difficult to see why the ability to dispose of the appointed property is not wholly regulated by the rules of English law, and I should (in the absence of authority) have supposed that the effect of s. 27 of the Wills Act, 1837, was sufficient to decide the whole matter.

- H This seems clearly to be the view of the authors of the article on "Conflict of Laws" in 7 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) at p. 62, where it is stated:

- I "If an appointment under the power is valid by English law, no restrictions placed by the law of the testator's domicile on the power of disposition can have any effect, the reason being that such restrictions apply to property, and a power of appointment is not a right of property."

This seems to me to be completely logical, and it is supported by the cases referred to in the note: *Pouey v. Hordern* (5) ([1900] 1 Ch. 492 (a case of a special power)), and *Re Mégret, Tweedie v. Maumder* (6) ([1901] 1 Ch. 547); and *Re Bald, Bald v. Bald* (7) ((1897), 66 L.J.Ch. 524). The same view is taken, I think, in CHESHIRE'S PRIVATE INTERNATIONAL LAW (4th Edn.) at p. 538 to p. 539.

In DICEY'S CONFLICT OF LAWS (6th Edn.), p. 855 to p. 856, a different view is put forward in the case of general powers of appointment. I find the reasoning in support of the distinction contained in the "comment" on p. 856 unrealistic, but the theory on which it rests presumably is intended to account for the results in *Re Pryce*, *Lawford v. Pryce* (8) ([1911] 2 Ch. 286); and *Re Lewal's Settlement Trusts*, *Gould v. Lewal* (9) ([1918] 2 Ch. 391). In *Re Pryce* (8), the Court of Appeal appear to have been influenced by *Re Moore*, *Moore v. Moore* (10) ([1901] 1 Ch. 691), and *Re Hadley*, *Johnson v. Hadley* (11) ([1909] 1 Ch. 20); and *Re Mégret* (6) came in for some criticism. But *Re Hadley* (11), and *Re Moore* (10) were overruled by the House of Lords in *O'Grady v. Wilmot* (12) ([1916] 2 A.C. 231); and, while it is true that the last-mentioned case was mainly concerned with the incidence of estate duty, the authority of *Re Pryce* (8) has been weakened. However, whether that case be treated as an authority still binding or not, the will in that case was entirely in Dutch language and form, the testatrix appointing her husband the "sole heir of the whole of which the law in force at the time of her death should allow her to dispose in his favour". It does not appear to be a case in which s. 27 of the Wills Act, 1837, came into the consideration of the court, and there was very positive evidence of the effect of the law of Holland on the terms of the will, restricting its effect to seven-eighths of the movables of the deceased (including movables over which a general power of appointment had been exercised). In the result, the remaining one-eighth, it was held, went to the wife's mother under the law of Holland. In my view, this case is clearly distinguishable from the present.

Re Lewal's Settlement Trusts (9) seems to me to be a very unsatisfactory case. It involved the exercise by a newly married wife, aged nineteen, of a general power of appointment conferred by her marriage settlement sanctioned under the Infant Settlements Act, 1855. Her will could not operate unless French law applied and she could by French law make a will at that age effectively only to dispose of half of her property. The settlement contained provisions obviously intended to secure that the rights of the parties should be regulated by English law, including a provision that they should be regulated by the law of England in the same manner as if the husband and wife were at the date of the settlement domiciled in England and were to remain thenceforth during their respective lives domiciled in England. If the wife had been and had remained domiciled in England she could not have made a will at the age of nineteen. But PETERSON, J., brushed aside arguments based on these provisions and decided that the will operated effectively on one half of the trust funds and the other half went in default of appointment. I find this result very difficult to understand, and, having regard to the peculiar circumstances to be found in this case, I do not think that I ought to apply it to the present case in the face of what appear to me to be the logical considerations to the contrary. It appears to me that the law is correctly stated in 7 HALSBURY'S LAWS OF ENGLAND, and CHESHIRE'S PRIVATE INTERNATIONAL LAW, in the passages to which I have referred. In my view there was an effective and complete exercise of the power of appointment in favour of Mrs. Brouard.

As a result of the conclusion which I have reached, it is unnecessary for me to consider the consequences that might arise if the power of appointment was only partially exercised by Mrs. Blizard's will.

Declaration accordingly.

Solicitors: *Radcliffes & Co.* (for the plaintiffs and second defendant); *I. Llewelyn Jones*, Ilford (for the first defendant); *Knapp-Fisher, Wartnaby & Blunt* (for the third defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A ALLIANCE PERPETUAL BUILDING SOCIETY v. BELRUM INVESTMENTS LTD. AND OTHERS.

[CHANCERY DIVISION (Harman, J.), February 12, 13, 1957.]

Contempt of Court—Chambers proceedings—Action for possession by mortgagee—Inaccurate newspaper report.

B On June 13, 1956, mortgagees of a dwelling-house issued an originating summons claiming possession of the house, but no other relief. They joined as defendants the mortgagors and D. and his wife who were in occupation of the house and claimed to be tenants. The matter proceeded in chambers and on Jan. 3, 1957, when the evidence was completed but the matter had not yet been adjourned into court for hearing, an extremely inaccurate article relating to the proceedings appeared on the front page of the "Daily Mail" newspaper. This stated in substance that mortgagees had issued a writ to take over D.'s £20,000 home, that D. was fighting for his mansion and that the mortgagees "claimed that a mortgage advanced to D. on his £20,000 house had not been honoured". The article continued: "They seek an injunction to foreclose on the mortgage. The action has been listed for Jan. 18. It will be heard by a judge in chambers". D. brought a motion to commit the editor of the "Daily Mail" to prison for contempt of court.

Held: the article was an account of proceedings pending in the privacy of chambers and thus its publication was a contempt of court; although jurisdiction to punish for contempt of court by publications concerning pending proceedings was a jurisdiction to be exercised with caution, and although this publication would have no influence on the judge trying the case, yet D. was entitled to complain of the unwarranted intrusion of a stranger into matters pending in chambers, and a fine would be imposed.

Gaskell & Chambers, Ltd. v. Hudson, Dodsworth & Co. ([1936] 2 K.B. 595) distinguished.

F *Re New Gold Coast Exploration Co.* ([1901] 1 Ch. 860), *Re William Thomas Shipping Co., Ltd.* ([1930] 2 Ch. 368) and *R. v. Evening Standard Co., Ltd., Ex p. A.-G.* ([1954] 1 All E.R. 1026) considered.

[**Editorial Note.** In *Re De Beaujeu* ([1949] 1 All E.R. 439), WYNN-PARRY, J., held that in the absence of any special permission it would be prima facie contempt of court to publish an account of proceedings relating to an infant conducted in chambers. WYNN-PARRY, J., applied the dictum of NORTH, J., in *Re Martindale* ([1894] 3 Ch. 193 at pp. 201, 202); cf., *Scott v. Scott* ([1913] A.C. at p. 437).

As to publication of pleadings, reports etc., see 8 HALSBURY'S LAWS (3rd Edn.) 12, para. 15; and for cases on the subject, see 16 DIGEST 31, 32, 300-302.]

H Cases referred to:

- (1) *Re Law*, [1914] W.N. 258; 16 Digest 63, 719.
- (2) *Scott v. Scott*, [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 16 Digest 31, 301.
- (3) *R. v. Astor, Ex p. Isaacs, R. v. Madge, Ex p. Isaacs*, (1913), 30 T.L.R. 10; 16 Digest 23, 182.
- I (4) *Gaskell & Chambers, Ltd. v. Hudson, Dodsworth & Co., R. v. Hudson, Ex p. Gaskell & Chambers, Ltd.*, [1936] 2 K.B. 595; 105 L.J.K.B. 734; 155 L.T. 507; Digest Supp.
- (5) *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860; 70 L.J.Ch. 355; 16 Digest 30, 286.
- (6) *R. v. Payne*, [1896] 1 Q.B. 577; 65 L.J.Q.B. 426; 74 L.T. 351; 16 Digest 23, 190.
- (7) *Hunt v. Clarke*, (1889), 58 L.J.Q.B. 490; sub nom. *Re O'Malley, Hunt v. Clarke*, 61 L.T. 343; 16 Digest 24, 200.

- (8) *Re Clements & Costa Rica Republic v. Erlanger*, (1877), 46 L.J.Ch. 375; sub nom. *Costa Rica Republic v. Erlanger*, 36 L.T. 332; 16 Digest 15, 92. A
- (9) *Re William Thomas Shipping Co., Ltd., Dillon (H. W.) & Sons, Ltd. v. The Co., Re Thomas (Sir Robert)*, [1930] 2 Ch. 368; 99 L.J.Ch. 560; 144 L.T. 104; Digest Supp.
- (10) *R. v. Evening Standard Co., Ltd., Ex p. A.-G.*, [1954] 1 All E.R. 1026; [1954] 1 Q.B. 578; 3rd Digest Supp. B
- (11) *R. v. Bolam, Ex p. Haigh*, (1949), 93 Sol. Jo. 220; 2nd Digest Supp.
- (12) *Re Read & Huggonson*, (1742), 2 Atk. 469; 26 E.R. 683; sub nom. *Roach v. Garvan*, Dick. 794; 21 E.R. 480; 16 Digest 6, 1.

Motion.

The applicant was a defendant in an action which had been initiated by an originating summons by which mortgagees claimed possession of a mortgaged dwelling-house. The applicant moved the court to commit the respondent, a stranger to the action, to prison for contempt of court in publishing an inaccurate and misleading report in a newspaper relating to the action, which was proceeding in chambers. C

J. F. F. Platts-Mills and *C. G. Allen* for the applicant. D

Sir Hartley Shawcross, *Q.C.*, and *Neville Faulks* for the respondent.

Cur. adv. vult.

Feb. 13. **HARMAN, J.**, read the following judgment: This is a motion by one George Dawson to commit Arthur George Wareham, editor of the "Daily Mail" newspaper, for contempt of court by the publication in that paper of what purports to be an account of proceedings in this action, now pending in chambers, and not yet heard in open court. The motion is by one of the defendants in the action against a stranger to it, and this appears to be the right procedure for the purpose. The notice should have been, but is not, entitled in the name of the respondent, but this omission is not fatal: see *Re Law* (1) ([1914] W.N. 258). E

The facts, so far as they seem necessary for present purposes and so far as undisputed, are as follows. In or about 1945 the applicant bought a property known as Garden Court, Esher, and resold it to the first defendants, a company owned and controlled by himself and his wife. Subsequently, by legal charge duly registered, that company mortgaged the property to the plaintiffs to secure a sum of money lent to the company, the applicant and his wife joining in the mortgage as sureties. There are some odd features about these transactions, but they do not concern me here. On June 13, 1956, the plaintiffs, as mortgagees, issued the originating summons in this action, claiming possession of the property and no further relief. This is a form of procedure now much in vogue where there are persons other than the mortgagor in occupation. It is usually designed to enable the mortgagees to exercise their power of sale, which can only be done with advantage if vacant possession can be offered. It has nothing to do with the enforcement of the mortgage debt, nor with foreclosure. Possession is a remedy to which a mortgagee is entitled as of right against the mortgagor, whether the principal or interest be due or not, unless there is some special clause in the mortgage excluding it. There is no suggestion of that sort here. The remedy in no way depends on default, nor are the applicant and his wife, as sureties, necessary parties to the suit, though the fact that they are sureties appears quite irrelevantly in the heading of the summons. The only reason for their presence is that they are in occupation and claim to be tenants of the mortgagors. If they are tenants having rights paramount to the mortgage, no relief can be given against them. If not, they are, qua the mortgagees, mere trespassers, and an order against them would go as of course. F

The action proceeded in the ordinary course in chambers, where it seems that the mortgagor company raised various defences as to the validity of the mortgage, G H I

A and others connected with the state of accounts between them and the plaintiffs, the latter being irrelevant, as no account or payment was sought. The applicant and his wife claimed to be tenants under a title anterior to the mortgage. I know nothing about the merits. The evidence was apparently complete and the master had given an appointment before him in chambers for Jan. 18, 1957, preparatory to adjourning the action into court for hearing. At this juncture, the matter complained of appeared in the form of an article in the "Daily Mail" of Jan. 3, 1957, in these terms: "Mortgage company issue writ to take over £20,000 home. George Dawson fights for his mansion. Money? Plenty!" Then there is a picture of "the house that George bought". The article then says:

"By 'Daily Mail' Reporter: George Dawson, the cockney millionaire, is to fight a writ which threatens his possession of his luxury home at Garden Court, Oxshott, Surrey. The case is being brought by the Alliance Perpetual Building Society of Baker Street, W.1. They claim that a mortgage advanced to Mr. Dawson on his £20,000 house has not been honoured. They seek an injunction to foreclose on the mortgage. The action has been listed for Jan. 18. It will be heard by a judge in chambers."

There then follows what purports to be an account of an interview with the applicant by the reporter on the telephone, in which the applicant is reported as saying that he has plenty of money and that it will take a long time to get him down. The author of this story was, it appears, one Martin, a journalist in the employ of the paper, and the respondent accepts responsibility for it. The source of it is in dispute. Mr. Martin has stated that he had it from one Addis, who on his part has sworn an affidavit filed on behalf of the applicant, stating that Mr. Martin told him that he got his information from the plaintiffs' solicitor, one Bieber. This sounds improbable, if only because of the gross inaccuracies in the story. Moreover, Mr. Addis declares himself an enemy of the applicant and may have made the disclosure out of spite. This is a question I need not decide. The article is full of inaccuracies and can, I think, be fairly described as a most misleading account of the proceedings. It represents the action as being a proceeding for foreclosure against the applicant arising out of his default in repaying the mortgage money. As I have shown, it has neither of these ingredients.

The applicant has issued a writ for libel against the newspaper. As to that, I make no comment. This motion was not launched until a month later. The gravamen of the charge made is that the article is an account of matters proceeding in chambers. In my judgment, if this charge be true, a contempt of court has been committed. Interlocutory matters before the master proceed in private; the public has no right to attend them, nor has anyone, as I conceive, any right to give any account of them while the action is pending and has not been adjourned into court.

It is not easy to find authority for this proposition, but it is assumed in the speech of EARL LOREBURN in *Scott v. Scott* (2) ([1913] A.C. 417 at p. 445), and is, I think, well established. The judge may allow a report of such proceedings to be published if it illustrates some point of principle: see [1932] Weekly Notes, Part 2, p. 185.

The first answer made is that there is no account of proceedings in chambers, but merely an inaccurate version of the originating summons. It is said that it is an everyday matter to publish in a newspaper the fact that A has issued a writ against B and to state generally the nature of the relief claimed; and further, that though in former times publication of a pleading in a pending action was treated as a contempt (see, e.g., *R. v. Astor, Ex p. Isaacs* (3), (1913), 30 T.L.R. 10) that doctrine has been modified by subsequent decisions, e.g., *Gaskell & Chambers, Ltd. v. Hudson, Dodsworth & Co.* (4) ([1936] 2 K.B. 595 at p. 604). In that case the defendants issued a circular enclosing the plaintiffs'

statement of claim, with comments, and that was held no contempt. The Divisional Court held that no hard and fast rule exists, and it is not difficult to see that to publish what your opponent said against you cannot be a contempt. Let it be conceded that the publication of the terms of the originating summons in this action would likewise be no contempt if the plaintiffs had published it. But in the present case the publication is by a stranger and is, moreover, not at all confined to the matter of the originating summons. It is a gloss on it and a grossly inaccurate one. The statement that default was alleged by the plaintiffs must be based, if not on guesswork or mere hearsay, on some knowledge of the evidence filed on the plaintiffs' behalf, and can only have been inserted in order to suggest that the applicant's solvency was in some way in doubt. But for this there would have been, I surmise, no news value in the disclosure, and, therefore, no reason for an article on the front page of a journal with a national circulation. A B C

In my judgment this is very far removed from the facts of the case last cited, and is in fact a disclosure of a matter proceeding in the privacy of chambers, and at least technically a contempt.

The respondent in his affidavit in answer disclaims any intention of contempt, but the matter of his affidavit makes the fault worse. First, he exhibits a copy of the originating summons itself. He does not say how he came by this document. It is one which he has no right to have in his possession. Documents in a pending action must not be disclosed to strangers to the suit. He follows this by stating that he knows nothing of the facts of the case on which his paper has commented and, worse still, persists in the statement that it shows that the claim is E

“that the defendant company has not paid the mortgage instalments and that George and Olga Dawson have defaulted as sureties.”

The originating summons shows nothing of the sort and makes no such claim: nor does the remedy depend on any such thing. If the affidavit in support so alleges, it is, as I have said, irrelevant and altogether unconnected with the claim for possession. Moreover, the statement that the action has been listed is untrue, for it implies that it has appeared in some list of actions to which the public has access, the truth being that only someone who had access to the parties could know of the appointment made by the master. It is not suggested that this information came either through the court itself (which would make the matter worse) or from the applicant or those in his confidence. F G

None the less, it is argued that if this be a contempt, it is only technically so, and I was referred to cases to show that the court ought to be slow to accept motions of this kind except in cases where real harm is done or was likely to ensue. The earliest of these cases was *Re New Gold Coast Exploration Co.* (5) ([1901] 1 Ch. 860). In that case there was a voluntary winding-up in progress and a shareholder issued a circular to his fellow shareholders in respect of which the liquidator moved against him, alleging it to be a contempt. COZENS-HARDY, J., would have none of it. He began by saying in his judgment that the application was misconceived and he went on to point out that the courts have to some extent taken a view of contempt less stringent than that which ruled in the preceding century. After pointing to a number of cases, he came to *R. v. Payne* (6) ([1896] 1 Q.B. 577) in which LORD RUSSELL OF KILLOWEN, C.J., sitting in a Divisional Court with WRIGHT, J., said (at p. 580): H I

“We have been referred to certain cases in the Chancery Division of the High Court as authorities in support of the present application. I will not refer to those decisions further than to say that, in my opinion, in some instances, the courts have gone rather too far.”

Then COZENS-HARDY, J., referred to those cases, and he went on to say ([1901] 1 Ch. at p. 864):

A "The lord chief justice also cites the following passage from the judgment of COTTON, L.J., in *Hunt v. Clarke* (7) ((1889), 58 L.J.Q.B. 490 at p. 493) in which after referring to the judgment of SIR GEORGE JESSEL, M.R., in *Re Clements & Costa Rica Republic v. Erlanger* (8) ((1877), 46 L.J.Ch. 375), he said: 'Now that I apply and adopt as the principle which ought to regulate these applications—that there should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the court in order to enable justice to be duly and properly administered without any interruption or interference, that is what we have to consider, and in my opinion although as I say there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interference or any such fear of any such interference with the due conduct of this action, or any such prejudice to the defendant who is applying here, as to justify the court in interfering by this summary and arbitrary process'."

A later case is *Gaskell & Chambers, Ltd. v. Hudson, Dodsworth & Co.* (4) to which I have already referred.

D It was said that this was not a bona fide complaint, but only an attempt either to bolster up the applicant's libel claim, or to wreak a spite against the respondent. I am very conscious that this is a jurisdiction to be exercised with caution and that this type of complaint is one which may easily become an abuse of the court's process. I am told, moreover, that in the Queen's Bench Division LORD GODDARD, C.J., made comments which in practice have confined these applications to those made or sanctioned by the law officers. No such practice exists in this perhaps more peaceable division, but the law must be the same for both.

E It goes without saying that the publication will have no influence on the judge who has to try the case. The issues which he will have to try are not even hinted at in the article; but that is not the end of it. The question was considered by MAUGHAM, J., in *Re William Thomas Shipping Co., Ltd., H. W. Dillon & Sons, Ltd. v. The Co., Re Sir Robert Thomas* (9) ([1930] 2 Ch. 368). The headnote states:

"'Contempt of court' may include conduct which, while it cannot directly influence a judge's mind, is calculated to affect the conduct of parties to proceedings, and the court's jurisdiction to commit for contempt is not confined to cases in which its orders may directly be affected."

G In that case there had been a receiver appointed in a debenture holders' action. A certain Sir Robert Thomas, who was a managing director of the shipping company concerned, feeling himself aggrieved, issued a circular abusing the liquidator and practically saying that the court was very stupid to have handled the matter in the way it did and that a disastrous blunder had in fact been made. The liquidator moved against him for contempt of court.

H MAUGHAM, J., carefully considered the authorities and said (*ibid.*, at p. 374):

I "In other words, is it a contempt of court, notwithstanding the recent decisions to which I am going to refer, to abuse the parties concerned in a pending cause or matter by injurious misrepresentations which may tend to influence the conduct of the party aggrieved in the proceedings or which may tend to cause other parties who have a proper cause of action not to approach the court? There are a large number of cases where conduct of that sort has been treated as a contempt of court."

HIS LORDSHIP then cited two of them and said (*ibid.*):

"It is quite clear that CHITTY, J., did not think that the circulars published by the defendant on the occasion of an election for the Ilkley Local Board were likely to prejudice them at the trial of the action in the Chancery Division. That could not be the ground on which he interfered."

He then cited *R. v. Payne* (6) and COTTON, L.J.'s observations in *Hunt v. Clarke* A (7) which I have read. He then said (*ibid.*, at p. 376):

"Dealing, as I am here, with a case very different from that which came before the court in *R. v. Payne* (6) I must express my opinion that the jurisdiction of the court is not confined to cases where the order of the court or the future orders of the court are likely to be directly affected in some way. If it were so confined, I doubt whether there would be any limit to what a litigant, or some other person, might say pending the hearing of an action in the Chancery Division, unless, indeed, it could be shown that possible witnesses in the case were being interfered with. I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason."

That again was a very different case from the present. The comment was on a decision come to in open court and no question of wrongful disclosure of private matters was or could be raised. D

An even more recent decision is that of the Divisional Court in *R. v. Evening Standard Co., Ltd., Ex p. A.-G.* (10) ([1954] 1 All E.R. 1026), in which LORD GODDARD, C.J., said (*ibid.*, at p. 1028):

"It is as well that the nature of the jurisdiction which this court exercises on these occasions with regard to reports of trials in newspapers should be understood. It is called contempt of court, which is a convenient expression because it is akin to a contempt. The foundation of the jurisdiction is that all misreports, whether they form comments on cases before they are tried or alleged histories of the prisoner who is on trial, as in *R. v. Bolam, Ex p. Haigh* (11) (1949), 93 Sol. Jo. 220, where this court had to intervene, are matters which tend to interfere with the due course of justice."

He then cited passages from LORD HARDWICKE, L.C., in *Re Read & Huggonson* (12) (1742), 2 Atk. 469 and said ([1954] 1 All E.R. at p. 1029):

"That is the foundation of the summary jurisdiction which this court has exercised now for more than two hundred years in the case of comment before the case is heard, or of the publication of improper information about a case which is to be heard or is not fully heard, or of the misrepresentation of the proceedings in a court. We have frequently said that this jurisdiction should be invoked and should be exercised only in cases of real and serious moment . . ."

In my judgment I ought not to hold that the applicant or any witness on his behalf would be deterred by what has happened from going on with his action or giving his evidence. In fact, the evidence is complete and is all on affidavit. Nevertheless, I think he was justified in bringing this matter before the court. The respondent had no right to comment on the matter, at any rate in a garbled form, falsifying the issues. It is in my judgment no justification to say that the applicant's rights, if he has any, can be vindicated in the libel suit. He is entitled to complain of the unwarranted intrusion of a stranger into his affairs.

I am content to accept the defendant's disclaimer and apology. He is a person high in his profession and with no previous default of this sort. Moreover, his responsibility is vicarious. If his underling took advice, he was very ill advised, and I cannot overlook the result. I regard it as important that this kind of intrusion on matters pending in chambers should be strongly discouraged and I feel bound to mark the court's displeasure by fining the respondent £100.

A [HIS LORDSHIP awarded the plaintiffs the costs of the motion and said that they would be on a party and party basis.*]

Fine of £100.

Solicitors: *J. M. Isaacs & Co.* (for the applicant on the motion); *Sweepstone, Walsh & Son* (for the respondent to the motion).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

B

THE PANTHER AND THE ERICBANK.

OWNERS OF THE STEAM BARGE TRISHNA AND OTHERS v. OWNERS OF THE MOTOR TUG PANTHER AND OTHERS.

C [PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J., assisted by Commodore Owen and Captain Galpin, Trinity Masters), January 16, 17, 18, February 4, 1957.]

Shipping—Collision—Apportionment of liability—Ship in canal under tow—Collision between steam tug and passing vessel—No signal by tow to tug to warn her of on-coming vessel—Officer-in-charge of tug negligent in not stopping her port propeller revolving on seeing on-coming vessel—Whether tug-owners or tow-owners liable for negligence of officer-in-charge of tug—Maritime Conventions Act, 1911 (1 & 2 Geo. 5 c. 57), s. 1 (1).

D

Master and Servant—Loan of servant—Tug and crew under towage contract—Collision between tug and another vessel—Negligence of officer-in-charge of tug—Whether tug-owners or tow-owners liable.

E

On Dec. 31, 1954, in daylight, a collision occurred in the Manchester Ship Canal between the steam barge Trishna and the motor tug Panther, which was acting as stern tug to the steamship Ericbank. The Ericbank was in the charge of a canal pilot, but at the material time her engines were stopped and, shortly before the collision occurred, she had ordered her two tugs to hold her in position. The collision occurred at a bend in the canal. While executing a legitimate manoeuvre to hold the Ericbank in position, the Panther, not knowing that the Trishna was approaching, swung out to port of the Ericbank across the Trishna's path. The officer-in-charge of the Panther first saw the Trishna when she was about 300 feet distant, and shortly afterwards, the Panther came into contact with the Trishna. As a result of the collision the Trishna was holed by the revolving port propeller of the Panther and sank. The collision was attributable to the fault of each of the three vessels. The Trishna was in breach of bye-law 15 of the Manchester Ship Canal Bye-Laws in that she attempted to pass the Ericbank in a place in the canal where it was not prudent or seamanlike for her to attempt to pass; and the Ericbank was in breach of bye-law 6 in failing, when she sighted the Trishna, to sound the appropriate signal to warn the Panther, who was at that time directly astern of her, of the Trishna's approach. It was the duty of the pilot of the Ericbank, as a vessel in tow, to give general directions to the officers-in-charge of her tugs, such as to start or stop towing, but the detail of manoeuvres by a tug was left to the discretion of the officer-in-charge of the tug. In the circumstances the Panther was not to blame for the contact with the Trishna, but her officer-in-charge was at fault in that he failed to stop her port propeller when he first saw the Trishna, and the fact that the Panther's propeller was kept revolving was the largest single contributing factor to the damage to the Trishna.

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Held: (i) the owners of the Ericbank were not responsible for the negligence of the officer-in-charge of the Panther, because the manoeuvre executed

* For an instance of costs being awarded on the basis of indemnity, compare *Morgan v. Carmarthen Corpn.* (ante, p. 437).

by the Panther at the time of the collision was within the province of the officer-in-charge of the Panther and not within the province of the pilot or officer-in-charge of the Ericbank, so that the officers and crew of the Panther were not in law, as between the owners of the Trishna and the owners of the Ericbank, the servants of the latter, whatever might be the term of the Ericbank's towage contract.

Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd. ([1946] 2 All E.R. 345) applied.

(ii) liability for the damage or loss would be apportioned as to one half to the Panther for the fault in keeping the tug's port propeller working and as to the other half between the Ericbank and the Trishna for their negligence, the latter half being attributable to them equally in accordance with s. 1 (1) of the Maritime Conventions Act, 1911, as different degrees of fault were not established.

Dictum of SCOTT, L.J., in *The Buccinum* ((1936), 55 Lloyd's Rep. at p. 218) applied.

[As to the division of liability where more than two vessels are at fault, see 30 HALSBURY'S LAWS (2nd Edn.) 840, para. 1098; as to the tow's control of the tug, see *ibid.*, p. 659, para. 840.

As to the position of workmen lent by one master to another, and the possibility of being a servant to two masters, see 22 HALSBURY'S LAWS (2nd Edn.) 193, para. 327, p. 242, para. 422, p. 113, para. 191, text and notes (k) (l); and for cases on the subject, see 34 DIGEST 22-27, 23-55.

For the Maritime Conventions Act, 1911, s. 1 (1), see 23 HALSBURY'S STATUTES (2nd Edn.) 830.]

Cases referred to:

- (1) *France v. Polartank (Owners), Aviator (Owners) & Lynn (Owners), The Polartank*, [1949] L.J.R. 423; 82 Lloyd's Rep. 108; 2nd Digest Supp.
- (2) *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.
- (3) *The Socrates & The Champion*, [1923] P. 76; *reversd. on the facts*, C.A., [1923] P. 162; 93 L.J.P. 38; 41 Digest 729, 5674.
- (4) *The Buccinum*, (1936), 55 Lloyd's Rep. 205.

Action.

This was an action arising out of a collision in the Manchester Ship Canal, at about 2.51 p.m. on Dec. 31, 1954, between the steam barge Trishna and the motor tug Panther, which at the material time was acting as stern tug to the steamship Ericbank. As a result of the collision the Trishna sank in the canal and had to be raised; her cargo was damaged and some was lost. The Panther also suffered some damage. The plaintiffs in the action were the owners of the Trishna, her master and crew (claiming for their lost effects), and the owners of the cargo on board the Trishna. The defendants were the owners of the Panther (who were the Manchester Ship Canal Co.) and the owners of the Ericbank. The plaintiffs claimed damages for negligence against the defendants, who denied liability and the owners of the Panther counterclaimed in respect of the damage suffered by the Panther.

The Trishna was a steel tank barge of 168 tons gross, 95.1 feet in length, 21.6 feet in beam, and fitted with compound engines of thirty h.p.n. The Ericbank was a steamship of 7,274 tons gross, 442 feet in length, 57 feet in beam, and fitted with triple expansion engines of 668 m.n. The Panther was a twin screw motor tug of 154.18 tons gross, 94 feet in length, 25.45 feet in beam, and fitted with diesel engines of twelve hundred b.h.p. At the time of the collision the Trishna was bound up the canal with a cargo and the Ericbank

A was bound down the canal in ballast. The Ericbank was in the charge of a Manchester Ship Canal pilot and was being assisted by two tugs, one fore and one aft, the Panther being the after tug.

Before the collision occurred, the Trishna was proceeding up the canal at her full speed, making about six knots. Just after passing a large outward bound tanker which was lying more or less stationary, those on board the Trishna
B saw the Ericbank coming very slowly round a bend in the canal about three-quarters of a mile away, with a tug fast ahead, and it was assumed that she would also have a stern tug. The engines of the Trishna were reduced to slow ahead to allow the Ericbank to get round the bend of the canal, and the Trishna twice sounded a signal of one long blast, which, under the Manchester Ship Canal Bye-laws, was the appropriate signal for an inward-bound vessel for the
C purpose of calling attention when approaching another vessel. No answer was received from the Ericbank which at this time was about in mid-canal proceeding very slowly and more or less drifting. The Ericbank gave no signal to warn her stern tug that the Trishna was coming on. At this point the width of the canal was about four hundred feet, but the deep water channel was only about 120 feet wide. On each side of this channel, which was about thirty feet deep,
D the bottom sloped up towards the side of the canal. The Ericbank was about 180 feet from the north bank, near the wall of which a dredger was moored, and there was a passage-way of navigable water for the Trishna of a width of some sixty to seventy feet. The Trishna proceeded to pass port to port with the Ericbank about in the centre of the passage between the port side of the Ericbank and the shallow water to the southward. At that time the Eric-
E bank's engines were stopped and she was being held in position by her two tugs. According to the defendants, the Ericbank had stopped her engines when she reached the bend in the canal, and, when about abreast of the dredger, had given the order to the tugs to hold her in position. The mate in charge of the Panther, the stern tug, thinking that the stern of the Ericbank was too near the dredger, eased his port engine to slow and allowed his tug to angle off on to
F the port quarter of the Ericbank. He then worked both engines full speed astern. He carried out this manoeuvre entirely on his own initiative, and without any orders from the pilot of the Ericbank. Having got out on the port quarter of the Ericbank, the Panther, for the first time, saw the Trishna approaching, some three hundred feet away and about abreast of the Ericbank's bridge. When the Panther came into sight on the port quarter of the Ericbank, the Trishna
G stopped her engines and shortly afterwards went full speed astern, and blew three short blasts. The Panther continued to swing across the Trishna's path, the port sides of the two vessels scraped, the stern of the Panther came over the top of the Trishna's deck knocking two bollards away, and then the Panther's revolving propeller struck the port side of the Trishna a number of blows, as a result of which the Trishna was holed. The Trishna started to take in water,
H and finally settled on the bottom of the canal in the shallow water near the bank. According to the defendants, the Panther's engines had been ordered to be stopped before her propeller struck the Trishna.

J. V. Naisby, Q.C., and D. H. Hene for the plaintiffs.

Kenneth Carmichael, Q.C., and J. B. Hewson for the defendants.

Cur. adv. vult.

I Feb. 4. WILLMER, J., read the following judgment, in which, after stating the facts, he said: It is obvious that but for the propeller damage, due to the fact that the propeller was revolving, the collision would have been of very little consequence. The mate of the Panther went so far as to say that it would have been a mere harmless brush. That is, perhaps, putting it too high, because (apart from the propeller damage) there was some evidence of bollards being displaced by the contact. In all the circumstances I agree with counsel

for the plaintiffs that it is necessary to decide, first, whether anyone was to blame, and, if so, who, for the fact that the Trishna and the Panther came into contact, and secondly, whether the failure to stop the propeller of the Panther was blameworthy and, if so, to whom the blame is to be imputed. It clearly required the combination of contact between the vessels with the fact of the propeller being in motion to bring about the major part of the damage.

In order to decide who was to blame for the fact of the vessels coming into contact it is necessary to refer to the bye-laws of the Manchester Ship Canal. The defendants rely as against the Trishna particularly on bye-law 9, bye-law 12 and bye-law 15, which are in the following terms:

"9. The maximum speed in the canal shall not exceed six statute miles an hour, except with the permission of the harbour master . . .

"12. Wherever the slopes of the canal will permit small craft shall be kept entirely out of the track of sea-going vessels . . .

"15. . . . When two vessels proceeding in opposite directions and about to meet are approaching a dredger or stationary craft (moored in the canal) . . . or any other place in the canal where it is not prudent or seaman-like for them to attempt to pass each other, the inward-bound vessel shall give way until passed by the outward-bound vessel . . . "

The arguments based on bye-law 9 and byelaw 12 can be quickly disposed of. Clearly, on her own admission, the Trishna by coming up the canal at full speed (i.e., six knots) was in breach of bye-law 9. I have, however, accepted that, well before she came up with the Ericbank, the Trishna reduced to slow and thereafter continued at slow. In these circumstances the breach of this bye-law in no way contributed to the collision and can be left out of further consideration. As to bye-law 12, I cannot find that the Trishna was at any time in the track of the Ericbank. On my findings she was at all material times navigating in water in which the Ericbank, with her draught, could not navigate. The fact that at collision the Trishna was touching the ground with her star-board bilge shows that she was well outside the track of sea-going vessels.

Bye-law 15 raises a question of much greater substance. Even though, on my finding as to the place of collision, it follows that the Ericbank and the Panther had just cleared the dredger, it is clear that, as they approached each other, the Trishna and the Ericbank were "vessels proceeding in opposite directions and about to meet", and that they were "approaching a dredger". Furthermore, it is contended that, as the place of collision is barely clear of the bend in the canal, and it is known that the water on the south side is very shallow, this was a place where it was "not prudent or seamanlike for them to attempt to pass each other". In such circumstances the defendants contend that the Trishna's duty under the bye-law was to hold back in the straight (i.e., somewhere off the North Pier) until the Ericbank had passed clear. It is said that to come on and attempt to pass in that place was doubly wrong, both because of the presence of the dredger and because of the bend in the canal and the dangerous shallow water. Clearly, but for the fact of the Trishna coming on and attempting to pass, this contact with the Panther could not have taken place. Furthermore, not only was the Trishna wrong to come on, but it is further contended that the likelihood of any vessel doing so in that position was not to be foreseen by the Panther. In the absence of any foreseeable probability of a vessel seeking to pass the Ericbank in that place, there could be no negligence on the part of the Panther in manoeuvring at an angle on to the port quarter of the Ericbank.

On behalf of the plaintiffs, reliance is placed on bye-law 6, which requires vessels to comply with the signals set out in the schedule to the bye-laws. Reliance is placed not only on the sounding of the signal of one long blast, which was a clear intimation that the Trishna was in fact coming on and intending to pass, but also on the failure of the Ericbank to sound the appropriate signal

- A to the Panther to warn the Panther of the approach of another vessel. The signal prescribed is No. 10 in the schedule, and is a signal of one long, one short, one long. That is a signal directed to the stern tug, and means "am about to pass another vessel". It is common ground that a tug when manoeuvring, like the Panther, at the stern of a large vessel is unable to see for herself whether other vessels are approaching in the opposite direction. I was informed that
- B signal No. 10 was inserted in the schedule in 1949, following some comments which I made in *France v. Polartank (Owners), Aviator (Owners) & Lynn (Owners), The Polartank* (1) ((1948), 82 Lloyd's Rep. 108 at p. 123) on the failure of a big ship in circumstances similar to these, to give any warning to her stern tug on the approach of another vessel. It is claimed that, had a signal of long, short, long been sounded by the pilot of the Ericbank, when the Trishna was seen to be
- C approaching and known to be intending to pass, the Panther would have had warning of the possible danger of allowing herself to get out on the port quarter of the Ericbank. As it was, the Panther acted in total ignorance of the fact that another vessel was approaching, and the first she knew, or could have known, of the Trishna was when the latter was already passing along the port side of the Ericbank. It is true that the master of the Panther said that, if he had got such a
- D signal, he would have acted no differently; but I am disposed to doubt whether, when it came to the point, he would have incurred the risk of getting his tug out on the port quarter of the Ericbank, if he had actually known that by doing so he would be putting his vessel in the way of an up-coming ship. If he did, his conduct would clearly be open to criticism, for he would be taking the risk with his eyes open, and if a collision occurred with the up-coming vessel he
- E might well be left without excuse.

- In my judgment, the contact between the Trishna and the Panther was brought about by breaches of the bye-laws on the part of both the Trishna and the Ericbank. It also appears to me, and I am advised by the Elder Brethren, that both the Trishna and the Ericbank were guilty of bad seamanship. The argument for the defendants satisfied me that bye-law 15 applied to the Trishna.
- F Not only was she, while about to meet the Ericbank, approaching a dredger; she was also approaching a place in the canal where I am advised by the Elder Brethren that, having regard to the bend and the shallow water on the south side, it was not prudent or seamanlike for her to attempt to pass. Her duty, therefore, was to give way, which she could have done by taking off her way and holding back in the vicinity of the North Pier until such time as the Eric-
- G bank and her tugs had advanced down the canal clear of the dredger and the bend. I am advised that there would have been no difficulty in the Trishna holding back in this way. I am further advised and find that she was also guilty of bad seamanship in coming on past the Ericbank in such a way and at such a speed that she was unable to bring herself up, when she found the way was barred, in time to avoid contact. She claims that her engines were put
- H full speed astern; but even on her own case there was clearly some delay (even if it were only seconds) before the order was given. It seems to me I must find that either there was undue delay in putting the engines full speed astern, or else that she was passing at a speed which, in the circumstances, was too high. Those in charge of the Trishna knew that the Ericbank must have a stern tug, and, having broken the bye-law by coming on, they were not entitled to assume
- I that the way would remain clear for them, or that there was no risk of the tug coming out on to the port quarter.

So far as the Ericbank is concerned, I am satisfied that, when the pilot heard the Trishna's signal of one long blast and saw that she was coming on and approaching to pass, he was under an imperative duty to warn the stern tug by sounding the prescribed signal of long, short, long. It was argued by counsel for the defendants that this signal did not apply because the Ericbank, being held more or less stationary, and just drifting, was not a vessel "about to pass

another vessel". But on the evidence she was moving down the canal, however slowly, and, if in the course of doing so she passes another vessel, it seems to me that the bye-law applies, just as much as if she were moving ahead under power. I also reject the argument that there was no duty to sound this signal because the Trishna was doing something that she was not entitled to do. It appears to me that the more wrongful was the conduct of the Trishna, and the more unexpected her manoeuvre in continuing on, the more important it was to warn the Panther of the danger by sounding the prescribed signal. The Elder Brethren advise me that, even apart from the bye-law, good seamanship would have required the Ericbank in this case—just as it required the Polartank in the case to which I have already referred—to give some warning to the stern tug.

In the absence of any such warning, whether by the prescribed signal or otherwise, I am unable to impute blame to the Panther for getting out on to the port quarter of the Ericbank. The evidence shows that in practice the pilots leave the detailed manoeuvres of the tugs very much to the discretion of the tug masters, so long as they carry out the general orders given. Here, the order given to the Ericbank's tugs was to hold the vessel in position. In the absence of any warning the Panther was executing a perfectly legitimate manoeuvre in getting out on to the port quarter of the Ericbank if, in the discretion of the mate in charge, this was desirable in order to hold the stern of the Ericbank a little further off the dredger. The blame for the Panther getting out on to the port quarter of the Ericbank was, therefore, wholly that of the Ericbank. The Panther having quite innocently manoeuvred into position off the port quarter of the Ericbank, I am satisfied that, as soon as she realised the danger, the Panther took prompt steps in an endeavour to square up and make more room for the Trishna, so as avoid contact. In the circumstances I am satisfied that the fact of contact between the Trishna and the Panther was not due to any fault on the part of the Panther but that it was attributable partly to the fault of the Trishna and partly to that of the Ericbank in the respects which I have described.

I pass now to the second question, namely, whether the fact of the propeller being in motion at the time of the contact was blameworthy and, if so, to whom the blame is to be imputed. Accepting, as I do, the evidence from the Trishna that the Panther swung out to such an extent as substantially to block the passage for the Trishna, I am satisfied that it ought immediately to have been realised on board the Panther that there was an imminent risk of the Trishna coming in contact with her, and most probably with her stern. On the evidence of both sides, it is clear that the Trishna and the Panther must have seen each other at a distance of something like three hundred feet. At the speeds at which the vessels were proceeding, this distance would represent quite an appreciable interval of time. Having sought the advice of the Elder Brethren, I am satisfied that in such circumstances the port propeller of the Panther ought to have been stopped immediately, and that the mate of the Panther was in fault in keeping his port engine working. It must be appreciated that there would necessarily be some time lag between the giving of the order and the time when the propeller would finally come to rest. If, however, the order had been given promptly, the probability is that the port propeller of the Panther would have come to rest before the Trishna reached her stern; and certainly it would have been unlikely to cause damage, even if still moving, once the power was cut off. It was the fact of the propeller continuing to revolve under power that caused the grievous damage to the Trishna, and converted what would otherwise have been a trivial bump into something in the nature of a disaster. In my judgment, the largest single factor contributing to the damage was this fault on the part of the Panther.

- A This fault was a fault on the part of the mate in charge of the Panther. It has been argued for the plaintiffs that the defendants, the owners of the Ericbank, are liable for that fault, first, because in law the crew of the tug are to be regarded as the servants of the owners of the tow, and secondly, because on the facts it is contended that it was within the province of the pilot on board the Ericbank to order the tug's engines to be stopped. So far as the latter point is concerned,
- B it is, I think, unarguable. No pilot can possibly be expected to control the individual manoeuvres of his two tugs. The evidence shows that in practice the detailed manoeuvres of the tug are, and must be, left to the discretion of the tug master, the duty of the pilot being confined to giving general directions, such as to start or stop towing, or to tow in this or that direction. I do not see how a pilot on the bridge of a large ship can possibly be expected to direct
- C the engine movements of a stern tug, operating some three or four hundred feet behind his back, and mostly out of sight, or even to know how the engines of the tug are working at any particular moment.

- Equally, the contention that the crew of the tug became in law the servants of the owners of the Ericbank, so as to make the latter liable for the negligence of the mate of the Panther, will not, in my judgment, bear examination. The
- D terms of the towage contract between the owners of the Ericbank and the owners of the Panther have not been proved before me; but I am prepared to assume that, as between themselves, these parties agreed that the crew of the tug should be deemed to be the servants of the owners of the tow. But, as against a third party who is injured by the act of a servant, the question which of two possible masters is liable (the regular employer or the temporary employer
- E to whom the servant is loaned) does not depend on the terms of the contract made between the respective employers; it depends on which employer has the right to control the servant, not only as to what he is to do, but as to the way he is to do it. Moreover, it has been held that, where the servant of one employer is temporarily loaned to another, it requires cogent evidence to prove that the latter has acquired such a degree of control over the servant as to render him,
- F rather than the regular employer, liable in the event of negligence on the part of the servant. This is the effect of the decision of the House of Lords in *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (2) ([1946] 2 All E.R. 345). I cannot do better than refer once again to a passage in the speech of LORD PORTER (*ibid.*, at p. 351), part of which I cited in *The Polartank* (1) (82 Lloyd's Rep. at p. 125), when a similar point was argued before me:

- G "Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed—all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion, but among the many tests suggested
- H I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to
- I how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case, if the appellants' contention

were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship.”

It seems to me that what applies to a crane and its driver should apply equally to a tug and its master or officer in charge. Accordingly, applying the principles there stated to the facts of this case, I find myself quite unable to hold that the crew of the Panther became in law the servants of the owners of the Ericbank, so as to render the latter, and not the former, liable for a faulty manoeuvre within the province of the man in charge of the tug. The position would, I apprehend, be different if the faulty manoeuvre were one within the province of the pilot or officer-in-charge of the tow, e.g., if the tug failed to carry out an order, or negligently executed without orders a manoeuvre which it was within the province of those in charge of the tow to order. Here, however, the faulty manoeuvre of failing to stop the port propeller in time was a matter which concerned the tug alone and not the tow, and in such circumstances I hold that the liability for the negligence of the mate of the Panther rests with his regular employers, the owners of the Panther.

In the result, therefore, the damage caused in the present case resulted partly from the negligence of the Trishna and the Ericbank, which combined to bring about the contact between the Trishna and the Panther, and partly from the negligence of the mate of the Panther in failing to stop his port propeller in time. All three vessels being guilty of faults contributing to the damage, it follows that s. 1* of the Maritime Conventions Act, 1911, applies. That means that the Trishna is not in the position of an innocent party, so as to be entitled to recover her damages in full against either of two wrongdoers. All three being at fault, the damage must be apportioned.

In *The Socrates & The Champion* (3) ([1923] P. 76), a decision subsequently reversed on the facts by the Court of Appeal ([1923] P. 162), HILL, J., refused to apportion the liability between tug and tow in a case where the tug and tow were held partly to blame for a collision between the tug and a third ship. Instead he held the tug and the tow jointly and severally liable for a moiety of the damage sustained by the other ship. It seems to me, however, that that case is distinguishable, because there the tug and tow were held in fault for jointly participating in a negligent operation (namely, coming out from a dock into the River Thames at an improper time). Here the faults which I have found against the Ericbank and the Panther, respectively, are quite distinct and separate. I conceive it to be my duty, therefore, to consider the relative gravity of their respective faults and to apportion the blame between all three vessels.

I confess that I have found this by no means an easy problem, and in approaching it I have reminded myself of what was said by SCOTT, L.J., in *The Buccinum* (4) ((1936), 55 Lloyd's Rep. 205 at p. 218):

“On the question of apportionment, one has to remember that the law of apportionment, under the Maritime Conventions Act [1911], is not one of distribution of moral blame, but of a comparative appreciation of the degree in which the respective faults of the vessels in fault have contributed to the result.”

It is true that this was said in the course of a dissenting judgment, but there can, I think, be no doubt as to the correctness of the principle stated. In the present case, as a matter of causation, the damage resulted from a combination of the negligence of the Trishna and the Ericbank, on the one hand, in producing

* The Maritime Conventions Act, 1911, s. 1 (1), reads: “Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault: Provided that— (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally . . .”

A the contact, with the negligence of the Panther, on the other hand, in keeping her propeller working. I think that I shall not be doing any injustice if I say that these two causes operated to an equal extent. That involves that the Panther must be held in fault to the extent of one half.

As between the Trishna and the Ericbank, it is no easy matter to determine in what proportions I should distribute the fault in bringing about the contact
B between the Trishna and the Panther. Like the Elder Brethren, I take a serious view of the fault of the pilot of the Ericbank in failing to give any warning to the Panther (whether by the prescribed signal or otherwise) of the impending danger caused by the approach of the Trishna. The result was to allow the Panther to fall into something in the nature of a trap. In favour of the Trishna it can be said that her action, albeit in breach of bye-law 15 and in breach of the dictates of good seamanship, did not constitute a very serious fault. She was
C not proceeding at any great speed, and when she embarked on the manoeuvre of passing the Ericbank there was apparently a clear way through. She was only executing a manoeuvre similar to one which had just been successfully completed by the Agnes. Although, as I have held, the Trishna was not entitled to expect that the way would remain clear, or that her manoeuvre would not
D in any circumstances be hampered by the Ericbank's stern tug, it would be difficult, I think, to say that it was reasonably foreseeable by those in charge of the Trishna that the consequence of her manoeuvre would be quite so calamitous. This consideration is not without importance, because the degree of blame must depend to some extent at least on the degree of damage reasonably foreseeable. But the same thing, it seems to me, can be said in relation to the fault of the
E pilot of the Ericbank. Could he reasonably foresee that the result of his neglect to give a warning signal to his stern tug would be quite so disastrous? The fact is that the degree of damage occasioned here was by no means likely; this is a case in which, unhappily, the improbable has in fact occurred.

In all the circumstances, I have come to the conclusion that this is a case to which proviso (a)* to s. 1 of the Maritime Conventions Act, 1911, applies,
F that as between the Trishna and the Ericbank it is not possible to establish different degrees of fault, and that, as between them, the liability should be apportioned equally. The result is that I find the Trishna to blame to the extent of one quarter, the Ericbank to blame to the extent of one quarter, and the Panther to blame to the extent of one half. That means, I apprehend, that the Trishna on her claim is entitled to recover a quarter of her damage against the
G Ericbank and (subject to limitation of liability†) half against the Panther, while the Panther, on her counterclaim, is entitled to recover a quarter of her damage against the Trishna.

Order accordingly.

Solicitors: *Batesons & Co.*, Liverpool (for the plaintiffs); *Weightman, Pedder & Co.*, Liverpool (for the defendants).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

* Proviso (a) is printed at p. 648, note, ante.

† See s. 503 of the Merchant Shipping Act, 1894; 23 HALSBURY'S STATUTES (2nd Edn.) 656.

INLAND REVENUE COMMISSIONERS v. THORNTON, KELLEY & CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), February 7, 8, 1957.]

Surtax—Undistributed income—Sums applied in repayment of share capital—Capital issued otherwise than for adequate consideration—Finance Act, 1922 (12 & 13 Geo. 5 c. 17), s. 21 (1), as amended by Finance Act, 1927 (17 & 18 Geo. 5 c. 10), s. 31 (1) and Finance Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 34), s. 19 (4).

A company in 1920 applied part of the surplus shown on a revaluation of its capital assets in paying up in full ten thousand cumulative preference shares of £1 each, which it issued by way of capitalisation to the holders of its ten thousand ordinary £1 shares. In 1951, when 8,865 of the ten thousand ordinary shares were owned by two directors, under a special resolution of the company and with the confirmation of an order of the High Court, the capital of the company was reduced from £20,000 to £10,000 by repayment of the whole amount of the preference shares, and the nominal capital was simultaneously again increased to £20,000 by the issue of ten thousand new ordinary shares of £1 each. In 1952 the company applied part of a surplus shown by a further revaluation in paying up in full ten thousand new ordinary shares of £1 each, which it issued by way of capitalisation to the holders of the existing ordinary shares. Surtax directions requiring the actual income of the company from all sources for the years ending June 30, 1951 and 1952, to be deemed to be the income of the members of the company and the amount thereof to be apportioned among the members were given by the Special Commissioners of Income Tax under s. 21 (1)* of the Finance Act, 1922. On appeal against the directions,

Held: the surtax directions were properly made, since, although in law the company received some benefit from the ordinary shareholders in the issue to them of the preference shares in 1920 which were credited as fully paid (dicta of VISCOUNT HALDANE and VISCOUNT FINLAY in *Inland Revenue Comrs. v. Blott*, [1921] 2 A.C. at pp. 185 and 194, applied), yet the value of the consideration to the company was substantially less than the amount of the capital and accordingly the shares were deemed by virtue of s. 21 (1) to have been issued "otherwise than for adequate consideration" within the meaning of that enactment.

Appeal allowed.

[For the Finance Act, 1922, s. 21 (1), as amended, see 12 HALSBURY'S STATUTES (2nd Edn.) 237, 238; and for the corresponding provisions of the Income Tax Act, 1952, s. 246 (2), (3), see 31 HALSBURY'S STATUTES (2nd Edn.) 233, 234.]

Case referred to:

- (1) *Inland Revenue Comrs. v. Blott*, *Inland Revenue Comrs. v. Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101; 28 Digest 107, 663.

Case Stated.

The company appealed to the Special Commissioners of Income Tax against directions made by the Special Commissioners under s. 21 of the Finance Act, 1922, as amended, that the actual income of the company from all sources for the years ended June 30, 1951 and 1952, be deemed to be the income of the members of the company and that the amount of such income be apportioned among the members. The commissioners discharged the directions. The

* The relevant terms of this enactment are printed at p. 653, letters D to G, post.

- A Crown required the appeal to be re-heard by the Board of Referees, who found the following facts.

The company was incorporated in 1913 with the object of carrying on the business of cotton spinners and doublers. Its original share capital was £10,000 divided into ten thousand ordinary shares of £1 each, of which £9,365 were held by Joss Thornton. Joss Thornton died in 1918, having by his will bequeathed

- B 8,865 of his shares to his trustees on trust to pay the income to his widow for life and after her death in trust for his two sons, Reginald Thornton and William Outram Thornton, and his two daughters, Ada Hawthorne and Gertrude Wood, in equal shares. In 1920 the company caused a revaluation of its fixed assets to be made and applied part of the surplus shown on such revaluation in paying up in full ten thousand new $7\frac{1}{2}$ per cent. cumulative preference shares of £1 each, which it issued by way of capitalisation to the holders of its ordinary shares, 8,865 such shares being issued to the trustees of Joss Thornton's will. In 1930 the new shares were converted into five per cent. cumulative preference shares.

Under the terms of a deed of family arrangement dated Apr. 6, 1925 and two deeds of family arrangement supplemental thereto dated Feb. 19, 1931 and June 29, 1949 respectively, it was provided that on the death of the widow of

- D Joss Thornton the 8,865 ordinary shares should be transferred to his two sons equally and the 8,865 preference shares should be transferred to his two daughters equally. The widow died in 1950, and shortly afterwards the 8,865 ordinary shares were transferred to the two sons and the 8,865 preference shares to the two daughters under the family arrangement. The two sons were at all material times directors of the company.

- E By virtue of a special resolution passed by the company in 1951 and with the confirmation of an order of the High Court dated May 7, 1951, the capital of the company was reduced from £20,000 to £10,000 by the repayment of the whole amount credited as paid up on the preference shares. At the same time the nominal capital of the company was again increased to £20,000 by the creation of ten thousand new ordinary shares of £1 each. In March, 1952, the company caused a further revaluation of its fixed assets to be made and applied part of the surplus shown on such revaluation in paying up in full ten thousand new ordinary shares of £1 each, which it issued by way of capitalisation to the holders of the existing ordinary shares or their respective nominees. At June 30, 1950, the company had a balance of £35,135 to the credit of profit and loss account. Its profit after provision for taxation was £13,690 for the year ended June 30, 1951, and £8,457 for the year ended June 30, 1952. At June 30, 1951 and 1952 respectively, the surplus of its liquid assets over its liabilities was £62,361 and £64,610 respectively. It distributed by way of dividend £531 in respect of the year ended June 30, 1951, and £525 in respect of the year ended June 30, 1952.

- G At the hearing of the appeal before the Special Commissioners, the company admitted that the ten thousand preference shares issued in 1920, having been issued by way of capitalisation, must be treated as having been issued "otherwise than for adequate consideration" within the meaning of the final paragraph of s. 21 (1) of the Finance Act, 1922, as amended by s. 31 (1) of the Finance Act, 1927, and s. 19 (4) of the Finance Act, 1936, and that the £10,000 applied in 1951 in repayment of the amount credited as paid up on the shares must accordingly be regarded as income available for distribution among the members and not as having been applied to the requirements of the company's business under s. 21 (1). The determination of the Special Commissioners in favour of the company was made on the footing of this admission. Before the Board of Referees the company was given leave, with the consent of the Crown, to substitute for this admission an admission that in the year ended June 30, 1952, it expended or applied out of its resources £10,000 in redemption of share capital but not that the share capital was issued otherwise than for adequate consideration. The Crown contended that the admission made by the company

at the hearing before the Special Commissioners represented a correct view of the law, and that no or no adequate consideration had moved from those to whom the shares had been issued. The Board of Referees found, as a matter of law, that the ten thousand preference shares issued in 1920 were not issued "otherwise than for adequate consideration" within the meaning of the final paragraph of s. 21 (1) of the Finance Act, 1922, as amended, with the consequence that that paragraph had no application to the £10,000 applied in 1951 in repayment of the amount credited as paid up on the shares. On this basis they found that the Crown had failed in respect of either of the two years to discharge the burden of proving as a fact that the company had not within a reasonable time after the end of such year distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of their total income for the purposes of surtax a reasonable part of its actual income from all sources for the year. They therefore confirmed the determination of the Special Commissioners that the directions be discharged. The Crown appealed.

Geoffrey Cross, Q.C., Sir Reginald Hills and E. Blanshard Stamp for the Crown. Heyworth Talbot, Q.C., and G. B. Graham for the company.

WYNN-PARRY, J.: In this appeal I am concerned with one short question of law, which is stated in para. 11 of the Case by the Board of Referees as follows:

"We the Board of Referees found, as a matter of law, that the ten thousand preference shares issued in 1920 were not issued 'otherwise than for adequate consideration' within the meaning of the final paragraph of s. 21 (1) of the Finance Act, 1922, as amended as aforesaid with the consequence that the said final paragraph has no application to the sum of £10,000 applied in 1951 in repayment of the amount credited as paid up on the said shares."

Two points must be kept quite distinct: the aspect of the matter considered in relation to company law, and the aspect considered in relation to s. 21 (1) of the Finance Act, 1922. The argument of counsel for the company proceeded on the basis that, in a transaction such as the one here under consideration, capitalisation of the profits of a company and their application in paying up shares, consideration moving from the company and consideration moving from the shareholder are necessarily involved, and counsel for the Crown did, I think, accept that there must be an element of consideration. If there were not, it would be difficult to see how the shares could be regarded as fully paid, and nobody doubts that shares which are issued pursuant to such a transaction are for all purposes to be regarded as fully paid up. In developing his argument, counsel for the company referred to passages in the speeches of VISCOUNT HALDANE and VISCOUNT FINLAY in *Inland Revenue Comrs. v. Blott* (1) ([1921] 2 A.C. 171). LORD HALDANE said (*ibid.*, at p. 181):

"My Lords, the questions so raised are of much importance. Speaking for myself, I think that they can only be answered if the relation of a shareholder to a company incorporated under the relevant Companies Acts, as they stood both before and after their consolidation in 1908, has been determined . . . [having developed that point, he continued (*ibid.*, at p. 182):] The company, acting with the assent so given of the shareholders, can decide conclusively what is to be done with accumulated profits."

That makes it clear that, however artificial it may appear, the matter must be regarded as one in which there are two parties, the shareholders on the one side and the company on the other. What is the benefit which the company gets? Counsel for the company sought, by relying on certain observations by, in particular, LORD HALDANE and LORD FINLAY, to establish that the company got a benefit. LORD HALDANE says (*ibid.*, at p. 185):

A "The new shares simply confer a title to a larger proportion of the surplus assets, if and when a general distribution takes place as in a winding-up. In these assets the undistributed profits now allocated to capital will be included, profits which will be used by the company for its business but henceforth as part of its issued share capital."

B Counsel for the company relied on that passage as showing that the company got a benefit. I am not disposed to disagree with him that, on the strength of that passage, it may be said that the company got some benefit. LORD FINLAY says (*ibid.*, at p. 194):

C "The effect of this operation was that the amount of the bonus was retained by the company as additional capital, and that the shareholders got the new preference shares . . . Instead of his [the shareholder's] getting any dividend, or anything in the nature of a dividend, the fund which might have been divided was impounded to increase the capital of the business."

D Those are the types of benefit to the company which counsel for the company was able to extract from the speeches in *Blott's* case (1) and I agree with him that, from the pure company law point of view, the transaction in question resulted in some benefit to the company. That does not end the matter, because I have to consider it in the light of the relevant part of s. 21 (1) of the Finance Act, 1922, as amended*. The relevant passage, so far as material, is as follows:

E "For the purpose of this sub-section any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business, that is to say:—(a) Any sum expended or applied, or intended to be expended or applied, out of the income of the company, otherwise than in pursuance of an obligation entered into by the company before Aug. 4, 1914 . . . (iv) in redemption or repayment of any share or loan capital or debt (including any premium on such share or loan capital or debt) issued or incurred otherwise than for adequate consideration."

F Then, finally, there occurs this critical provision†:

G "For the purposes of this sub-section share or loan capital or debt shall be deemed to be issued or incurred otherwise than for adequate consideration if—(a) it is issued or incurred for consideration the value of which to the company is substantially less than the amount of the capital or debt (including any premium thereon)."

H It follows that the mere circumstance that there is shown to have been a benefit to the company as part of the consideration involved in the transaction which enables one to say that the shares are fully paid up does not necessarily mean that the requirements of s. 21 (1) of the Finance Act, 1922, are complied with, and on the material before me I find it quite impossible to say that the provision at the end of sub-s. (1) has been fulfilled. For those short reasons, I am of opinion that the Board of Referees was wrong in its conclusion of law, that the appeal must be allowed, and that the matter must be referred back to the Board of Referees to deal with the matter on that basis.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Hatchett, Jones & Co.* (for the company).
[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

* The provision read first above was added by the Finance Act, 1927, s. 31 (1).

† This provision was added by the Finance Act, 1936, s. 19 (4).

GRAHAM v. CO-OPERATIVE WHOLESALE SOCIETY, LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), February 5, 6, 7, 8, 1957.]

Factory—Dust—Wood dust—Duty to provide adequate ventilation—Duty to prevent “accumulation” of dust—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 4 (1), s. 47 (1).

Master and Servant—Duty of master—Reasonable precautions not to expose employee to unnecessary risk—Knowledge of risk—Duty to keep knowledge up to date.

The plaintiff was employed by the defendant company in a factory workshop in which furniture was manufactured and in which there was an electric sanding machine; at the material time the machine was mainly used on West African hardwoods, and particularly on West African mahogany, and gave off a quantity of fine wood dust when operated. The plaintiff worked some ten or fifteen yards away from the sanding machine, and as a result of the wood dust settling on his skin, he contracted dermatitis. The wood dust also settled on the plaintiff's coat, which hung near him, in sufficient quantities to require brushing off. The ventilation in the workshop was adequate for ordinary purposes but was inadequate as a means of removing the wood dust. It was established that in general no precautions were taken in the furniture trade against disease from wood dust and that the defendants' assistant works manager received all the information commonly circulated in the trade. In an action by the plaintiff claiming damages for negligence at common law, and for breach of statutory duty under s. 4 (1)* and s. 47 (1)† of the Factories Act, 1937,

Held: the plaintiff's claim for damages failed for the following reasons—

(i) the defendants were not in breach of their common law duty of care as (a) they did not know nor on the evidence ought they to have known that the wood dust was a source of danger, their duty being to take reasonable steps to keep their knowledge up to date and there being no evidence that as a result of so doing they should have known that the wood dust might cause disease, and (b) they were not guilty of obvious neglect.

Principle stated by LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (1909 S.C. at p. 809) applied.

(ii) the defendants were not in breach of statutory duty since—

(a) s. 4 (1) of the Factories Act, 1937, on its true construction, was concerned only with the provision of adequate ventilation for ordinary purposes by the circulation of fresh air, which was adequate in this factory, and did not extend to such matters (for example, the provision of exhaust appliances) as were within the scope of s. 47 of the Act (*Ebbs v. James Whitson & Co., Ltd.*, [1952] 2 All E.R. 192, followed), and

(b) the obligation imposed by s. 47 (1) to take all practicable measures to prevent dust accumulating was an obligation to prevent an accumulation of deposited dust, not to prevent dust settling on the plaintiff.

[Editorial Note.] In applying this decision to future cases it will be material to consider the consequence of the danger from wood dust becoming more widely known either as result of the decision itself or for other reasons (compare *Crookall v. Vickers-Armstrong, Ltd.*, [1955] 2 All E.R. 12). The consequence of taking no precautionary measures after knowledge of the danger is illustrated at p. 658, letter F, post. Even in the present case the result might have been different if it had been possible to prove that the trade literature contained information on the danger from wood dust (see p. 658, letter A, post).

* For the terms of s. 4 (1) see p. 659, letter C, post.

† For the relevant terms of s. 47 (1) see p. 660, letter A, and p. 661, letter A, post.

A As to a master's duty of care at common law, see 22 HALSBURY'S LAWS (2nd Edn.) 187, 188, para. 314; and for cases on the subject, see 34 DIGEST 194-196, 1580-1601.

As to the statutory obligations concerning ventilation and protection against dust in factories, see 17 HALSBURY'S LAWS (3rd Edn.) 102, 120.

B For the Factories Act, 1937, s. 4 and s. 47, see 9 HALSBURY'S STATUTES (2nd Edn.) 1004, 1038.]

Cases referred to:

(1) *Ebbs v. James Whitson & Co., Ltd.*, [1952] 2 All E.R. 192; [1952] 2 Q.B. 877; 3rd Digest Supp.

(2) *Morton v. William Dixon, Ltd.*, 1909 S.C. 807.

C (3) *Morris v. West Hartlepool Steam Navigation Co., Ltd.*, [1956] 1 All E.R. 385; [1956] A.C. 552.

Action.

The plaintiff, Thomas Walter Graham, claimed damages for having contracted dermatitis in February, 1954, while employed as a cabinet maker by the defendants, the Co-operative Wholesale Society, Ltd., at their premises at Enfield. The premises were a factory within the meaning of the Factories Act, 1937. The plaintiff alleged, among other allegations, that the dermatitis was caused by wood dust given off from an electric sanding machine which was used in the workshop where the plaintiff worked. The medical evidence established to the satisfaction of the court that the plaintiff's dermatitis was caused by the wood dust from a sanding machine in the factory, and, accordingly, the issues raised were whether the defendants were in breach of their common law duty to exercise due care for the safety of the plaintiff, and whether they were in breach of s. 4 (1) and s. 47 (1) of the Factories Act, 1937, which respectively relate to the provision of ventilation, and to the measures to be taken for the removal of dust and the prevention of its accumulation.

F The plaintiff worked in a workshop which measured seventy-five yards by twenty-five yards. The electric sanding machine was operated at a place some ten or fifteen yards distant from the place where the plaintiff worked and at the material time was being used on West African mahogany, a type of West African hardwood. During 1953 about eighty per cent. of the wood used in the workshop was West African hardwood. Of the West African hardwood used in 1953 twenty per cent. was West African mahogany and eighty per cent. was obeche wood. The plaintiff's case was that the disease was caused by dust from the mahogany not from obeche wood. The sanding machine was in use for about eighteen hours in each week. When first used, the machine had given off a considerable quantity of dust and two abstractors had been fixed in a position to remove some of the dust. At the end of 1947 there were two occasions when wood dust was given off from the machine in such quantities that the men in the workshop complained, and, as a result, two further abstractors were fixed and a hessian curtain was placed round three sides of the machine. No further complaints were made except by the machine operator, who found that the abstractors were blowing a quantity of dust into his face. Accordingly, an air line was fixed above the operator which blew this dust out into the workshop. Some of this dust reached the place where the plaintiff was working and settled on his skin, causing dermatitis. The dust also settled on the plaintiff's coat, which hung near him, in sufficient quantities to require brushing off. It was established that, while the ventilation in the workshop was adequate for ordinary purposes, it was inadequate as a means of removing the wood dust.

I A reference to wood dust as a source of dermatitis appeared in a report of the Chief Factory Inspector made in 1935, but that reference was to monsonia wood, a particular West African hardwood, and not to West African hardwood generally, and the report was not produced in the present case. In 1952, in *Ebbs v. James Whitson & Co., Ltd.* (1) ([1952] 2 All E.R. 192), the plaintiff in that case claimed

damages for having contracted dermatitis from monsonia wood dust in April, 1950, in the course of his employment, and it was found as a fact that at that time monsonia wood dust was not recognised as a cause of dermatitis. It was probably at about the end of 1951 or in 1952 that suspicion was aroused, at any rate among dermatologists, in regard to the noxious properties of West African hardwood generally; but there was no evidence that the danger of disease from wood dust was generally appreciated at the time when the plaintiff contracted the disease. A B

The defendants had never used monsonia wood, and it was not until after the second world war that they began to use West African hardwood in substantial quantity. In 1952 the only West African hardwood which they used was obeche, which did not cause dermatitis.

The evidence also showed that only a small percentage of people were sensitive to wood dust, and that a person who was sensitive to it might be in contact with it for many years before contracting dermatitis. The plaintiff had worked for eight or nine years in the defendants' workshop prior to February, 1954. In 1951 he was away from work for eight weeks because of a skin disease, but his skin specialists attributed that disease, not to wood dust, but to contact with glue; he contracted dermatitis quite suddenly in 1954. C

C. J. A. Doughty, Q.C., and R. T. Monier-Williams for the plaintiff.

John Thompson, Q.C., and C. Fawcett for the defendants. D

DEVLIN, J., stated the facts, and said: I shall consider the common law claim first. The first question is: To whom was delegated by the defendants the duty of seeing that proper precautions were taken for the health of their workmen? That person, in relation to the workshop concerned, was a Mr. Woolhouse. Having identified him, I next have to ask myself: Did Mr. Woolhouse know that the dust from the wood which was being used in the sanding machine in the workshop was a source of danger? If not, ought he, as a reasonably prudent man, to have known about it? And, if he either knew or ought to have known, did he take reasonable precautions for the safety of those who were working near the sanding machine? E F

Mr. Woolhouse* gave evidence before me, and he said that in fact he did not know that the dust was a source of danger. I accept that evidence; it has not seriously been challenged. The next question is whether he ought to have known, and that raises a question, I think, of some general importance as to what it is that an employer ought to do by way of keeping pace with the new developments and discoveries which may reveal sources of danger to his workmen hitherto unsuspected. Mr. Woolhouse was a man of great experience in the industry. He had been through the workshop himself; for twelve years he was a foreman; he had spent his life in woodworking, and he did not, in fact, know that this wood dust was a source of danger; knowledge of this fact was a comparatively recent development. How far, then, is it the duty of an employer to keep abreast of developments of this sort and to acquaint himself with new discoveries? G H

In my judgment an employer is not entitled to wait until the matter is forcibly brought to his attention either by an outbreak of disease in his factory or something of that sort. I think that under modern conditions something more is required and would be accepted by reasonably good employers as being required. An employer must take reasonable steps to keep his knowledge on the matter up to date. I do not think that this includes, except perhaps in exceptional cases, making independent researches of his own, but he must not allow himself to fall behind the standard which is adopted by reasonably good employers in the industry. I take the test which, I think, ought to be applied from the well-known passage in the judgment of LORD DUNEDIN, Lord President, nearly fifty years ago in *Morton v. William Dixon, Ltd.* (2) (1909 S.C. 807 at p. 809). I

* Mr. Woolhouse was the assistant works manager at the defendants' factory.

A This test has been adopted many times since then, and was referred to recently in *Morris v. West Hartlepool Steam Navigation Co., Ltd.* (3) ([1956] 1 All E.R. 385 at p. 387). The words which LORD DUNEDIN used were these (1909 S.C. at p. 809):

B “Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it.”

C Subject to a gloss on the word “folly” which appears in *Morris v. West Hartlepool Steam Navigation Co., Ltd.* (3), that passage has been constantly approved as being a correct statement of the law in cases of faults of omission, and I think that I can properly apply it to a case of this sort where the fault, if it exists, is a fault of omission, being a failure to make reasonable inquiries or to keep abreast of contemporary sources of information, and I would, therefore, paraphrase it in this way for my purposes: I have to ask myself whether Mr. Woolhouse has failed to acquire information which was commonly known in the furniture trade, or (and this is the second limb of LORD DUNEDIN’s test) whether he was guilty of obvious neglect.

E I think that it is the duty of an employer to acquire that degree of knowledge that is common in the trade, and also, of course, not to be guilty of obvious neglect. Having taken that as the test which I shall apply, I must first, in applying it, ask myself what, on the evidence which I have heard, was the knowledge that was common in the furniture trade about wood dust, specifically West African hardwood dust, as a source of dermatitis. [HIS LORDSHIP reviewed the evidence before him and accepted that given on behalf of the defendants, which showed that no precautions were taken in the furniture trade against disease from wood dust, and that the sources of information available to employers did not indicate that wood dust was a cause of dermatitis. HIS LORDSHIP then considered the extent to which Mr. Woolhouse familiarised himself with the available information, and found that he received the information which was commonly circulated in the trade, and which included bulletins issued by the Furniture Development Council. HIS LORDSHIP continued:] Those being the facts, what is it that, under the first limb of LORD DUNEDIN’s principle, as I have adapted it, the plaintiff has to prove in order to succeed? I think that he must show either that Mr. Woolhouse did not get the information which was commonly got in the trade, and I have just held that the plaintiff has failed to show that, or, alternatively, that, having got it, Mr. Woolhouse either did not read it or did not pay sufficient attention to what he read. On that second part of the case I think that the plaintiff is in some difficulty. I do not think that he can discharge the burden of proof on him in this matter by inviting me, as counsel for the plaintiff, in effect, invited me, to speculate from answers which Mr. Woolhouse gave on other parts of the case that it is likely or probable that he did not read these bulletins with proper attention. The way to find that out is to obtain the bulletins, see if they contain anything about wood dust and then see what it is, if anything, that the defendants have missed and call for an explanation from them as to how it came that they missed it. I should have thought that this type of case was one in which interrogatories could usefully have been asked for before the trial, and one in which the defendants would be interrogated as to the grounds of their belief in material matters. If the defendants had been asked whether they believed that wood dust was not injurious and, if so, what were the grounds for that belief, the material would perhaps have been collected in a convenient form which could have been examined and scrutinised at the trial. However that may be, I can concern myself only with the evidence which is before me, and, as the Furniture Development Council bulletins are not here

and have not been scrutinised, I am not entitled to assume that they contained certain matters when there is no evidence that they did so. The evidence, so far as it goes, is that they made no reference to diseases from wood dust. It is impossible for me to assume that they did, in fact, say something which, if read carefully, would have put the defendants on their guard. It is the more impossible because no material has been produced to me from any source, whether the Furniture Development Council or any other source, which was proved to be in existence at the time of the accident and which referred to wood dust as a cause of this disease. In my judgment, therefore, the plaintiff has failed to bring himself within the first limb of the principle stated by LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (2).

The second limb of LORD DUNEDIN's principle is that of obvious neglect. It so happens that there is, in fact, in this case what seems to me to be an excellent example of obvious neglect which would fall within the second limb. In June, 1954, a specific complaint alleging that the plaintiff had dermatitis and specifying South African hardwood—West African hardwood was obviously meant—as being one of the possible or probable causes, was made, and Mr. Woolhouse, when asked what he did about it, said that he did nothing because he did not regard the claim as authentic. I can quite see that people in Mr. Woolhouse's position get a little sceptical about some of the claims which are addressed to them from workmen who have had to go off work for one reason or another, but I should have thought that the matter merited some consideration. In fact, the medical evidence in this case was undisputed, but Mr. Woolhouse took no steps to test the position. He did not bother to acquaint himself with what was being ascertained by the doctors who were retained for the defendants in the course of this case, whether they accepted or rejected the medical evidence, and until he came to court and heard the evidence of Dr. Borrie, one of the specialists who examined the plaintiff, he was ignorant of the fact that wood dust had, in fact, caused the dermatitis. If I were dealing with the case of someone who had contracted dermatitis a week ago, I should find it very difficult to say that that was not obvious neglect, and, quite apart from what might or might not be known about it in the trade, it would have been enough to have made me hold the defendants liable. Except as an instance of obvious neglect, this has no relevance to the facts of this case, because it occurred after the casualty which happened to the plaintiff. It might have had some relevance if the material which Mr. Woolhouse had had been explored. It might have made me more ready to believe that he was the sort of person who might not pay sufficient attention to warnings which he had received. I quite agree with the submission of counsel for the plaintiff that, since dermatitis is one of the known dangers in the woodworking industry, it behoves managements to be on the alert to see if new causes of dermatitis are being discovered. However, in the absence of any analysis of the material and of any information about the material which Mr. Woolhouse had, it is impossible for me to find, merely because he could, I think, rightly be labelled as not taking proper precautions on the occasion to which I have referred, as therefore having missed something which is to be presumed to be found in the material which he received. In my judgment, the claim at common law fails. It fails on the ground that the plaintiff has not proved that the defendants knew or ought to have known that wood dust was a source of danger.

On the third question of fact, which, on my finding, does not arise, I can say shortly that, if I had been satisfied that the defendants had such knowledge or that it ought to have been imputed to them, I should have held that they did not take sufficient precautions or give a sufficient warning in the circumstances. I accept that the risk was not a serious one, not because it might not have serious consequences for anyone who contracted the disease, but because the percentage of those who contracted it was so small, and, therefore, looked at generally, it was not serious; but I think that it was serious enough to justify at least some

A inquiry from those, of whom the plaintiff was one, who were working within range, if I may so put it, of the sanding machine, and a warning to the plaintiff, to which, having regard to his previous trouble of skin disease, he might well have paid regard.

I turn now to the two sections of the Factories Act, 1937, on which counsel for the plaintiff relied. They are s. 4 and s. 47. The first answer of counsel B for the defendants to s. 4, the answer which comes logically first, is that it is not a section which gives the plaintiff a right to sue. That question is one which has now been twice reserved for future consideration in the Court of Appeal, and I am happy, therefore, to think that the view which I take of the other submissions of counsel for the defendants in relation to s. 4 is such C that it makes it unnecessary for me to determine that obviously difficult point. I shall pass, therefore, to counsel's next submission on the assumption that s. 4 does impose obligations on the defendants for the benefit of the plaintiff. The section deals with ventilation and s. 4 (1) reads:

"Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each work room the adequate ventilation of the room, and for rendering harmless, so far as practicable, D all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory."

Section 4 (1) would appear, on a superficial reading of it, to be in two parts, and to impose two separate and distinct obligations; first, the obligation of maintaining adequate ventilation by the circulation of fresh air in each work room, E and, secondly, the obligation of rendering harmless, so far as practicable, dust that might be injurious to health; but that point has already been considered and determined by the Court of Appeal in *Ebbs v. James Whitson & Co., Ltd.* (1) ([1952] 2 All E.R. 192), where it is clearly laid down that that is not the proper construction of s. 4 (1) and that the sub-section is to be regarded as a whole and as dealing only with ventilation. Had it been otherwise, it might well F have been argued that there was an absolute duty, independent of the duty to maintain adequate ventilation, to render the dust in this case harmless, and, if the sub-section were interpreted literally in that way, I should have been compelled to hold that the dust had not been rendered harmless, as it did, in fact, cause harm to the plaintiff. The construction adopted by the Court of Appeal in *Ebbs v. James Whitson & Co., Ltd.* (1) is that both limbs of s. 4 (1) G are, in effect, governed by the words "by the circulation of fresh air". That limitation is, therefore, to be put on the obligation to render injurious dust harmless. It is an obligation to render the dust harmless only so far as harmlessness can be secured by the circulation of fresh air. Does it, then, apply to the provision of exhaust appliances? If one looked merely at s. 4 (1) itself, there is no reason why it should not. Counsel for the plaintiff submits that exhaust H appliances for the extraction of stale air with other impurities, including dust and so forth, are one of the means of securing ventilation, that is, one of the means of securing a circulation of fresh air, and, therefore, the sub-section must mean that exhaust appliances must be provided and that they must be such as will render harmless so far as practicable the dust in this case. If that submission is right, I should, no doubt, have to consider the scope of the words "so far as practicable". I have not had much evidence whether the extractors in I this case were the best practicable solution.

The contention of counsel for the defendants concentrated on the more general aspect of s. 4 (1). Counsel submitted that it was a sub-section dealing with adequate ventilation in the ordinary sense of the term, that is, securing adequate ventilation by the circulation of fresh air as that was ordinarily understood, by vents and windows and doors and so on, and that the sub-section was not dealing with the provision of exhaust appliances for the removing of a particular impurity. He fortified that submission by reference to s. 47 of the Act of 1937, where exhaust

appliances are specifically dealt with. In the last part of s. 47 (1) it is provided that: A

“ . . . where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom.” B

That, said counsel, is a provision which is specifically dealing with the sort of situation for which these extractors were provided, and the obligation is based on s. 47. Counsel for the plaintiff also relied on s. 47, which I shall have to consider next, but for the moment I am dealing with s. 4 (1), and counsel for the defendants submitted that the proper construction of s. 4 (1) is that it should not be held to apply to matters which are covered by s. 47. C

In my judgment, that submission is right, and s. 4 (1) should not be treated as requiring the provision of exhaust appliances. In *Ebbs v. James Whitson & Co., Ltd.* (1), while the Court of Appeal did not expressly say that, I think that the reasoning which they adopted on the construction of s. 4 (1) inevitably leads to that conclusion, for the basis of the submission of counsel for the defendants (and it was also, I think, the basis of the reasoning in the Court of Appeal) is that, if s. 4 (1) were available, it would impose a duty so much more stringent than that imposed by s. 47 that there would be no room for s. 47. It is true that it may be said that s. 47 applies to a substantial quantity of dust, whether it is likely to be injurious or not; but taking, for the purpose of comparison of the two sections, a small quantity of dust, then s. 47 (1) requires that a small quantity of dust which is “likely to be injurious” should be removed by exhaust appliances, but s. 4, on the reading which the plaintiff desires to give to it, would already have provided that a small quantity of dust which “may be injurious” would have to be removed by exhaust appliances; and the obligation to remove something which “may be injurious” is much more stringent than the obligation to remove that which is “likely to be injurious”. That is a reasoning specifically adopted in the Court of Appeal in *Ebbs v. James Whitson & Co., Ltd.* (1), D and it applies equally on the point which I am considering. E

Another point is that, whereas the obligation under s. 47 (1) to provide exhaust appliances arises only where the nature of the process makes it practicable to do so, there is an unrestricted obligation under the first part of s. 4 (1), and an obligation “so far as practicable” under the second part of s. 4 (1). Whichever be the relevant part of s. 4 (1), the term “where the nature of the process makes it practicable” in s. 47 (1) is a more favourable limitation from the employer’s point of view than anything that is contained in s. 4 (1). That, therefore, again means that s. 47 (1) would be unnecessary if s. 4 (1) were given the wider meaning of application to exhaust appliances. The only scope that would be left for s. 47 (1) would be in relation to substantial quantities of dust that were not likely to be injurious, and even then, as I have said, the provision in relation to exhaust appliances would be a narrower one than that which is to be found in s. 4 (1) on the wider reading. F

For these reasons, not merely because I respectfully adopt the nature of the reasoning of the Court of Appeal in *Ebbs v. James Whitson & Co., Ltd.* (1) but also because, on the larger aspect of endeavouring to put a proper construction to s. 4 in its place in the Factories Act, 1937, as a whole, I am satisfied that on its proper construction s. 4 (1) refers only to adequate ventilation for ordinary purposes by the circulation of fresh air and does not include any requirement which would mean that exhaust appliances would have to be provided to remove dust from the point of egress so as to prevent it entering the air. Section 4 is dealing with the circulation of fresh air which gets rid of impurities which come into the air, whereas s. 47 is dealing with methods of prevention, of stopping the impurities from ever getting into circulation at all. G H I

A That leaves, then, only s. 47 (1) itself as the other sub-section of the Act of 1937 on which the plaintiff relies. I have already read the last part of the sub-section*. The first part of s. 47 (1) reads:

B "In every factory in which, in connection with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom . . ."

C Counsel for the defendants submits that, in the present case, the dust was not "likely to be injurious" within the meaning of those words as they have been interpreted in the decided cases. "Likely to be injurious" involves a knowledge of the possibility of injury which takes one back, in effect, to the common law test which I have already considered. I think, however, that there is a simpler answer to s. 47; it is an answer, of course, which counsel for the defendants also gave. Section 47 imposes two duties, the first being that the employer shall take practicable measures to protect employees against inhalation; that plainly does not apply in this case, because there was no inhalation of dust, and it was not contended by counsel for the plaintiff that it did apply. Counsel for the plaintiff relied on the other obligation, namely, to take practicable measures to prevent the dust accumulating in any workroom. He submitted that in this case the dust accumulated in the air. I do not think that that is the meaning of accumulation within this section. I think that accumulation means accumulation of deposited dust. It has the same sort of meaning as is indicated by the use of the same term in s. 1 (a) of the Act of 1937, which requires that "accumulations of dirt and refuse shall be removed daily by a suitable method from the floors and benches of workrooms . . ." Nor do I think it can be said, without an abuse of language, that the dust which settled on the plaintiff can be regarded as accumulating on him, and it was from the settlement of dust on him that he acquired the disease. One has only to test the matter by this simple question: How does one prevent the accumulation of dust? The answer, I think, is that, if one is old fashioned, one takes a duster and dusts it away, but no one would suggest that a settlement of dust on the skin of a workman was something which could be dusted away in that sense, and, in my judgment, the second part of s. 47 (1) does not apply. The result is, therefore, that the plaintiff's claim fails and there must be judgment for the defendants.

G I should like to add these words. This is now the second reported case† of dermatitis that has arisen from West African hardwood, and, although the incidents of sensitivity to it may be small, it seems to me, nevertheless, to be plain enough that there is a proportion of people working in the woodworking industries who may be put in danger as a result of it. The defendants are a very well known body and I have no doubt that they will take steps to see that the facts of this case are brought to the notice of the Furniture Development Council so that the council can circulate the industry on the matter as they think right. I have no doubt also that the defendants will have regard to the last paragraph of the circular issued by the Ministry of Labour and National Service, Form 1863, in which the Factory Department of the Ministry expresses the wish to be kept informed of cases where dermatitis has occurred in factories, and in which employers are asked to assist in the prevention of disease by voluntary notifications.

Judgment for the defendants.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *H. Smith* (for the defendants).
[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* See p. 660, letter A, ante.

† The other case is *Ebbs v. James Whitson & Co., Ltd.* (1), [1952] 2 All E.R. 192.

MONMOUTHSHIRE COUNTY COUNCIL v. BRITISH TRANSPORT COMMISSION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), February 13, 1957.]

Highway—Repair—Bridge carrying road over railway—New stretches of road joining existing road to bridge carried along embankment—Embankment slipping into railway cutting—Extent of liability of railway company's successors to repair embankment and road—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 46.

Railway—Bridge carrying road over railway—"Immediate approaches" of bridge—Extent of liability to repair road and embankment—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 46.

In 1847 a railway company were authorised to construct an extension to their railway by a private Act which incorporated the Railways Clauses Consolidation Act, 1845. The extension crossed a turnpike road, now a county highway, and the company, in accordance with s. 46 of the Act of 1845, built a bridge to carry the road over the railway; it was also necessary to construct new stretches of road on either side of the bridge to join the turnpike road to it, and these stretches of road were carried along an embankment formed by the railway cutting. A part of the embankment, which was about a quarter of a mile away from the bridge, was falling into the cutting and thereby causing damage to the road. Under s. 46, where a railway company built a bridge to carry a turnpike road over a railway, "such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company".

Held: the defendants were not liable to repair that part of the embankment and road which were in disrepair because they were too distant to be "the immediate approaches" of the bridge within s. 46 of the Act of 1845; nor were the required repairs "necessary works" connected with the bridge or its immediate approaches, as the embankment existed for the protection of the railway cutting and not for the protection of the bridge.

[As to the maintenance of railway bridges carrying highways, and of the approaches thereto, see 27 HALSBURY'S LAWS (2nd Edn.) 45, 46, para. 94; and for cases on the subject, see 38 DIGEST 271-274, 118-137.]

For the Railways Clauses Consolidation Act, 1845, s. 46, see 19 HALSBURY'S STATUTES (2nd Edn.) 616.]

Case referred to:

- (1) *London & North Western Ry. Co. v. Skerton*, (1864), 5 B. & S. 559; 33 L.J.M.C. 158; 10 L.T. 648; 28 J.P. 518; 122 E.R. 940; 38 Digest 270, 112.

Action.

This was an action in which the plaintiffs, Monmouthshire County Council, sought a declaration against the defendants, the British Transport Commission, that on the true construction of s. 46 of the Railways Clauses Consolidation Act, 1845, the defendants were liable to maintain a bridge with its approaches and all necessary works connected therewith between two points on either side of the bridge, referred to as points X and Y, including the embankment between those two points. The plaintiffs also sought an order directing the defendants, forthwith and at their own expense, to carry out, between points X and Y, any works required for the reconstruction and reinstatement of the embankment and any supplementary works necessary to repair and maintain the road and footpath on the embankment.

A The plaintiffs were the highway authority for the County of Monmouth, and the defendants were the successors in title* to the Newport, Abergavenny and Hereford Railway Company (referred to hereinafter as the company). In 1847 the company was authorised under the provisions of the Newport, Abergavenny and Hereford Railway (Extension to Taff Vale Railway) Act, 1847, a private Act which incorporated the provisions of the Railways Clauses Consolidation Act, 1845, to construct an extension to its railway, the Taff Vale Railway, to run from Llanvrechva otherwise Llanvrechva Upper, in the County of Monmouth, to Merthyr Tydfil, in the County of Glamorgan. In or about 1860 this railway extension was constructed so that it crossed what was then a turnpike road and is now route A472, a class 1 county highway, at Maesycwmmr in the County of Monmouth. In order to carry the turnpike road over the railway extension the company built a bridge and constructed new stretches of road on each side of the bridge to join the old road to the bridge. The new stretches of road extended from point X, which was approximately 143 yards from the centre of the bridge in a westerly direction, to point Y, which was approximately 367 yards from the centre of the bridge in an easterly direction, and ran along the top of an embankment which existed because of the deep cutting through which the railway extension passed at this point. A part of that embankment which was about a quarter of a mile away from the bridge was now slipping into the cutting and causing damage to the road and footpath carried on it.

Harold Williams, Q.C., and H. Marnham for the plaintiffs.

Geoffrey Cross, Q.C., and H. E. Francis for the defendants.

LORD GODDARD, C.J., stated the facts and continued: The case for the plaintiffs is based entirely on s. 46 of the Railways Clauses Consolidation Act, 1845, which is incorporated in the several Acts under which the railway line was constructed. Section 46 reads:

"If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company . . ."

When this case was first opened it seemed to me, on looking at the map, that it was, at any rate, a reasonable interpretation to say that the approaches to the bridge were the two new pieces of road which were constructed to take the place of the old road through which the railway runs; but on further consideration of s. 46 and other sections of the Act of 1845 I am now quite satisfied that that construction would not be right.

In the first place s. 46 does not deal with roads at all. It deals merely with bridges and with the obligation on a railway company, if the railway must cross a turnpike road, to carry the railway either over or under the road, in either case by means of a bridge. Section 46 is dealing only with bridges and the immediate approaches to bridges and the necessary works connected with bridges. That is the interpretation which I put on the words "all other necessary works connected therewith". These words could also refer, no doubt, to work connected with immediate approaches, but they certainly refer to work connected

* For the British Transport Commission's succession to the liabilities and obligations of railway companies, see Transport Act, 1947, s. 14 (4); 19 HALSBURY'S STATUTES (2nd Edn.) 1034.

with bridges; bridges are the things with which s. 46 is mainly concerned. Section 50 of the Act of 1845 provides: A

"Every bridge erected for carrying any road over the railway shall (except as otherwise provided by the special Act) be built in conformity with the following regulations; (that is to say,) There shall be a good and sufficient fence on each side of the bridge of not less height than four feet, and on each side of the immediate approaches of such bridge of not less than three feet . . ."

I am quite certain that it was never intended by s. 50 to impose an obligation on a railway company to put a fence of not less height than three feet along miles of road. In this case the particular portion of the embankment with which we are concerned is a quarter of a mile away from the north end of the bridge, and, if the construction which I am asked to put on s. 46 is right, it would make no difference if the distances were two miles or even further. C

One knows that a railway company must maintain fences in a proper manner if the railway runs alongside a high road, and that there is an additional obligation on a railway company with regard to fencing bridges; but I think that the subsequent sections of the Act of 1845, namely, s. 52-s. 56, are the sections which deal with roads. I do not think that s. 46 has anything to do with roads; it is simply concerned with bridges, and I am not prepared to hold that the words "immediate approaches" mean anything except that part that is adjacent to the bridge. D

I think that some help is to be gained from an observation of MELLOR, J., in *London & North Western Ry. Co. v. Skerton* (1) ((1864), 5 B. & S. 559). It is true that it was only an interlocutory observation, but I suppose it could be said to be obiter. MELLOR, J., pointed out (*ibid.*, at p. 564): E

"The words 'ascents and descents and other convenient approaches' [in s. 46] show that the legislature used the terms 'ascent and descent' and 'approaches' as equivalent, or *ejusdem generis*."

I think that that is right because s. 46 speaks of the road being "carried over the railway . . . by means of a bridge . . . with the ascent or descent by this or the special Act in that behalf provided", and that is followed immediately by the words "and such bridge, with the immediate approaches . . ." Section 50 also deals with "a good and sufficient fence . . . on each side of the immediate approaches" of a bridge, and I think that the legislature were there considering a bridge, which, as so many do, could come up one side and go down the other. F G

I do not think that the part of the road and embankment with which I am concerned in this case come within s. 46. I cannot say that work done to prevent the embankment falling into the cutting is necessary work connected with the bridge, or with the approaches to the bridge. The embankment is there for the protection of the cutting; it is not there for the protection of the bridge. For these reasons I think that this action fails. H

Judgment for the defendants.

Solicitors: *Overton & Blackburn*, agents for *Vernon Lawrence*, Newport, Mon. (for the plaintiffs); *M. H. B. Gilmour* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A

R. v. HALLAM.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Stable, Cassels, Gorman and Hinchcliffe, JJ.), February 25, 1957.]

Explosives—Possession—"Knowingly" in possession of explosives for unlawful object—*Explosive Substances Act*, 1883 (46 & 47 Vict. c. 3), s. 4 (1).

B

On an indictment against an accused of knowingly having in his possession any explosive substance, it must be shown not only that he knowingly had the substance in his possession but also that he knew it was an explosive substance.

C

The proper direction to a jury stated (see p. 666, letter E, post).

R. v. Dacey ([1939] 2 All E.R. 641) disapproved.

Appeal dismissed.

[As to possession of explosive substances, see 10 HALSBURY'S LAWS (3rd Edn.) 881, para. 1707; and for cases on the subject, see 15 DIGEST 1031, 11,614-11,621.]

Case referred to:

D

(1) *R. v. Dacey*, [1939] 2 All E.R. 641; 160 L.T. 652; Digest Supp.

Appeal.

The appellant, James Edward Hallam, was convicted before the Recorder of London (SIR GERALD DODSON), on Dec. 6, 1956, on an indictment preferred under the Explosive Substances Act, 1883, charging him that he knowingly had in his possession or under his control certain explosive substances, to wit fifteen pieces of gelignite and thirty-four detonators, in such circumstances as to give rise to a reasonable suspicion that they were not in his possession or under his control for a lawful object. He was sentenced to three years' imprisonment and he now appealed against his conviction.

E

Gerald Gardiner, Q.C., and *B. J. Shaw* for the appellant.

F

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and *J. H. Buzzard* for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court, in which he stated the facts and continued: The appeal has been heard by a full court because of a judgment of the court in 1939 in *R. v. Dacey* (1) ([1939] 2 All E.R. 641). The point that is raised is purely a matter of construction of s. 4 (1) of the Explosive Substances Act, 1883, which is in these terms:

G

"Any person who . . . knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession or under his control for a lawful object, shall, unless he can show that he . . . had it in his possession or under his control for a lawful object, be guilty of felony . . ."

H

The question is whether the word "knowingly" means that he must know not only that he has a parcel or a substance in his possession but also that it is an explosive. The words, I repeat, are "knowingly has in his possession any explosive substance". Having given the best consideration that we can to this case, we think that the words must mean that he must know that it is an explosive substance. The difficulty caused by *R. v. Dacey* (1) is that CASSELS, J., directed the jury in these words ([1939] 2 All E.R. at p. 643):

I

"What you have to be satisfied upon is: 'Did he knowingly have these things in his possession, he knowing that they were explosive substances?'"

In spite of some confusion which seems to have existed as to what CASSELS, J., meant, he says that that is what he said and what he meant to say, and I think it is clear what he meant to say. This court in that case upheld the conviction

because they refused the application for leave to appeal. It was a case which was not argued, and counsel did not appear on either side; the court simply refused to give leave. Counsel for the Crown in this case has not contended that this court is bound by the judgment in that case because it was to a great extent obiter. What the court decided in that case was that it was sufficient to show that a man had in his possession something which proved to be an explosive substance, provided also that there was some evidence of suspicious circumstances from which a jury could draw the inference that he did not have it in his possession for a lawful purpose; although, of course, there is an onus thrown on him, if there is a suspicious circumstance proved, of showing that it was in his possession for a lawful purpose.

The recorder, no doubt relying on that case, did charge the jury that it did not matter whether the prisoner knew that the substance which he had in his possession was an explosive. In so charging the jury, he was, we think, applying *R. v. Dacey* (1) because that really was what *R. v. Dacey* (1) decided but, with all respect to that case, this court cannot take that view. We think that the clear meaning of the section is that the person must not only knowingly have in his possession the substance but must know that it is an explosive substance. The section says he must knowingly have in his possession an explosive substance; therefore, it does seem that it is an ingredient in the offence that he knew it was an explosive substance. If evidence is given that the person had the substance in his possession, and some evidence of circumstances which give rise to a reasonable suspicion that he had not got it for a lawful purpose is given, the jury are then entitled to infer that he knew it was an explosive substance. We think the proper direction to give to a jury in this case is that they must first of all be satisfied that he had the substance in his possession. Secondly, they must be satisfied that it was in his possession in circumstances such as to give rise to a reasonable suspicion that he had it in his possession not for a lawful object, and then tell the jury that if they are satisfied of that, then they can infer that the person knew it was an explosive substance. It is not necessary, of course, to show that he had any particular chemical knowledge. What he had in his possession may be gelignite, dynamite or gunpowder, but, if he had it in his possession in such circumstances as to give rise to a suspicion that he had it for something other than a lawful object, it is then only a short step for the jury, taking into account all the circumstances, to consider that he knew quite well that he had it in his possession for an unlawful purpose. If the argument which found favour in *R. v. Dacey* (1) really takes the word "knowingly" out of the section, it would simply mean that any person who has in his possession an explosive substance in such circumstances as to give rise to a reasonable suspicion, does not have it in his possession for a lawful object unless he can show he has it in his possession for a lawful object, and is guilty of felony. It would then have to be shown that he had it in his possession for an unlawful object. We think the ordinary prima facie construction of the section is that he must knowingly have in his possession an explosive substance, viz., that he knows that he has a substance which is, in fact, explosive. That can be inferred from the facts of the case. We think, therefore, that there was a misdirection by the learned recorder. When one finds that the appellant had in his possession fifteen pieces of gelignite and thirty-four detonators, it is impossible to believe that he did not know quite well he had explosives in his possession, more especially from one very significant piece of evidence that he gave when he went into the witness-box. Having said that he had thrown the parcel behind the hedge, he said: "I went and took it from the hedge to the taxi in case children might touch it". The story which the appellant told of how he came into possession of this stuff and what he did with it was a story which no jury, I should have thought, in any circumstances would believe. Accordingly, although we decide the point of law in the appellant's favour, and though we differ from the decision

A in *R. v. Dacey* (1) and give a different construction to the section, we have come to the conclusion that it is a case in which we should properly apply the proviso*, and, therefore, we dismiss the appeal.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions*.

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

NOTE.

MINES *v.* MINES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 6, 7, 8, 1957.]

D *Legal Aid—Costs—Security for costs—Wife, respondent to divorce petition, an assisted person—Respondent's answer and cross-prayer abandoned at hearing in view of respondent's evidence—Whether respondent entitled to order for costs, the husband having given security.*

E [As to a wife, who has obtained security for costs, being awarded costs although she has been unsuccessful in the proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 400, para. 889; and as to the effect of legal aid on wife's costs, see *ibid.*, p. 359, para. 768.

For cases on the subject, see 27 DIGEST (Repl.) 505, 506, 4482-4492.]

Petition.

F On a petition by the husband for divorce on the ground of the wife's desertion, security for the wife's costs was given, and a sum of money (about £100) was paid into court as security†. The wife defended as an assisted person denying desertion and cross-praying for divorce on the grounds of cruelty and adultery. Her contribution to the legal aid fund was assessed as nil. After she had given evidence at the hearing, counsel for the wife stated that it would not be proper, in view of her evidence, to continue to press the prayer contained in her answer or to resist the prayer contained in the petition. The court accepted that decision as proper and pronounced a decree nisi on the husband's petition and rejected the prayer in the wife's answer. Counsel for the wife then asked for an order for costs in her favour as she was an assisted person.

H *N. H. Curtis-Raleigh* for the petitioner (the husband): The wife's cross-prayer and her defence in this suit were unreasonable, and the husband should not have to pay for them. The wife's last reply in the course of giving her evidence showed that she knew there was no defence.

D. L. McDonnell for the respondent (the wife): Unless the case is a frivolous one, which should not have been defended, the court should be slow to depart from its normal practice of giving the wife her costs, even in a case in which she loses.

I **WILLMER, J.:** This application for costs raises a difficult question. The reason why a wife is put in the privileged position of being able to ask for security for her costs from her husband (and even if she loses may in a proper case nevertheless recover her costs, at any rate up to the amount of the security

* I.e., the proviso to the Criminal Appeal Act, 1907, s. 4 (1); 5 HALSBURY'S STATUTES (2nd Edn.) 929.

† As regards the right of an assisted person to an order for security for costs, see *Wigley v. Wigley* ([1950] 2 All E.R. 1218).

given), is based on the doctrine of necessities*. A wife cannot obtain the legal assistance necessary for the proper presentation of her case without paying for it, and apart from legal aid the only source to which she can ordinarily look for payment of such legal expenses is her husband.

It is perfectly true that, since the advent of the legal aid scheme, all that has in a sense been altered, because a wife is now in a position, in a proper case, to obtain the required legal assistance through the help of the legal aid committee. On the other hand it may be rightly said that the legal aid fund, having financed the wife's case, is entitled to stand in the shoes of the wife, just in the same way as the National Assistance Board are entitled to stand in the shoes of a wife whom they have had to maintain, and for that reason the board may claim against the husband.

To that it is well answered that the legal aid fund can be in no better position than the wife, and must take her case as it is. If it turns out to be a wholly worthless case, such as in the old days would have justified the court in withholding costs from the wife, then the legal aid fund must be in the same position. I think that that must be right, and in those circumstances it is necessary to look at the merits of the case. When I say that it is necessary to look at the merits of the case, I mean that not only must regard be paid to the fact that the case has been lost, but also regard must be had to the question whether the case was one in which there ever was a reasonable prospect of success once the facts were known.

In this case the wife's case broke down on the wife's own evidence, and at the conclusion of the wife's evidence her counsel very properly, as I stated at the time, abandoned the further prosecution of the wife's answer, and abandoned the cross-charges which she made against her husband. In all the circumstances of the case I think that that was a completely proper decision. Thus when the case was examined in court—and even as pleaded it was never more than a thin case—it broke down completely.

I am not in any way criticising the local committee† for granting a certificate in this case. Those gentlemen who form the committee, and who give up their time to investigating these cases, can be guided only by what the parties tell them. In this case it must be the fact that the wife put up a case to the legal aid committee which she was not prepared to sustain when subjected to cross-examination in this court.

It may well be that if there had been no legal aid fund the case on behalf of the wife would never have been started at all. However that may be, since the case has turned out to be completely hopeless once the facts were ascertained, I think that in my discretion I ought not to order the husband, notwithstanding that he has been made to provide security, to bear any part of the wife's costs. Having regard to the merits of the case as they are now known, it would be a very great hardship on the husband if he were required to pay any part of the costs incurred on behalf of the wife in presenting such a hopeless case.

In those circumstances I exercise my discretion by refusing the application made on behalf of the wife for costs.

There will be an order for the payment out of the security to the husband.

Order accordingly.

Solicitors: *Graham Hooper & Betteridge*, Brighton (for the husband); *H. P. & H. C. Rigby*, Sandbach (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

* As to a wife's costs being necessities, see 12 HALSBURY'S LAWS (3rd Edn.) 401, para. 892.

† I.e., the local committee appointed by the appropriate area committee appointed by the Law Society under the provisions of a legal aid scheme; see Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 1 (3); 5 HALSBURY'S STATUTORY INSTRUMENTS 203.

WEST RIDING OF YORKSHIRE COUNTY COUNCIL v. HUDDERSFIELD CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), February 6, 1957.]

Local Government—Alteration of area—Extension of county borough boundaries to include part of administrative county area—Financial adjustments—Claims presented by county council against corporation of borough more than six years after alteration of areas—Limitation of time—Date from which time runs—Local Government Act, 1933 (23 & 24 Geo. 5 c. 51), s. 151 (1), (3)—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 2 (1) (d), s. 27 (1), (6).

Arbitration—Limitation of time—Statutory arbitration—Arbitration under Local Government Act, 1933, s. 151 (3)—Claims by one local authority against another for financial adjustment in respect of alteration of areas—Claims presented more than six years after alteration of areas—Date from which time runs—Limitation Act, 1939 (2 & 3 Geo. 6 c. 51), s. 2 (1) (d), s. 27 (1), (6).

On Apr. 1, 1937, and Apr. 1, 1938, parts of the area of the West Riding were transferred to the borough of H. Early in 1953 the county council of the West Riding claimed from the borough a total sum of £258,789 by way of financial adjustment under s. 151 of the Local Government Act, 1933*. No agreement was reached under that section and in 1955 the claim was referred to arbitration pursuant to sub-s. (3). On the question whether the claim was barred by virtue of s. 2 (1) and s. 27 (1), (6)† of the Limitation Act, 1939,

Held: the claim of the county council was statute-barred because it was a money claim recoverable by virtue of an enactment, within s. 27 (6) and s. 2 (1) (d) of the Act of 1939, and the period of limitation, viz., six years, began to run from the dates of the transfers, viz., Apr. 1, 1937 and 1938.

[As to arbitration regarding financial adjustments consequent on alteration of local government areas, see 21 HALSBURY'S LAWS (2nd Edn.) 250, para. 450.

For the Local Government Act, 1933, s. 151, see 14 HALSBURY'S STATUTES (2nd Edn.) 434.

For the Limitation Act, 1939, s. 2 (1), s. 27, see 13 HALSBURY'S STATUTES (2nd Edn.) 1160, 1189.]

Special Case.

This was a Special Case stated under s. 21 (1) (a) of the Arbitration Act, 1950, by an arbitrator appointed pursuant to s. 151 (3) of the Local Government Act, 1933, in default of an agreement under s. 151 (1) of the Act of 1933 between the claimants, the West Riding of Yorkshire County Council, and the respondents, Huddersfield Corporation.

By the County of York West Riding Review Order, 1937, and a similar order of 1938, made by the Minister of Health in pursuance of powers given to him by s. 46 of the Local Government Act, 1929, the boundaries of the county borough of Huddersfield were extended so as to include certain areas which had previously been part of the administrative county of the West Riding of Yorkshire. These transfers of areas took effect from Apr. 1, 1937, and Apr. 1, 1938, respectively.

By a letter dated Jan. 29, 1953, together with an enclosed form of claim and supporting financial details, the claimants submitted for the agreement of the respondents a claim in the sum of £214,516 in respect of a financial adjustment under s. 151 (1) of the Act of 1933 consequent on the order of 1937. By a further letter of the same date, the claimants submitted for the agreement of the respondents a claim in the sum of £44,273 in respect of a similar financial

* The relevant provisions are printed at p. 670, letters E to G, post.

† The relevant terms of the sub-sections are printed at p. 671, letters G to I, post.

adjustment consequent on the order of 1938. By two letters dated Oct. 27, 1954, the respondents refused to agree to either of the claims. By an agreement dated Sept. 9, 1955, the claims were referred to an arbitrator. By their points of defence the respondents contended that the claimants were not entitled to either or any part of the adjustments claimed by them because the claimants' rights thereto did not arise in whole or in part within a period of six years before the arbitration or before the claims were made and, therefore, such rights, if any, were barred under the Limitation Act, 1939. At the request of the parties the arbitrator submitted a Special Case for the decision of the court before proceeding further with the determination of the matters in issue. The question for the decision of the court was whether or not the claimants' claims were barred by the Limitation Act, 1939.

Sir Hartley Shawcross, Q.C., and *I. S. Warren* for the claimants, the West Riding County Council.

H. I. Willis, Q.C., and *E. H. Blain* for the respondents, Huddersfield Corporation.

LORD GODDARD, C.J.: This is a Special Case stated by the learned arbitrator who was appointed pursuant to s. 151 (3) of the Local Government Act, 1933. Section 151 deals with the financial adjustment between two local authorities where there has been an alteration of boundaries and one local authority takes part of the area of another local authority. Under an order of 1937 and another order of 1938 parts of the West Riding area were transferred to and incorporated in the borough of Huddersfield, and that, no doubt, led to many financial adjustments and other matters.

Section 151 reads:

"(1) Any public bodies affected by any alteration of areas or authorities made by an order under this Part of this Act may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities and expenses (so far as affected by the alteration) of, and any financial relations between, the parties to the agreement. (2) The agreement may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any functions, and for payment by either party to the agreement in respect of property, debts, functions, and liabilities so transferred or retained, or of such joint user, and in respect of the remuneration or compensation payable to any officer or person, and that either by way of a capital sum or of a terminable annuity for a period not exceeding that allowed by the Minister. (3) In default of an agreement as to any matter requiring adjustment, such adjustment shall be referred to the arbitration of a single arbitrator agreed upon by the parties, or in default of agreement appointed by the Minister, and the award of the arbitrator may provide for any matter for which an agreement might have provided."

The section then contains several provisions for the payment of moneys found due by the arbitrator. I have no doubt that there are matters which may not involve the payment of money. It may be that some functions can be transferred without financial provision having to be made with regard to them; but it is quite obvious to me from the whole of the section, including the sub-sections following those which I have read, that the statute clearly is contemplating that, in most cases at any rate, there will be payments of money.

What has happened in this case is simply this. On Jan. 29, 1953, the treasurer of the West Riding County Council wrote to the treasurer of the Huddersfield Corporation as follows:

"I enclose the claim, with supporting financial tables, of the county council against the corporation of the Borough of Huddersfield, in respect of the areas added to Huddersfield on Apr. 1, 1937, under the provisions of

- A the [County of York West Riding] Review Order [1937]. The claim is marked 'Without prejudice and subject to revision', and if any of the items are not quite clear to you, I shall be pleased to explain them if we can arrange an appointment. The question of orders for continuing county expenditure remains to be considered."
- B That was sending in a money claim—there is no question about that—for £214,516, and it was followed by another letter submitting a claim for £44,273. These letters were accompanied by most elaborate and lengthy accounts and figures showing how the amounts were made up. It seems to me that one would be shutting one's eyes to the truth of the matter if one did not regard this as simply being a claim by the West Riding County Council on the Huddersfield Corporation for nearly £260,000, taking the two claims together.
- C As there was no agreement between the parties, an arbitrator was appointed. Then points of claim were prepared. Paragraph 3 and para. 4 of the points of claim recite:

- "3. On Jan. 29, 1953, by letter dated that day, the claimants [the county council] submitted for the agreement of the respondents [the corporation] two proposals for the purpose of adjusting property income debts liabilities and expenses of the claimants and the respondents in so far as the same were affected by the two alterations of area aforesaid respectively and financial relations between the claimants and the respondents. 4. By letter dated Oct. 27, 1954, the respondents refused to agree to the adjustments proposed in respect of either of the aforesaid alterations of area. And the claimants claim: A financial adjustment pursuant to s. 151 . . ."
- D A defence was put in, and, after referring to the letters it raised the plea of the Statute of Limitations in this form:

- "The claimants' alleged rights herein did not arise in whole or in part within a period of six years before this arbitration or before the making of either of the aforesaid claims and such rights (if any) were and are barred by virtue of the provisions of the Limitation Act, 1939."
- E On that the learned arbitrator, obviously regarding, and, I think, quite rightly regarding, the arbitration as being one in which he was being asked to make an award in favour of the county council for £258,789, or such less sum as he might find, so that it was essentially a money claim, and finding that a plea of statutory limitation was on the record, thought that the right course to adopt was to take the opinion of the court, by way of Special Case, whether the Limitation Act, 1939, applied, and he was invited to take that course by the parties.
- F The Limitation Act, 1939, s. 2 (1), provides:

- "The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say . . . (d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture."
- G

Section 27 (1) of the Act provides:

- "This Act and any other enactment relating to the limitation of actions shall apply to arbitrations as they apply to actions in the High Court."
- H

- I Section 27 (6) provides:

"This section shall apply to an arbitration under an Act of Parliament as well as to an arbitration pursuant to an arbitration agreement, and sub-s. (3) and sub-s. (4) thereof shall have effect, in relation to an arbitration under an Act, as if for the references to the arbitration agreement there were substituted references to such of the provisions of the Act or of any order, scheme, rules, regulations or bye-laws made thereunder as relate to the arbitration."

I should perhaps have mentioned, because my attention was called to it, that, by the terms of the appointment of arbitrator, the arbitrator was required to adjudicate on "the adjustments in respect of the matters as to which [the county council] have submitted the aforesaid claims", and the "aforesaid claims" were money claims. Therefore, in my opinion, this is a money claim and it is an arbitration to recover a sum recoverable by virtue of an enactment. Section 151 of the Local Government Act, 1933, provides for this adjustment. If a local authority who lose part of their area to another corporation or body can show that they have suffered financial loss within the meaning of the section and a loss which has to be adjusted, then they have a claim for the money. It seems to me that that is the scheme of the Act. I think that in the present case the arbitrator was appointed, and the arbitration which was held was an arbitration, because the county council are claiming that they ought to be paid money in respect of the transfer of part of their area to another body. The transfer, however, took place more than six years ago.

Counsel for the county council submitted that the cause of the arbitration, which would be equivalent for this purpose to a cause of action, did not arise until the parties failed to agree. I cannot think in the circumstances that that is right. There is no obligation on the parties to come to an agreement. The money was demanded by the county council more than six years after the transfer had taken place and more than six years, therefore, after the time when they might have demanded or required the money. Then, the matter having been left and no claim having been made to the money, suddenly a claim comes forward which nobody was under any obligation, so far as the statute is concerned, to discuss or to attempt to agree. The corporation merely said: "We do not recognise that claim". Thereupon an arbitrator was appointed. What he was appointed to do was to make a financial adjustment arising out of what happened many years ago. In my opinion, when the realities of the transaction are looked at and the documents to which I have been referred are considered, this is really an action to recover a sum of money by virtue of the provisions of s. 151 of the Act of 1933. Therefore, in my judgment, the answer to the arbitrator's question is that the claim is barred by the Limitation Act, 1939, and I so declare.

Judgment for the respondents.

Solicitors: *Cummings, Marchant & Ashton*, agents for *Bernard Kenyon*, Wakefield (for the claimants); *Sharpe, Pritchard & Co.*, agents for *Harry Bann*, Huddersfield (for the respondents)

[*Reported by MARGARET D. ABEL, Barrister-at-Law.*]

ANGLO-SAXON PETROLEUM CO., LTD. v. ADAMASTOS
SHIPPING CO., LTD.

[QUEEN'S BENCH DIVISION (Devlin, J.), January 16, 17, 18, February 1, 1957.]

Shipping — Charterparty — Construction — Incorporation of U.S. Paramount Clause—Application to charterparty of United States Carriage of Goods by Sea Act, 1936—"Loss or damage"—United States Carriage of Goods by Sea Act, 1936 (Public Statutes No. 521), s. 3 (1), s. 4 (1), (2), s. 5, s. 13.

An oil tanker was chartered from the owners by a voyage charterparty which was to remain in force for as many consecutive voyages as the vessel could perform within a period of about eighteen months. By cl. 1 the vessel "being tight, staunch and strong, and every way fitted for the voyage" was to proceed to the port of loading. The charterparty incorporated the U.S. "Paramount Clause" which was attached to the charterparty and was in these terms: "This bill of lading shall have effect subject to . . . the Carriage of Goods by Sea Act of the United States . . . which shall be deemed to be incorporated herein . . . If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further." Section 5 of the U.S. Act provided that the Act should "not be applicable to charterparties". Owing to mechanical breakdowns, the first of which occurred on the vessel's voyage to the port of loading, and owing to other breakdowns and incidents she lost 106 days. The charterers claimed damages. It was found that, in the main, the breakdown of the machinery was due to incompetence of the engine room staff amounting to unseaworthiness, but that the owners had exercised due diligence in appointing the staff; in one respect, however, the vessel was unseaworthy and the owners had not exercised due diligence to make her seaworthy. Under s. 4 (1) and (2)* of the U.S. Act the owners would not be liable for "loss or damage arising from unseaworthiness unless caused by want of due diligence" on their part and would not be responsible for "loss or damage arising or resulting from act, neglect or default of the master . . . or the servants" of the owners in the management of the ship. Section 3 (1) of the U.S. Act bound the owners before and at the beginning of the voyage to exercise due diligence to "(a) make the ship seaworthy . . . (c) make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation". The U.S. Act also contained general provisions, one of which was s. 13, stating that the Act applied to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. On the question whether the U.S. Act had been effectively applied to the charterparty, and, if it had, of its effect on the rights and liabilities of the parties, and whether the words "loss or damage" in s. 4 (1) and (2)* related only to physical loss of or damage to goods,

Held: (i) on the true construction of the charterparty the paramount clause was incorporated in the contract, and the reference to "bill of lading" should be rejected as *falsa demonstratio*, since the word "herein" in the clause referred to the charterparty.

* Section 4 of the Carriage of Goods by Sea Act of the United States, approved Apr. 16, 1936, provides, so far as relevant: "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied . . . Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of ship; . . ."

(ii) since the paramount clause showed an intention that the U.S. Act should be incorporated in the charterparty, s. 5 of that Act should be rejected as inconsistent with the intention (dictum of LORD ESHER, M.R., in *Hamilton & Co. v. Mackie & Sons* (1889), 5 T.L.R. at p. 677, applied).

(iii) the U.S. Act, when incorporated in the charterparty, applied, notwithstanding such provisions as s. 13 of the Act, to all voyages covered by the charterparty, whether they were or were not voyages to or from ports of the United States.

(iv) s. 3 (1) of the U.S. Act, to which s. 4 (1) and (2) in effect referred, was limited on its true construction to cargo-carrying voyages and accordingly the warranty of seaworthiness in cl. 1 of the charterparty should prevail undiminished in relation to non-cargo-carrying voyages; and, therefore, the defence afforded by s. 4 (1) and (2) was not available for such voyages (principle stated by LORD WRIGHT in *Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (1937), 42 Com. Cas. at p. 291, applied).

(v) loss or damage in s. 4 (1) and (2) of the U.S. Act were not limited to actual loss of or physical damage to goods, and were subject only to the limitation (which was a consequence of s. 2 of the Act) that they must be such as arose in relation to the loading, handling, stowage, carriage, custody, care, and discharge of the goods.

[**Editorial Note.** The United States Carriage of Goods by Sea Act, 1936, gives legal effect to the Hague Rules of 1921. The corresponding English statute is the Carriage of Goods by Sea Act, 1924, for which, see 23 HALSBURY'S STATUTES (2nd Edn.) 884.

As to the construction of charterparties, see 30 HALSBURY'S LAWS (2nd Edn.) 365, para. 542; and for cases on the subject, see 41 DIGEST 305, 1670 et seq.]

Cases referred to:

- (1) *Hamilton & Co. v. Mackie & Sons*, (1889), 5 T.L.R. 677; 2 Digest 331, 138.
- (2) *Minister of Food v. Reardon Smith Line, Ltd.*, [1951] 2 Lloyd's Rep. 265; 2nd Digest Supp.
- (3) *Thomas & Co., Ltd. v. Portsea S.S. Co., Ltd.*, [1912] A.C. 1; 2 Digest 331, 141.
- (4) *Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa*, (1937), 42 Com. Cas. 286; Digest Supp.
- (5) *G. H. Renton & Co., Ltd. v. Palmyra Trading Corp'n. of Panama*, [1956] 3 All E.R. 957.
- (6) *Imperial Smelting Corp'n., Ltd. v. Joseph Constantine S.S. Line, Ltd.*, [1940] 2 All E.R. 46; [1940] 1 K.B. 812; 162 L.T. 267; *revsd.* C.A., [1940] 3 All E.R. 211; [1940] 2 K.B. 430; 109 L.J.K.B. 968; 163 L.T. 168; *revsd.* H.L. sub nom. *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corp'n., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest (Repl.) 436, 3333.

Special Case.

By a charterparty dated May 25, 1950, the charterers, the Anglo-Saxon Petroleum Co., Ltd., chartered an oil tanker, the Saxon Star, from the owners, Adamastos Shipping Co., Ltd., by a voyage charterparty. Clause 43 of the charterparty, as extended by agreement on May 26, 1950, provided that the charterparty was to remain in force for as many consecutive voyages for [sic] which the vessel could tender for loading within a period of about eighteen months, the last cargo to be loaded about Dec. 31, 1951. By cl. 1 the vessel "being tight, staunch and strong, and every way fitted for the voyage . . ."

A was to proceed to the loading port. By cl. 52 it was agreed that the U.S. Paramount Clause* was to be incorporated in the charterparty.

Due to mechanical breakdowns and other incidents at various stages of her service, the vessel lost in all 106 days. The charterers claimed damages of £83,509, being the difference between the charter and market rates of freight on cargo-carrying voyages which might have been performed within the eighteen months if the vessel had been continuously fit for service. The claim went to arbitration and the umpire made an interim award on the question of liability in the form of a Special Case under the Arbitration Act, 1950, s. 14 and s. 21 (1) (b). He held that the owners were not entitled to rely on any provisions of the United States Carriage of Goods by Sea Act, 1936, in relation to the charterparty or their obligations thereunder, and the question of law for the decision of the court was whether, on the facts found and on the true construction of the charterparty, the owners were in breach of the charterparty in any one of ten respects particularised or on any other ground. Subject to the decision of the court the umpire awarded that the owners were liable to the charterers. At the hearing before DEVLIN, J., certain questions† were agreed and raised for determination before the damages should finally be assessed, and the Case was treated as if it contained the questions.

Ashton Roskill, Q.C., and T. G. Roche, Q.C., for the owners.

A. A. Mocatta, Q.C., and S. O. Olson for the charterers.

Cur. adv. vult.

Feb. 1. **DEVLIN, J.**, read the following judgment: On May 25, 1950, the charterers chartered a tanker belonging to the owners by a voyage charter which provided that it was to remain in force for as many consecutive voyages as the vessel could perform within a period of eighteen months. The first voyage began on July 27, 1950, when the vessel left Baltimore in ballast to load her first cargo at Curacao. On the way there she broke down and had to be taken in tow to Puerto Rico where repairs were effected. Other similar incidents occurred at different stages of her service and the result was that she lost in all 106 days. She was not on time charter so that no question of payment of hire arose, but, as the result of the time lost, she was able to complete fewer voyages than she would otherwise have done. The charterers claimed damages which they put at over £80,000, the claim being for the difference between the charter and market rates of freight on cargo-carrying voyages which might have been performed within the eighteen months if she had been continuously fit for service.

The claim went to arbitration and the investigation of it has already occupied a good deal of time. The umpire has now made an interim award on the question of liability, leaving the amount of damages to be determined hereafter. His findings, stated broadly, are that the breakdown of the vessel's machinery was due to the incompetence of the engine room staff, this incompetence amounting to unseaworthiness; but he found that due diligence had been exercised by the owners in the selection and appointment of the staff. In one instance, however, he found that the vessel was unseaworthy in respect of her machinery and that due diligence had not been exercised to make her seaworthy. He has stated the question of law for the decision of the court in a form which I understand to have been requested by the parties, but which has not turned out to be a very useful one. The question is whether, on the facts that he has found and on the true construction of the charterparty, the owners are in breach of the charterparty in any one of ten respects thereafter particularised or on any other ground. The answer is that, by concession on the facts found, the owners are in breach

* The terms of the paramount clause are printed at p. 676, letter I, post.

† These questions are stated at p. 676, letter C, post.

on at least one ground, and, accordingly, I answer the question addressed to me in the affirmative and uphold the award.

When he comes to assess the damages, the umpire will have to determine in which of the ten respects, or, put another way, for how much of the loss of time he holds the owners responsible, and, in making this determination, some specific questions of law, which have already been argued before the umpire, will have to be decided. The most important of them is whether the owners are liable in respect of unseaworthiness which they exercised due diligence to prevent, and that, in turn, depends on whether the United States Carriage of Goods by Sea Act, 1936, was effectively incorporated in the charterparty. The main questions which the parties consider will have to be determined before the damages can be finally assessed have been agreed between them as follows: (i) Whether the United States Carriage of Goods by Sea Act (hereinafter called "the Act") affects the rights and liabilities of the parties under the charterparty. (ii) If the answer to (i) is "Yes", whether under the charterparty any material provisions of the Act affect the rights and liabilities of the parties in connection with (a) non-cargo-carrying voyages, (b) cargo-carrying voyages other than those to or from ports in the United States of America. (iii) Do the words "loss or damage" in s. 4 (1) and/or s. 4 (2) of the Act relate only to physical loss of or damage to goods?

The proper way to raise these questions is by way of a Consultative Case under s. 21 (1) (a) of the Arbitration Act, 1950. In order to avoid the necessity of an adjournment and a new statement of Case I have agreed, at the request of both sides, to treat the Case as if it contained these three questions stated as questions of law arising in the course of the reference, and I shall now proceed to answer them.

The United States Carriage of Goods by Sea Act, 1936, is the Act which embodies the Hague Rules, and it is on most points the same as the British Carriage of Goods by Sea Act, 1924. The Hague Rules, of course, apply only to bills of lading. Section 13 of the American Act, which is in the same terms as s. 3 of the British Act, provides that every bill of lading which is within the Act shall contain a statement that it shall have effect subject to the provisions of the Act. The overriding clause which is put on the bill of lading so that it may conform with this statutory provision is generally known as the clause paramount. Although the Hague Rules do not apply to charterparties, the parties to a voyage charterparty often wish to incorporate them. That is quite a general practice, well-known to those sitting and practising in this court, and I observe that the practice is referred to in SCRUTTON ON CHARTERPARTIES (16th Edn.), p. 456 and p. 464. There appears to be no set form of clause for this purpose.

In this case what the parties have done is to provide by cl. 52 of the charterparty, which is a typed clause, that certain sets of clauses such as the Chamber of Shipping War Risks Clauses, and so on, "are to be incorporated in this charterparty"; and included among those set out in cl. 52 is the paramount clause. The parties have then attached the various sets of clauses which they want incorporated, and they have attached a typed sheet headed "Paramount Clause", which sets out what is called the U.S. Clause Paramount, which will be found also printed in SCRUTTON at p. 464. It is in the following terms:

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved Apr. 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

A This method of incorporation, or attempted incorporation, of the Hague Rules seems also, as noted in SCRUTTON on p. 464, to be very common.

B But the paramount clause begins with: "This bill of lading". The charterparty is, of course, not a bill of lading and the charterers, therefore, submit that the parties have failed to make their charterparty subject to the Act or to incorporate the Act in the charterparty. They say that "bill of lading" cannot be interpreted to mean charterparty and, therefore, that the whole clause must, if necessary, be disregarded and treated as meaningless. As a matter of interpretation of the words "bill of lading" this is undoubtedly right, but interpretation is not quite the same thing as construction. The true construction of a document may require the court to reject words which cannot be interpreted in a way which makes them consistent with the object of the parties. The object of cl. 52 appears to me quite plainly to be to incorporate the clause paramount in the charterparty. I ought not to hold that they have failed in that object if there is any rule of construction which would enable me to give effect to it. I think there is such a rule in the principle *falsa demonstratio non nocet*.

D The paramount clause is to be treated just as if it were a typed clause in the charterparty. If it were, for example, cl. 1, it would appear almost immediately under the heading of the document which is "Tank Vessel Voyage Charterparty", and would read: "This bill of lading shall have effect subject to the . . . Act which shall be deemed to be incorporated herein", that is, in this charterparty. Although it is contended that the clause might refer to bills of lading which might be issued under the charterparty, it is conceded that there was no bill of lading then in existence to which the clause could have referred. E It seems to me to be plain, therefore, first, that it is the intention of the parties that "this" document in which the clause is contained is to be subject to the Act, and, secondly, that the provisions of the Act are to be incorporated in the same document: and that document is a charterparty. The case is not simply one in which the expression "This bill of lading" is inconsistent with the document into which the incorporation is to be made. If that were all, the clause paramount might, on the authority of *Hamilton & Co. v. Mackie & Sons* (1) ((1889), 5 T.L.R. 677), which I later consider, have to be disregarded. But as soon as the clause is written into the charterparty an inconsistency appears between two parts of the clause itself: "This bill of lading" and "herein" cannot stand together; one is false and one is true, and the principle *falsa demonstratio* can be used to determine which. I think that the description of the document as a bill of lading, which manifestly it is not, should be treated as *falsa demonstratio*.

F It is, of course, a very slapdash way of doing things. The parties would have done very much better to have noted the disapproval of the learned editors of SCRUTTON of the practice of frequently attaching the U.S. Clause Paramount to charterparties "for which it was clearly not originally intended" (*ibid.*, at p. 456) and to have studied the particularly carefully drawn clause in *Minister of Food v. Reardon Smith Line, Ltd.* (2) ([1951] 2 Lloyd's Rep. 265), which the editors commend. They would thus have saved a good deal of argument and, doubtless, also some expense. This court does not exist, however, for the purpose of correcting the exercises of commercial men but for the purpose of giving effect to their intentions where it can penetrate to them through the very often dubious forms of words which they use, and in this case I have no doubt what the intention was. Of course, as the editors of SCRUTTON truly say, and as later parts of this judgment will make manifest, the result of the method chosen, the incorporation of the Act en bloc, must be very doubtful; but it is a method which is so common in the composition of commercial documents that the court has become used to doing its best to find the right solution.

The conclusion that I have reached is that the clause paramount is incorporated in the charterparty, treating it as corrected to read: "This charterparty is subject to", etc. There arises next the question of incorporating the Act in the way in which the clause requires. The charterers submit that this cannot be done because of s. 5, which says: "The provisions of the Act shall not be applicable to charterparties". The way in which this sort of point should be dealt with has been decided by the Court of Appeal in *Hamilton & Co. v. Mackie & Sons* (1), a decision which was approved in the House of Lords in *Thomas & Co., Ltd. v. Portsea S.S. Co., Ltd.* (3) ([1912] A.C. 1). In the former case, the question related to the incorporation of charterparty terms in a bill of lading and LORD ESHER, M.R., said that the procedure to be followed was well settled (5 T.L.R. at p. 677):

"the conditions of the charterparty must be read verbatim into the bill of lading as though they were there printed in extenso. Then if it was found that any of the conditions of the charterparty on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded."

Since the clause paramount says that this charterparty shall be subject to the Act, it is insensible to incorporate into the clause paramount a condition which says that the Act shall not apply to charterparties; and, therefore, s. 5 must be rejected. I answer the first question addressed to me in the affirmative.

The material provisions of the Act, mentioned in the second question, I take to be a reference principally to s. 4 (1), which gives the shipowner immunity for loss or damage arising or resulting from unseaworthiness unless caused from want of due diligence. It is convenient to take the second part of the question first, that is whether the immunity covers voyages other than those to and from American ports; for that point follows naturally on the one which I have just been considering. There is a wide range of ports in the charterparty and, if the immunity were to relate only to voyages to and from American ports, the effect of it would be considerably cut down. The basis for this contention is in the general provision at the beginning of the American Act in the following terms:

"That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act."

There is also to be considered s. 13, which provides: "This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade . . ."

Together with s. 5 already quoted, these provisions define the sort of contracts to which the Act applies; it does not apply to charterparties, and it does apply to some, but not all, bills of lading. No part of these provisions can have application when the Act is applied to contracts outside its provisions, by virtue of a clause in the contract itself; and, in particular, the fact that the Act limits the categories of bills of lading to which it applies is no justification for saying that it applies only to a limited part of a charterparty. The extent of the application must be governed by the contract itself. I answer question 2 (b) in the affirmative.

The other part of this question inquires whether the immunity under s. 4 (1) of the Act covers non-cargo-carrying voyages. This vessel was first found to be unseaworthy when she was on her voyage from Baltimore in ballast to her first loading port. This is the sort of voyage that is meant by a non-cargo-carrying voyage and, no doubt, there were other similar voyages at a later stage of her service. Apart from the Act, the obligation expressed in cl. 1 of the charterparty is that the said vessel

"being tight, staunch and strong, and every way fitted for the voyage . . . shall, with all convenient despatch, sail and proceed to"

A the loading port. That is an express and absolute warranty of seaworthiness covering the voyage from Baltimore, and the question is whether it is displaced by the qualified warranty in the Act.

Section 4 (1), which I have already quoted and which confers the immunity when due diligence is proved, takes the reader back to s. 3 (1), which is as follows:

B "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(a) make the ship seaworthy; (b) properly man, equip, and supply the ship; (c) make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

C There can be no doubt that "the voyage" in this sub-section, when it is incorporated in a bill of lading, means the cargo-carrying voyage. The bill of lading is not concerned with anything else; and the Act is concerned (see s. 1 (e)) with the period beginning with the loading and ending with the discharging of the goods. The word "before" in this clause is, I think, intended to cover the period of preparation for the voyage and cannot be extended to cover any earlier voyage.

D There can likewise be no doubt that "the voyage" in the charterparty, for example in cl. 1, means the charterparty voyage, that is to say, it begins when the vessel proceeds to the port of loading. The question is, therefore: When s. 3 and s. 4 are translated into the charterparty, does "the voyage" therein take on a different meaning and become the charterparty voyage so that the immunity attaches from the beginning of that voyage? Or does it take its original meaning with it so that the absolute warranty governs the voyage to the port of loading and the qualified warranty relates only to the cargo-carrying voyage? It would not be startling to find a change of warranty in this way. Voyage charterparties often contain a cesser clause, and the result of that is that the bill of lading provisions often supersede the charterparty provisions, and, if the bill of lading is subject to the Hague Rules, the shipowner will find that his obligations are modified.

E If "voyage" were expressly defined in the Act, counsel for the owners, I think, concedes that it would carry its definition with it; but, in the absence of express definition, its meaning has to be gathered from its context, and, if the context is amplified, the meaning may be amplified also. In the context of a charterparty "voyage" means charterparty voyage. That is certainly its meaning in cl. 1 of the charterparty and, if s. 3 (1) of the Act is written into the charterparty as some later clause, the "voyage" referred to in it must, prima facie, be considered to be the same voyage.

G This is a strong argument and, for the purposes of this case, I am prepared to assume that it is right. Nevertheless, the presumption that "voyage" has the same meaning throughout may have to yield to any special indication of meaning and, treating s. 3 of the Act purely as a charterparty clause, I think that it does contain such an indication. Section 3 (1) (c) imposes on the shipowner the obligation to exercise due diligence to make the holds, etc., fit for the reception of cargo before and at the beginning of the voyage. If this obligation attaches at the time when the ship leaves in ballast for the port of loading, it would in many cases, probably in most, impose an unreasonable and unnecessary burden on the owner. It suggests very strongly that the voyage in this clause means the cargo-carrying voyage.

I If there are two possible meanings, I must have regard to the general principle that the express warranty of seaworthiness in cl. 1 of the charterparty ought to prevail except and in so far as it is clearly diminished. This well-established rule was stated by LORD WRIGHT, M.R., in *Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (4) ((1937), 42 Com. Cas. 286 at p. 291) as follows:

"if it is sought to effect a limitation of the overriding obligation to

provide a seaworthy ship (whether that is express or implied for this purpose does not matter), by other express terms of the charterparty of contract or affreightment, that result can only be achieved if perfectly clear, effective and precise words are used expressly stating that limitation."

For these reasons I consider that question 2 (a) should be answered in the negative.

The last question asks whether the words "loss or damage" in s. 4 (1) and (2) of the Act relate only to physical loss of or damage to goods. The words themselves are not qualified or limited by anything in the section. The Act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual liabilities are not limited to physical damage. A carrier may be liable for loss caused to the shipper by delay or misdelivery, even though the goods themselves are intact. I can see no reason why the general words "loss or damage" should be limited to physical loss or damage. The only limitation which is, I think, to be put on them is that which is to be derived from s. 2 which is headed: "Risks". The "loss or damage" must, in my opinion, arise in relation to the "loading, handling, stowage, carriage, custody, care, and discharge of such goods", but is subject to no other limitation. In *G. H. Renton & Co., Ltd. v. Palmyra Trading Corp'n. of Panama* (5) ([1956] 3 All E.R. 957), the House of Lords held that the words "loss or damage to or in connection with goods" in art. III, r. 8*, were not limited to actual loss of or physical damage to the goods; and I should give the same meaning to "in relation to" as to "in connection with".

In *Imperial Smelting Corp'n., Ltd. v. Joseph Constantine S.S. Line, Ltd.* (6) ([1940] 2 All E.R. 46), ATKINSON, J. (ibid., at p. 65), expressed obiter the view that art. IV referred only to "damage to goods". In the report in 66 Lloyd's Rep. 147 at p. 165, which was cited to me, he is reported as saying "damages or injury to goods"; I think it must be assumed that, on revision, he preferred the shorter phrase. In the House of Lords, VISCOUNT MAUGHAM ([1941] 2 All E.R. 165 at p. 179), also speaking obiter, approved ATKINSON, J.'s view. These dicta were relied on by counsel for the charterers as furnishing authority for the view that the words in s. 4 should be limited to physical loss or damage. In *Imperial Smelting Corp'n. v. Joseph Constantine S.S. Line, Ltd.* (6), the vessel, while waiting outside her loading port and before she became an arrived ship, sustained a serious boiler explosion with the result that the owners gave notice that they could not perform the charterparty. The charterers made a claim for damages for failure to load. The claim is not stated more precisely than that because the award with which the courts were dealing was an interim award on liability. Presumably, since no goods were on board or affected in any way, the claim can only have been based, as the claim in the present case apparently is, on a rise in freights. The charterparty incorporated the Hague Rules, and it was in that connection that the words "loss or damage" came to be considered as a very minor point in the case, the main point being frustration. ATKINSON, J., was not, therefore, considering a claim for delay in connection with goods or anything of that sort. His opinion that the Act† refers only to damage to goods must be considered in relation to the facts of the case, and does not, in my judgment, amount to authority for limiting the phrase to physical loss or damage. I, therefore, answer the third question in the negative.

It will have been observed that the type of damage apparently claimed in *Imperial Smelting Corp'n., Ltd. v. Joseph Constantine S.S. Line, Ltd.* (6) is not unlike the claim made in the present case. The parties did not, however, feel able to agree on any form of question wider than the one I have just discussed and answered. I agree with that attitude. Until the nature of the damages claimed is fully investigated and determined, it is not possible to decide finally

* Of the Hague Rules.

† I.e., the Carriage of Goods by Sea Act, 1924.

A whether the damage is or is not "in relation to" the operations which are set out in s. 2 and which I have quoted previously*.

Award upheld.

Solicitors: *Constant & Constant* (for the owners); *Waltons & Co.* (for the charterers).

B

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

BERRY v. ST. MARYLEBONE CORPORATION.

[CHANCERY DIVISION (Wynn-Parry, J.), February 22, 1957.]

C *Rates—Limitation of rates chargeable—Organisation concerned with the advancement of religion, education or social welfare—Theosophical Society in England—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).*

D

One of several main objects of a society was "(i) to form a nucleus of the universal brotherhood of humanity without distinction of race, creed, sex, caste or colour". By the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, a limit is placed on the amount of rates leviable in relation to hereditaments occupied for the purposes of an organisation whose main objects "are . . . concerned with the advancement of religion, education or social welfare" (s. 8 (1) (a))†. The court accepted the following explanation of the meaning of object (i), i.e., that it meant that the object was "to form an ever expanding group of persons who are aware of the universal brotherhood of man which is implied by the Fatherhood of God and who believe in working for the diminution and final abolition of all intolerance and discrimination relating to race, creed, sex, social class and colour."

E

F

Held: the society was not an organisation to which s. 8 (1) (a) related because object (i) was not solely the advancement of religion and education (*Re Macaulay's Estate*, [1943] Ch. 435, n. followed) and would justify activities that could not be considered to fall within the terms "social welfare", which connoted the provision of benefits or facilities tending directly to improve the health and condition of life of the class of persons concerned.

Dictum of LORD TUCKER in *Inland Revenue Comrs. v. Baddeley* ([1955] 1 All E.R. at p. 547) applied.

G

Per CURIAM: there is good ground for agreeing that the words "religion" and "education" were probably included in s. 8 (1) (a) in order that the benefit of the section might enure to bodies which, though concerned with religion or education, do not qualify as charities because they are of a private nature (see p. 683, letter D, post).

H

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

- (1) *Re Macaulay's Estate*, *Macaulay v. O'Donnell*, [1943] Ch. 435, n.; 8 Digest (Repl.) 438, 1287.
- (2) *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council*, [1957] 1 All E.R. 407.
- I (3) *Baddeley v. Inland Revenue Comrs.*, [1953] 2 All E.R. 233; [1953] Ch. 504; *revsd. on appeal*, H.L. sub nom. *Inland Revenue Comrs. v. Baddeley*, [1955] 1 All E.R. 525; [1955] A.C. 572; 35 Tax Cas. 661; 3rd Digest Supp.
- (4) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest (Repl.) 313, 1.

* See p. 680, letter C, ante.

† The relevant terms of this enactment are printed at p. 682, letter D, post.

Adjourned Summons.

The plaintiff, Alice Lilian Berry (suing on behalf of the Theosophical Society in England), applied to the court by originating summons for the determination of the question whether on a true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), the Theosophical Society in England was an organisation which was not established or conducted for profit and whose main objects were charitable or were otherwise concerned with the advancement of religion, education or social welfare.

G. G. Honeyman, Q.C., and *D. Taverne* for the plaintiff.

Geoffrey Cross, Q.C., and *J. L. Arnold* for the defendants.

WYNN-PARRY, J.: The question which is raised by this summons is whether on the true construction of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, the Theosophical Society in England is an organisation which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare. Section 8 (1), so far as material, reads as follows:

"This section applies to the following hereditaments, that is to say—
(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

In the first place it is clear that the society is not established or conducted for profit. It is equally clear that its main objects are the three objects which are set out in para. 2 of the constitution of the Theosophical Society in England and which read as follows:

"(i) To form a nucleus of the universal brotherhood of humanity without distinction of race, creed, sex, caste or colour. (ii) To encourage the study of comparative religion, philosophy and science. (iii) To investigate unexplained laws of nature and the powers latent in man."

Those objects have been the subject of consideration by the courts, including the House of Lords, in *Re Macaulay's Estate, Macaulay v. O'Donnell* (1) ([1943] Ch. 435, n.). It is clear from a perusal of the two speeches which are reported that those three objects are separate and distinct. In the course of his speech LORD BUCKMASTER said (*ibid.*, at p. 437):

"This by itself, however wise and estimable it may be, is certainly no charitable purpose, nor can I see that it is so connected with others which are stated as separate and distinct objects as to connect it into a charitable object, even if the latter objects could themselves be regarded as charitable."

In the course of his speech, LORD TOMLIN said (*ibid.*, at p. 438): "Each clause, in my opinion, expresses a distinct and independent object". The House of Lords held that the first object was not a charitable object and that was the ground of the decision in that case.

It becomes necessary to examine object (i) with a view to considering whether or not it is within the relief provided by s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Object (i) is explained in para. 5 of the plaintiff's affidavit. Strictly speaking, as LORD TOMLIN pointed out in the House of Lords, evidence purporting to interpret any object is not admissible, but, as their Lordships, to whose speeches I have referred, felt able for the purposes of their conclusions to adopt with approval the meaning put forward of the provisions which they were considering, I think I can follow the same course

A and accept as a satisfactory explanation that which is set out in para. 5 of the affidavit in support of the summons sworn by Mrs. Berry where it says:

B “Theosophists explain the meaning of object (i) in para. 2 hereof as follows:—to form an ever expanding group of persons who are aware of the universal brotherhood of man which is implied by the Fatherhood of God and who believe in working for the diminution and final abolition of all intolerance and discrimination relating to race, creed, sex, social class and colour.”

C That is, to form an ever-expanding body of persons who have certain beliefs and desire to work together to maintain them. As I have said, the House of Lords held that object (i) was not charitable and I think it must follow from that that they did not regard that object as being solely for the advancement of religion and education. It is, as counsel for the defendants pointed out, at first sight somewhat curious that after the first class of objects mentioned in s. 8 (1) (a), namely, charitable, there are repeated two of the subjects of good charitable gifts, namely, religion and education. There is good ground for agreeing with his suggestion that they were probably included in order that the benefit of the section might enure to bodies which, though concerned with religion or education, do not qualify as charities or charitable bodies within the legal meaning of charity because they are of a private nature. At any rate, there is no question of any private element in this case. On that reasoning it follows that in order that the plaintiff should succeed she must demonstrate that the first object is for social welfare purposes. Counsel for the plaintiff in his argument laid stress on the word “concerned” and submitted that the effect of the introduction of that word was that each object need not be wholly concerned with, for instance, religion or education or social welfare. I cannot accept that argument because to my mind it introduces such an element of uncertainty as would make the provision in the Act of 1955 quite unworkable. What test could be devised to say when a degree had been reached beyond which it would not be proper to allow an applicant the benefit of the section.

F The phrase “social welfare” is one the exact scope of which no judge has yet attempted to define. I do not propose to make the attempt myself and I doubt whether any judge ever will. In fact I share with LYNKEY, J.*, the feeling that it would be impossible to do so. There are some indications to be found in the decided cases: for instance, the statement in the judgment of G JENKINS, L.J., in *Baddeley v. Inland Revenue Comrs.* (3) ([1953] 2 All E.R. 233 at p. 250), which was the subject of criticism later in the House of Lords ([1955] 1 All E.R. 525 at p. 529). Then there is the passage from the speech of LORD TUCKER in the House of Lords which was cited to me and which reads ([1955] 1 All E.R. at p. 547):

H “In considering whether they fall within the fourth class of *Income Tax Special Purposes Comrs.* v. *Pemsel* (4) ([1891] A.C. 531), as the Court of Appeal have held, or within class 2—trusts for the advancement of education—as was submitted in the alternative for the first time before your Lordships, the words which, in my view, create the difficulty are ‘the promotion of social well-being’. This is an extremely vague phrase which may have different meanings to different minds, and may include things considered by some, but not by others, to be advantageous. It would appear to cover many of the activities of the so-called ‘welfare state’, and to include material benefits and advantages which have little or no relation to social ethics or good citizenship, concepts which are themselves not easily definable. I find it impossible to construe these trusts, as the Court of Appeal have done, in such a way as to restrict the operation of this language to promoting or

* See *Trustees of the National Deposit Friendly Society v. Skegness Urban District Council* (2) (ante, at p. 410).

inculcating those standards of secular conduct or behaviour expected of a good neighbour and a good citizen . . . ” A

It is true that the problem with which the court had to deal in that case was whether the provision in question was charitable or not, but it seems to me that the reasoning of LORD TUCKER in that passage which I have just read is applicable to such a provision as the one I have to consider in this case, viz., s. 8 (1) (a) of the Act of 1955. B

Object (i) as explained in para. 5 of the plaintiff's affidavit is extremely wide and, as pointed out by counsel for the defendants, would justify operations which could not by any stretch of the imagination be considered as within the phrase “social welfare”, however wide a construction were reasonably placed on that phrase. He gave two examples. One was that it would be perfectly legitimate under object (i) to further propaganda for the purposes of encouraging intermarriage between members of different races; and secondly that, again, it would be perfectly proper to conduct a propaganda campaign to break down the caste rules which obtain in India. As I have said, it would appear to me virtually impossible to attempt a definition of this phrase, but I am inclined to agree with counsel, Mr. Cross, that one must discover in the operation of the undertaking some direct impact on the proposed beneficiary, his example being a social centre established in Liverpool with a view to encouraging better relations among the various races which are to be found from time to time in that great port. While regarding it as no more than an indication and not a definition of what should properly be regarded as the content of the phrase “social welfare”, I would be content to adopt the suggestion as to its meaning which Mr. Cross put forward in argument, viz., the provision of benefits or facilities which tend directly to improve the health and condition of life of the class of persons concerned. C D E

In the result I come to the conclusion that even accepting that every activity which might be undertaken under object (i) could be described as a good object, and that, as has been observed in the House of Lords, different minds might differ on that matter, that, whatever be the true scope of the phrase “social welfare” object (i) is too wide to cover no more than the activities which might reasonably be said to fall within that phrase. F

For those reasons, therefore, I must answer the question in the sense that the main objects of the society are not concerned with the advancement of social welfare.

Declaration accordingly. G

Solicitors: *Gibson & Weldon*, agents for *Berry & Berry*, Tunbridge Wells (for the plaintiff); *Sharpe, Pritchard & Co.* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

A HAYES v. BRISTOL PLANT HIRE, LTD. AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), February 14, 15, 19, 20, 21, 1957.]

Company—Director—Exclusion from board—Action claiming equitable relief—What is a sufficient proprietary interest to support the claim.

B By resolution of the board of the defendant company, passed by certain defendant directors in the absence of the plaintiff, who was also a director, the exclusion of the plaintiff from the board for his absence from board meetings, was confirmed. The consequence of the resolution, if it were valid, was that the plaintiff's office as a director of the company would be vacated. The articles of association did not require a director to hold a share qualification and did not confer on directors the right to any specified remuneration, but provided that, subject to the terms of any agreement between a director and the company, the directors should be paid, by way of remuneration for their services, such sums as the company in general meeting might prescribe. The plaintiff had no service agreement with the company. He was a shareholder in the company. In an action for a declaration, among other declarations, that the resolution confirming the exclusion of the plaintiff was invalid and for consequential relief by injunction, the defendants objected, as a preliminary point, that the plaintiff had no such proprietary interest as entitled him to equitable relief by declaration and injunction.

E **Held:** the action would not be stopped on the preliminary objection because, although the articles of association of the company did not require a director to hold a share qualification and although they did not confer on directors a right to specified remuneration, yet the plaintiff had a sufficient proprietary interest to enable him to pursue an action for relief by way of declaration and injunction against his exclusion from the board.

Dicta of SIR GEORGE JESSEL, M.R., in *Pulbrook v. Richmond Consolidated Mining Co.* ((1878), 9 Ch.D. at pp. 612, 613) applied.

F [As to directors not being entitled to prevent a properly elected director acting, see 6 HALSBURY'S LAWS (3rd Edn.) 295, para. 598, note (f); and for cases on the subject, see 9 DIGEST (Repl.) 485, 3183-3187.

As to action by member against a company for an individual wrong, see 6 HALSBURY'S LAWS (3rd Edn.) 447, para. 865.]

G Case referred to:

(1) *Pulbrook v. Richmond Consolidated Mining Co.*, (1878), 9 Ch.D. 610; 48 L.J.Ch. 65; 9 Digest (Repl.) 485, 3038.

Action.

H For the purposes of the preliminary point referred to below (and to which this report is limited) the facts stated in the statement of claim were accepted by the court as true. So far as relevant they were as follows.

I The defendant company was incorporated on June 14, 1950, as a private company limited by shares. At all material times, the issued capital of the company was 3,400 ordinary shares of £1 each of which the plaintiff held one thousand. Prior to Jan. 3, 1956, the directors of the company had at all material times been five in number, namely, the plaintiff, his brother (who was not a party to the action) and the defendants Davison, Warne and Lyons. At a meeting of the board of directors of the company held on Dec. 22, 1955, at which the only directors present were the defendants Davison, Warne and Lyons, it was resolved that the plaintiff's exclusion from the board by reason of his absence from board meetings be confirmed in accordance with the provisions of art. 23 (3) of the company's articles of association. At the adjourned board meeting held on Jan. 3, 1956, of which the plaintiff received no notice and at which he was not present, the meeting purported to appoint the defendant, Simmonds, to the board. The plaintiff asserted that he had been wrongfully

excluded from the board of directors and claimed declarations (among others) A
that the resolutions passed on Dec. 22, 1955, and on Jan. 3, 1956, were invalid,
and consequential injunctions.

A preliminary point was taken by the defendants that the action was mis-
conceived and that the court had no jurisdiction to entertain it further in that
the plaintiff (who in fact had no service agreement with the company) had no
such proprietary interest as to enable him to invoke the equitable jurisdiction B
of the court to grant declarations and injunctions.

Charles Russell, Q.C., and Nigel Warren for the plaintiff.

J. B. Lindon, Q.C., and M. M. Wheeler for the defendants.

WYNN-PARRY, J.: Counsel, on behalf of the defendants, has taken a
point which is essentially in the nature of a preliminary point and which, if
well taken, would, he submits, entitle the defendants here and now to have the
action dismissed. C

The action is one in which the plaintiff complains of two things; first that, in
circumstances which are detailed in the statement of claim and which I do
not propose to repeat for the purposes of this judgment, he has been expelled
from his office of director, and in his contention wrongly. The second thing of D
which he complains is that the two defendants Warne and Lyons have purported
to fill the vacancy thereby said to have been created by appointing the last
defendant, Thomas Harvey Simmonds, as a director. For the purpose of
considering the preliminary point, which is that the action is misconceived and
that I have no jurisdiction to entertain it further, or, alternatively, that at the
end of the day it will necessarily be the position that I should not grant either E
the declarations or the injunctions asked for, I am bound to consider only the
statement of claim and the documents referred to in the statement of claim.
Further, I am bound to proceed on the basis that every statement in the state-
ment of claim and every assertion in the documents therein referred to are true.

In the statement of claim the plaintiff asserts that he is and has at all material
times been a director. So I must proceed on that basis. The point taken by F
counsel for the defendants is that, even assuming that fact in favour of the
plaintiff, he is not in a position to maintain this action because when the relevant
articles of association are looked at it will be found that he has no such prop-
rietary interest as, having regard to the authorities, will allow him to invoke
this equitable jurisdiction viz., the jurisdiction, by way of a declaration and,
following that declaration, a consequential injunction. G

It is quite true that under the articles of association those who are directors of
this company need not be shareholders, and it is also true that the articles do
not confer any direct right to a stipulated amount of remuneration in any
year, but provide, by art. 26, that: H

“Subject to the terms of any agreement between them and the company,
the directors shall be paid out of the funds of the company, by way of H
remuneration for their services, such sums as the company, in general
meeting, may from time to time prescribe . . .”

The article also refers to the payment of expenses subject to the sanction of the
board.

On those facts counsel for the defendants contends that there is no, or no
sufficient, proprietary interest vested in the plaintiff as director. He cited to I
me a number of cases* the principles underlying which I wholly accept. It is
perfectly clear that in the case of any relationship which involves a personal
relationship this court will not intervene by way of injunction to enforce on a

* These included *Pickering v. Ely (Bishop)* (1842), 2 Y. & C. Ch. Cas. 249; *Stocker v. Brockelbank* (1851), 3 Mac. & G. 250; *Johnson v. Shrewsbury & Birmingham Ry. Co.* (1853), 3 De G.M. & G. 914; and, in relation to the jurisdiction being founded on property, e.g., *Rigby v. Connol* (1880), 14 Ch.D. 482; and cf. as regards such cases 5 HALSBURY'S LAWS (3rd Edn.) 264.

A person or on a limited company in the position of an employer a person whom the employer or the company, expressing its view through the shareholders, does not want; and it is perfectly true also to say that the cases establish that the basis of the court's interference is the existence of some right of property in the person seeking the relief.

In dealing with this as a preliminary point I have necessarily no information on which I could act to enable me to proceed on the basis that the majority of the members of this company do not want the plaintiff to continue as a director, and I therefore shut that consideration and the authorities relevant thereto out of my mind. It appears to me that, for the purpose of deciding this preliminary point, it is proper to concentrate on the question whether or not the plaintiff has a sufficient proprietary interest.

The nearest case to the present one is *Pulbrook v. Richmond Consolidated Mining Co.* (1) ((1878), 9 Ch.D. 610). In that case an individual director sued the company in question and the other directors, the basis of his action being that he was being improperly excluded from the board room and from otherwise discharging his duties as a director, for the other directors treated him as not being a director at all. I think that the solution to the problem presented by this preliminary point is to be found in a proper appreciation of certain passages in the judgment of SIR GEORGE JESSEL, M.R. The matter came before him on a motion, and he said (*ibid.*, at p. 612):

"This is a motion which raises some points of great importance. The first question is, whether a director who is improperly and without cause excluded by his brother directors from the board from which they claim the right to exclude him, is entitled to an order restraining his brother directors from so excluding him."

That is exactly the question which arises here, because I must proceed on the basis that the plaintiff is a director and that those who seek to treat him as not being a director are not acting properly. SIR GEORGE JESSEL, M.R., continues (*ibid.*):

"In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board."

Counsel for the defendants founds his argument for distinguishing that case from the present case on those two statements in the sentence that I have just read, namely, that in the case before the Master of the Rolls a man was necessarily a shareholder in order to be a director because the articles required that he should hold that qualification, and secondly that the Master of the Rolls said: "he is entitled to fees and remuneration for his services". Unfortunately, the statement of facts and, indeed, also the arguments are silent as to the form which the article relating to remuneration of directors took in that case and one does not know whether it provided for the payment of a specific sum to each of the directors or was in the form of cl. 76 of the present Table A and art. 26 of the special articles of the company. I shall have to consider further that question in a moment. The Master of the Rolls continued (9 Ch.D. at p. 612):

"He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable."

That sentence establishes beyond doubt that, other things being equal, and the director having a sufficient proprietary interest, he is in a position, so far as procedure is concerned, to maintain an action by himself in his own name. The Master of the Rolls continues (*ibid.*):

"He has a right by the constitution of the company to take a part in its

management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence. Besides that, he is in the position of a shareholder . . .”

I pause there because it appears to me that, in order to give full effect to the statement that “It may affect his individual interest as a shareholder as well as his liability as a director”, the Master of the Rolls is contrasting two capacities, and when he says “Besides that, he is in the position of a shareholder” he is treating the position of the plaintiff as a shareholder separately from his position of a director. Those two passages throw light on the effect which is properly to be given to the previous statement in the judgment (9 Ch.D. at p. 612): “In this case a man is necessarily a shareholder”. I think that all that the Master of the Rolls meant in saying that was that in fact, as a result of the framework of the articles of association, a director was also a shareholder, but that his reasoning must equally apply where the articles do not require that a director should hold a qualification, but as a matter of fact he is, as well as being a director, a shareholder, because if he is a shareholder then he must as such be entitled to the degree of protection which is mentioned by the Master of the Rolls in the passages from his judgment which I have already read. I proceed to recite his judgment, beginning again at the sentence from which I broke off (*ibid.*):

“Besides that, he is in the position of a shareholder, of a managing partner in the affairs of the company, and he has a right to remain managing partner, and to receive remuneration for his services.”

Now again I pause to remind myself that I am dealing with a preliminary point going to jurisdiction. It is open to the court to stop an action such as this in limine if, on a point being properly taken, it thinks right to do so, and generally speaking, if a point as to jurisdiction is taken, it is the duty of a court to bring the proceedings to as early an end as possible. At the same time, it is quite clearly established that it is a jurisdiction which should only be used very carefully and in circumstances where there is no possibility of doubt as to the lack of jurisdiction. It is against that background that I proceed to consider what appears to me to be perhaps the most vital aspect of this matter reflected in the language of the Master of the Rolls where he says “he has a right to remain managing partner, and to receive remuneration for his services”. Counsel has urged on me that that phrase should be construed as applying only where the articles in question give an express right, for instance by reference to a specific sum, to a director to receive remuneration in each year; but, in my view, particularly on a point such as this, it would be wrong to give such a narrow meaning to the phrase. I am not prepared to accede to the suggestion that such an article as art. 26 gives no more than what was described as a *spes successionis*. It gives the man who is a director a right, if the company decide to pay the directors in any year for their services, to share in that remuneration, and that seems to me to be more than what is properly to be described as a *spes successionis*. I think that it is, for the purposes of the problem which I have to consider, a sufficient property interest. I cannot help feeling, having regard to what would be the consequences if I had taken a different view, that it would be a denial of justice to prevent a person in the position of this plaintiff from pursuing what otherwise is a proper right of action, because the Master of the Rolls goes on (*ibid.*, at p. 613):

“He has what is commonly called a right of action, and those decisions which say that, where a wrong is done to the company by the exclusion

A of a director from board meetings, the company may sue and must sue for that wrong, do not apply to the case of wrong done simply to an individual."

In those circumstances, it appears to me that I should not be justified in bringing this action to an end at this stage, and therefore it must proceed.

[His LORDSHIP then proceeded to hear the action.]

B Solicitors: *Robins, Hay & Waters*, agents for *Burges, Salmon & Co.*, Bristol (for the plaintiff); *Ralph Bond & Rutherford*, agents for *Veale & Co.*, Bristol (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

C

NOTE.

R. v. WILLIAMS AND ANOTHER.

D [COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Gorman, JJ.), February 25, 1957.]

Criminal Law—Practice—Report of inquiries subsequent to trial not to be sent to Court of Criminal Appeal.

Application.

E The applicants, Christopher Joseph Williams and Edward Bell, sought leave to appeal against conviction. Williams and Bell (who pleaded guilty) were convicted of robbery with aggravation before the recorder at the Crown Court at Liverpool on Dec. 10, 1956, and Williams was sentenced to five years' imprisonment and Bell to three years' imprisonment.

F The applicants did not appear and were not represented.

CASSELS, J., delivered the judgment of the court: The court is going to refuse leave to appeal in this case but desires to make one or two observations.

G It is an appeal against conviction at the Crown Court at Liverpool where the applicant Bell pleaded guilty, and the applicant Williams pleaded not guilty. Williams was sentenced to five years' imprisonment and Bell to three years' imprisonment for robbery with aggravation. The learned recorder, before whom the case was tried, has seen fit to send to the court a detective sergeant's report as the result of inquiries which have been made subsequent to the trial and in respect of certain allegations which were made by one of the applicants against the police. This court sometimes asks for a special report, and sometimes the Home Office asks for a special report, but we think it is undesirable that recorders, or judges, or anybody else before whom a case has been tried should go out of their way to make further inquiries because this court has to make up its mind on the evidence which was actually given before the court of trial and on what took place at that court. In this particular case, a very long and detailed report has been made and observations put forward on the allegations which one of the applicants made. It is quite unnecessary and of no assistance to this court, and

I we desire that the practice should not be repeated.

Application refused.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

Re RANSOME'S WILL TRUSTS.
MOBERLEY AND OTHERS *v.* RANSOME AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), January 30, 31, February 1, 7, 22, 1957.]

Will—Class gift—Time of ascertainment of class—Gift to children of grandson living on the attainment of the age of twenty-one by the youngest of such children—Only one such child living at date of death of testatrix—Possibility of birth of further children—Rights of existing child.

Accumulation—Accumulation of income for excessive period—Accumulation directed for the benefit of a class—Interests of members of class contingent—Cesser of statutory period—Entitlement to surplus income—Rights on attainment of twenty-one of person having contingent interest—Direction to accumulate excluding statutory power of maintenance—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 164 (1) (b)—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 31 (1) (ii), s. 69 (2).

By her will dated Jan. 20, 1930, a testatrix directed the division of her residuary estate into four shares, two of which were to be held by "the Ransome Trustees" (as therein defined) on the trusts thereafter declared, and she directed that her ordinary shares in R. & H., Ltd., should be allocated in equal portions to the four shares. The testatrix further provided that the Ransome trustees should invest one of the shares of the residuary estate which she called the Wilson Ransome Trust Fund and hold the same on trust to pay some annuities. She authorised the payment out of the Wilson Ransome Trust Fund of college fees of her grandson W.A.R., and subject thereto, she directed the Ransome trustees to stand possessed of the Wilson Ransome Trust Fund in trust for all or any of the children or child of her son, Wilson (other than R.) who being male should attain the age of twenty-one years or being female attain that age or marry. The grandsons' shares were settled. By a codicil dated Aug. 14, 1934, to her will the testatrix recited that she desired to make some provision for the education of the children of her grandson R., and she directed that the Ransome trustees should hold one-fifth part of the shares of R. & H., Ltd., held by them as part of the Wilson Ransome Trust Fund on trust to pay and apply any dividend declared thereon towards the expenses of the education of the children of R. as the Ransome trustees thought fit, and she further directed that "any part of the income not expended as aforesaid shall be accumulated until the youngest child of my said grandson shall attain the age of twenty-one years". The codicil proceeded: "Upon the youngest child of my said grandson attaining the age of twenty-one years the Ransome trustees shall stand possessed of the said one-fifth part of the said shares and the accumulated income therefrom upon trust for such of the children of my said grandson as shall be then living and if more than one in equal shares. Should no child of my said grandson attain the age of twenty-one years my trustees shall hold the said shares and the accumulated income thereof upon the trusts declared in my said will of and concerning the Wilson Ransome Trust Fund". In all other respects the testatrix confirmed her will. She died on July 6, 1935. The grandson R. (and other children of Wilson the son of the testatrix) survived the testatrix and had at the date of her death two children, viz., D. who was born on June 24, 1930, and a daughter who was born in 1932 and died an infant and unmarried in 1948. R. had no further children, but married for the second time in 1953. D., having attained the age of twenty-one years, claimed to be absolutely entitled to the said one-fifth part of the shares in R. & H., Ltd. (called below "the special fund"). It was conceded that the ultimate gift, apart from the direction to accumulate, would carry the intermediate income.

A **Held:** (i) D. was not absolutely entitled to the special fund for the following reasons:—

(a) as a matter of construction of the codicil, the gift of the special fund was not limited to take effect on the attainment of the age of twenty-one by the youngest child of R. living at date of the death of the testatrix.

B (b) although the court leaned towards early vesting, the court had never applied that policy to permit the artificially early closing of a class of beneficiaries except where there was someone in existence who, on the natural construction of the language of the will, was entitled to a share absolutely vested in interest and possession (although the quantum of the vested share was not known); and, on the construction of the codicil, D. was entitled to no such share.

C *Kevern v. Williams* ((1832), 5 Sim. 171) and *Elliott v. Elliott* ((1841), 12 Sim. 276) criticised and distinguished.

(ii) D. was not entitled to receive the surplus income after the expiration of the permitted period of accumulation (viz., the period permitted by s. 164 (1) (b) of the Law of Property Act, 1925), because

D (a) his interest was contingent on his being alive when the youngest son of R. attained the age of twenty-one, and, although the ultimate gift carried the intermediate income, this meant in the circumstances that it would (so far as lawful) be accumulated for the persons ultimately entitled to vested interests; and that was the case even assuming that D. might himself prove to be the youngest child of R. who attained twenty-one; and

E (b) D. could not claim the income by virtue of the Trustee Act, 1925, s. 31 (1) (ii), because the express direction to accumulate income disclosed a "contrary intention" within s. 69 (2) of that Act and thus excluded s. 31 (1) (ii), and the fact that the direction to accumulate was partially invalidated by the Law of Property Act, 1925, s. 164, did not render s. 31 (1) (ii) applicable as from the date of the direction becoming invalid.

F *Re Turner's Will Trusts* ([1936] 2 All E.R. 1435) and *Re Watt's Will Trusts* ([1936] 2 All E.R. 1555) applied.

(iii) on the true construction of the will and codicil the surplus income as from the date of the invalidity of the direction to accumulate it, must be held on the trusts of the will relating to the Wilson Ransome Trust Fund.

G [For the Law of Property Act, 1925, s. 164, see 20 HALSBURY'S STATUTES (2nd Edn.) 771; and for the Trustee Act, 1925, s. 31, s. 69, see 26 HALSBURY'S STATUTES (2nd Edn.) 94, 157.]

Cases referred to:

- H** (1) *Re Manners, Public Trustee v. Manners*, [1955] 3 All E.R. 83; 3rd Digest Supp.
- (2) *Andrews v. Partington*, (1791), 3 Bro. C.C. 401; 29 E.R. 610; 44 Digest 768, 6266.
- (3) *Mainwaring v. Beevor*, (1849), 8 Hare, 44; 19 L.J.Ch. 396; 68 E.R. 266; 44 Digest 771, 6297.
- (4) *Re Bleckly, Bleckly v. Bleckly*, [1951] 1 All E.R. 1064; [1951] Ch. 740; 2nd Digest Supp.
- I** (5) *Kevern v. Williams*, (1832), 5 Sim. 171; 58 E.R. 301; 44 Digest 766, 6248.
- (6) *Elliott v. Elliott*, (1841), 12 Sim. 276; 10 L.J.Ch. 363; 59 E.R. 1137; 44 Digest 766, 6250.
- (7) *Re Wenmoth's Estate, Wenmoth v. Wenmoth*, (1887), 37 Ch.D. 266; 57 L.J.Ch. 649; 57 L.T. 709; 44 Digest 568, 3857.
- (8) *Re Coppard's Estate, Howlett v. Hodson*, (1887), 35 Ch.D. 350; 56 L.J.Ch. 606; 56 L.T. 359; 44 Digest 568, 3856.
- (9) *Re Pilkington, Pilkington v. Pilkington*, (1892), 29 L.R.Ir. 370; 44 Digest 768, 6266 xi.

- (10) *Re Watt's Will Trusts*, *Watt v. Watt*, [1936] 2 All E.R. 1555; Digest Supp. A
- (11) *Re Whitehead*, *Whitehead v. Whitehead*, (June 16, 1955), unreported.
- (12) *Re Conyngham*, *Conyngham v. Conyngham*, [1921] 1 Ch. 491; 90 L.J.Ch. 364; 125 L.T. 300; 44 Digest 431, 2591.
- (13) *Re Turner's Will Trusts*, *District Bank, Ltd. v. Turner*, [1936] 2 All E.R. 1435; [1937] Ch. 15; 106 L.J.Ch. 58; 155 L.T. 266; Digest Supp.
- (14) *Ward v. Van der Loeff*, *Burnyeat v. Van der Loeff*, [1924] A.C. 653; 93 B L.J.Ch. 397; 131 L.T. 292; 44 Digest 336, 1662.

Adjourned Summons.

The trustees of the will (and of the Wilson Ransome Trust Fund constituted pursuant to the will) of Elizabeth Ransome, deceased, issued an originating summons for the determination of the following questions: (i) Whether on the true construction of the fourth codicil to the said will (a) the shares of Ruston & Hornsby, Ltd., and the accumulations of income thereof which by cl. 3 of such codicil were directed, on the youngest child of the testatrix' grandson Robert Charles Ely Ransome attaining the age of twenty-one years, to be held on trust "for such of the children of my said grandson as shall then be living and if more than one in equal shares" vested absolutely in the first defendant, David Robert Ransome, on his attaining the age of twenty-one; or (b) any future child or children of Robert Charles Ely Ransome who were living when the youngest of such future children attained the age of twenty-one would be entitled to participate in such shares and accumulations; or (c) how otherwise such shares and accumulations were held. (ii) If the shares and accumulations did not become absolutely vested in the first defendant, David Robert Ransome, on his attaining the age of twenty-one whether (a) the testatrix died intestate in respect of the shares and accumulations accruing during the period commencing at the expiration of twenty-one years from the death of the testatrix and continuing until the death of Robert Charles Ely Ransome and so long thereafter as there was some child of Robert Charles Ely Ransome living under the age of twenty-one; or (b) such income ought to be paid divided and applied to and among the persons who would be entitled thereto or for whose benefit the same would be applicable if the capital from which it was derived formed part of the Wilson Ransome Trust Fund and was accordingly held on the trusts and subject to the provisions declared in cl. 28 and cl. 29 of the will of the testatrix, or (c) such income was held on some other and if so what trusts.

Robert Charles Ely Ransome survived the testatrix and at the date of her death had two children, viz., the first defendant, David Robert Ransome who subsequently attained the age of twenty-one, and a daughter who died unmarried while an infant. Robert Charles Ely Ransome (who was the seventh defendant) had no further children.

E. Blanshard Stamp for the trustees of the will and of the Wilson Ransome Trust Fund.

Nigel Warren for the first defendant, David Robert Ransome.

Arthur Bagnall for the second, third, fourth and fifth defendants, grandchildren of the testatrix.

H. E. Francis for the sixth and seventh defendants, interested on intestacy.

Cur. adv. vult.

Feb. 22. UPJOHN, J., read the following judgment: This summons raises a number of interesting points on the effect of a gift contingent on a youngest child attaining twenty-one and on the Thellusson Act, now s. 164 of the Law of Property Act, 1925. The problems arise on the true construction of the fourth codicil as slightly amended by the fifth codicil dated respectively Aug. 14, 1934, and June 12, 1935, of Elizabeth Ransome who died on July 6, 1935, but a brief recital of parts of her will dated Jan. 20, 1930, is first necessary.

I can go straight to cl. 24 of the will where the testatrix directed her residuary estate to be divided into four shares and directed that two shares should be

- A held by certain persons described as "the Ransome Trustees" to be held by them on the trusts thereafter declared. By cl. 25 the testatrix directed that in the division of her residuary estate her trustees should allocate "my ordinary shares in Ruston & Hornsby, Ltd. . . . in equal portions to the four shares of residue". By cl. 27 the testatrix directed that the Ransome trustees should invest one of the shares in the residuary estate which she called "the Wilson Ransome Trust Fund" on trust to pay certain annuities and she authorised the Ransome trustees to pay out of the income of the Wilson Ransome Trust Fund the college fees while at Haileybury of her grandson Wilson Arthur Ransome. By cl. 28 subject to the payments provided in cl. 27, she directed that the Ransome trustees should stand possessed of the Wilson Ransome Trust Fund in trust for all or any of the children or child of her son Wilson
- C other than her grandson Robert Charles Ely Ransome who being male should attain the age of twenty-one years or being female attain that age or marry. There followed in cl. 29 and cl. 30 certain provisions for hotchpot and a settlement of the grandsons' shares on protective trusts for the benefit of each such grandchild and after the termination of such trust on trust for the children or child of such grandchild as he should appoint and in default of appointment equally.
- D So far no difficulty arises.

The effect of the fourth codicil was to settle 2,015 Ruston & Hornsby shares on certain trusts, but by the fifth codicil the testatrix directed that in lieu of that figure should be substituted the words "one-fifth part" and I will therefore read the fourth codicil as modified by the fifth codicil:

- E "2. Whereas out of the Wilson Ransome Trust Fund mentioned in my said will I am desirous of making some provision for the education of the children of my said grandson Robert Charles Ely Ransome should there be any dividends received from the shares in Ruston & Hornsby, Ltd., to be held by the Ransome trustees as part of the Wilson Ransome Trust Fund and by reason thereof the income of such fund should be increased so that
- F payment may be made thereout without injustice to the remaining grandchildren of my said son Wilson. Now I hereby direct that the Ransome trustees shall hold one-fifth part of the shares of Ruston & Hornsby, Ltd., held by them as part of the Wilson Ransome Trust Fund upon trust to pay and apply any dividend declared thereon for or towards the expenses of the education of the children or child of my grandson Robert Charles Ely
- G Ransome in such manner as the Ransome trustees shall think best but so that they shall personally see to the payment of the costs and expenses of such education authorised by them and shall not devote any part of the said income in payment for the cost of any education not specifically authorised by them And I direct that any part of the income not expended as aforesaid shall be accumulated until the youngest child of my said grandchild shall attain the age of twenty-one years.

- H "3. Upon the youngest child of my said grandson attaining the age of twenty-one years the Ransome trustees shall stand possessed of the said one-fifth part of the said shares and the accumulated income therefrom upon trust for such of the children of my said grandson as shall be then living and if more than one in equal shares.

- I "4. Should no child of my said grandson attain the age of twenty-one years my trustees shall hold the said shares and the accumulated income thereof upon the trusts declared in my said will of and concerning the Wilson Ransome Trust Fund.

"5. In all other respects I confirm my said will as altered by the said first, second and third codicils thereto."

This fund of Ruston & Hornsby shares has in argument been called the special fund and I will so describe it. As appears from the will, the testatrix had a

number of children, including her son Charles Wilson Ransome who had predeceased her. Another of her children is the sixth defendant who is interested on an intestacy.

Charles Wilson Ransome left five children who survived the testatrix, that is the second to fifth defendants inclusive, and the seventh defendant, Robert Charles Ely Ransome whom I will call "Robert" who is also interested on an intestacy. Robert has been twice married. Of the first marriage there were two children, the first defendant, David Robert Ransome, whom I will call "David" who was born on June 24, 1930, and a daughter born in 1932 who died in 1948 an infant and unmarried. Of the second marriage, which took place in 1953, there has been no child.

Counsel for David claims that on the true construction of the fourth codicil (which I will call "the codicil") he is absolutely and indefeasibly entitled to the whole capital and income of the special fund for he submits that the gift in cl. 3 of the codicil is a gift on the youngest child of Robert living at the testatrix' death attaining the age of twenty-one; David, being the only child living at the testatrix' death who has attained twenty-one, is therefore entitled. In support of this argument he submits that the special fund was primarily concerned with the education of Robert's children and that the testatrix had in mind only the children born in her lifetime. He points to the comparable provisions in relation to the education of Wilson Arthur while at Haileybury. He points out truly enough that at the time of the will Robert had no children, but that at the time the codicil was executed he had two. I am quite unable to accept this submission. As a matter of language the relevant terms of the codicil seem to me to be reasonably clear. A gift for such of the children of A as shall be living at a given date *prima facie* means all the children of A whenever born who are living at that date. I see nothing in the provisions for education in cl. 2 to preclude the application of income of the special fund for the education of the children of Robert whenever born. Indeed the direction to accumulate the balance of income not expended until the youngest child of Robert should attain twenty-one (and for the purpose of construction I ignore s. 164 of the Law of Property Act, 1925) seems to indicate clearly that the testatrix intended that all children of Robert whenever born should be educated out of the fund. Then when the youngest attained twenty-one the fund was to be divided among all his children then living. I therefore reject that submission.

Then it is said that the policy of the law favours early vesting and that I must apply some artificial construction which compels me, notwithstanding the conclusion I have reached as to the meaning of the language used by the testatrix, to hold that the class of Robert's children to take under the provisions of the codicil closed on the death of the testatrix. I have been referred to a number of authorities and it must be conceded that the policy in favour of early vesting has created certain artificial rules of construction. Thus an immediate gift to all the children of A is (contrary to its natural meaning) construed as a gift to the children living at the death of the testator, to the exclusion of after born children. That is purely a rule of convenience. A recent example of the application of that rule is to be found in *Re Manners, Public Trustee v. Manners* (1) ([1955] 3 All E.R. 83), where I held that a direction only to distribute the share on the youngest attaining twenty-one did not evince a contrary intention to displace the rule, it being conceded that the gift vested absolutely on the death. A similar rule of construction operates when there is a gift to a class after a life interest. There the class closes when the life interest drops. Another example of the result of this policy of law is to be found in the well-known rule in *Andrews v. Partington* (2) ((1791), 3 Bro. C.C. 401). Where there is a class gift to the children of A. when they attain twenty-one, the class closes when the eldest child attains twenty-one. If the gift is after a life interest the closing of the class is postponed accordingly. That rule is said to be based partly on

A convenience and partly on an inconsistency in a gift to all the children of A when they attain twenty-one for a child attaining twenty-one has a right to demand his share: see *Mainwaring v. Beevor* (3) ((1849), 8 Hare, 44).

These rules are applied to enable a member of the class who has a share vested absolutely both in interest and possession to receive his share and that seems to me to be the whole reason for these rules. Thus, for example, if in the case of an immediate gift to the children of A, there is no child in existence on the death of the testator, the rule is not applied and it appears that the class remains open and the gift is given its natural construction, so as to include all the children of A whenever born: see *Mainwaring v. Beevor* (3); *Re Bleckly, Bleckly v. Bleckly* (4) ([1951] 1 All E.R. 1064 at p. 1071). It is said, however, that there are certain authorities which enable and indeed compel me to depart from the language that the testatrix has used. The first of these in point of time is *Kevern v. Williams* (5) ((1832), 5 Sim. 171), where there was a gift for the grandchildren of C to be by them received in equal proportions when they should severally attain the age of twenty-five years. In a very short judgment, SIR LANCELOT SHADWELL, V.-C., said that those only of the grandchildren were to take who were in esse at the death of the tenant for life. This case has not escaped criticism, but a possible explanation of it seems to me to be that the Vice-Chancellor may have treated the gift as vesting at the death but the time of payment was postponed until each should respectively attain twenty-five years. In support of that view it may be pointed out that in the next case which I must mention, *Elliott v. Elliott* (6) ((1841), 12 Sim. 276), which was decided some nine years later, Mr. Knight Bruce could hardly have failed to cite it in support of his argument before the same Vice-Chancellor had he thought that it was the case of a gift contingent on attaining twenty-five. If that is not the true explanation of it then it is open to the same criticisms which have been directed at *Elliott v. Elliott* (6) where there was a gift to all and every the children of the testatrix' daughter in equal shares when they should attain twenty-two. SIR LANCELOT SHADWELL, V.-C., said in a very short judgment (*ibid.*, at p. 277):

"I see no objection, in principle, to holding that by the description 'all and every the children, sons and daughters of my daughter Elizabeth Elliott', the testator meant those children who were then living or might be living at his death; and then there is no objection to the gift."

In that case the gift was undeniably contingent and it has been much criticised on the ground that it was an attempt to get round the rule against remoteness. WIGRAM, V.-C., criticised it on that ground in *Mainwaring v. Beevor* (3), as did CHITTY, J., in *Re Wenmoth's Estate, Wenmoth v. Wenmoth* (7) ((1887), 37 Ch.D. 266). STIRLING, J., followed it with obvious reluctance in *Re Coppard's Estate, Howlett v. Hodson* (8) ((1887), 35 Ch.D. 350). He did so on the ground that it had stood for over forty years without being dissented from or even doubted and he felt that it was for the Court of Appeal to set it aside and not him. Apparently he was not referred to the criticism of the case in *Mainwaring v. Beevor* (3). *Elliott v. Elliott* (6) was further criticised in the Irish case of *Re Pilkington, Pilkington v. Pilkington* (9) ((1892), 29 L.R.Ir. 370). LORD PORTER, M.R., expressed the view that it was not rightly decided, but he was able to distinguish it from the case before him and he said (*ibid.*, at p. 377):

"He [the testator] can of course make the shares payable on the youngest child attaining age; and if he does so, the court has no power to depart from his directions. In such a case all the children whenever born who attain the prescribed age participate."

It seems to me reasonably clear that *Kevern v. Williams* (5), unless explicable for the reason I have suggested, and *Elliott v. Elliott* (6) were wrongly decided as a matter of construction of the language used. It is to be noted, moreover, that both cases were susceptible to the rule in *Andrews v. Partington* (2), even then

well settled, but, of course, it would not, as the law then stood, have saved them from the law relating to remoteness. However, I do not have to consider whether, however reluctantly, I should pay lip service to the lapse of time and follow *Elliott v. Elliott* (6) and *Re Coppard's Estate* (8) for the reason that the cases do not purport to lay down any principle of construction, and the words I have to consider, as LORD PORTER, M.R., pointed out, are completely different.

Apart from these three cases, the policy of the law favouring early vesting has never been applied to any case except where there is someone in existence who can say, on the natural construction of the language of the will, that his share has absolutely vested in interest and possession, although it cannot be said exactly what share as a matter of quantum has so vested. In that case the policy of the law has led to the formulation of certain rules to permit the artificially early closing of the class. Apart from the line of cases I have just reviewed, which, as I have said, seem to me wrongly decided, no court, so far as I am aware, has ever misconstrued a contingent gift to make the gift vest artificially at a date earlier than that contemplated by the testator, and I see no reason for introducing any such rule based on the unsound foundation of those cases.

Accordingly, the will must operate according to the meaning of the words used, which I need not recapitulate.

The next question is as to the impact of the rule against accumulations on the directions to accumulate until the youngest child attains twenty-one. Plainly, that direction infringes the rule and it is necessary to determine for what period the term is valid. The test is stated to be that one first has to determine which of the four periods set out in s. 164 the testatrix has seemingly selected, determining that question according to the language employed and the facts of the case: see *Re Watt's Will Trusts*, *Watt v. Watt* (10) ([1936] 2 All E.R. 1555 at p. 1562). That seems to me an artificial and difficult test. The trouble in this case and in most cases dealing with the rule against accumulations is that the testatrix has given directions clearly not having the rule in mind at all. The competing periods in this case are s. 164 (1) (b), a term of twenty-one years from the death of the testatrix, which brings the period of valid accumulation to an end on July 6, 1956, on the one hand, and on the other, s. 164 (1) (c), the duration of the minority or respective minorities of anyone living at the death of the testatrix. If that period is selected it is submitted that it came to an end when the eldest child, David, attained twenty-one on June 24, 1951.

Neither paragraph fits in, in the least degree, with the directions of the testatrix. However, in directing accumulations until Robert's youngest child should attain twenty-one, the testatrix can hardly have contemplated that the period of accumulations would in fact come to an end by the attainment by Robert's eldest child of the age of twenty-one years and I propose to hold that para. (b) is the relevant paragraph; the difference is not of great importance.

The next question, and it is a difficult one, is as to the destination of income from the expiry of twenty-one years from the death of the testatrix until it is known when the gift vests.

Now it is conceded that the special fund is either a contingent residuary gift, or having regard to cl. 24 of the will a contingent specific gift and, accordingly, apart altogether from the direction to accumulate, the ultimate gift carries the intermediate income. On this point, counsel for David submits that David, being the only member of the contingent class, is now entitled to be paid the whole income, and he does so on three grounds. First he relies on a passage to be found in JARMAN ON WILLS (8th Edn.), Vol. 3, p. 1682. It is in these terms:

"In cases where property is given to a class of persons contingently on their attaining a certain age or marrying, questions sometimes arise as to the destination of the income while the ultimate constitution of the class is

A uncertain. So far as gifts of residue or of an income-bearing fund are concerned, the rule is clearly settled that each contingent member is entitled to the income of his contingent share; and this is so whether the class is capable of increase or not."

B Read quite literally that does support counsel's submission, but I have been referred to the cases referred to in support of that passage. They do no more than state another well-known rule of convenience, that, where the share of one or another members of a class has vested, the income of that share may be paid to one or more members of that class notwithstanding that the class is capable of increase or decrease. It has no application to the case where no share can be said with certainty to have vested. The well-known rule that a contingent future specific or residuary gift carries the intermediate income unless a contrary intention is expressed in the will does not entitle a member of the class whose share has not vested to claim payment of income before vesting. The rule means no more than this, that the income must be accumulated (subject to all prior interests) for the benefit of the class as a whole, again subject to the rule as to members whose shares have vested, in order that it may be seen who in fact are actually entitled to the corpus and accumulations. When the law intervenes to prevent further accumulations, then the income will in general pass to residue or on an intestacy, as the case may be.

C Counsel's second point is that it may well be found that on the death of Robert, David, although his eldest son in point of birth, is also the youngest son to attain twenty-one for Robert may have no further children. That involves reading "youngest child" as including the "only surviving child", but it may be the correct construction having regard to the fourth clause of the codicil. I will assume, though I certainly do not decide, that David can qualify as a youngest son if he has no younger brothers or sisters who attain twenty-one and if that does prove to be the ultimate event it will follow that David is found to be solely entitled. Nevertheless, it is clear that the gift today is still contingent and not vested, for David cannot today claim to be living at the time of Robert's youngest child attaining twenty-one. However as that may be the ultimate event, counsel submits that it would be unjust to pay away the income to others when it may ultimately be due to David. He relies on an unreported case in the Court of Appeal called *Re Whitehead, Whitehead v. Whitehead* (11) (June 16, 1955, unreported) (Judgment No. 215 in the Book of Appeal Court Judgments for that year). As SIR RAYMOND EVERSHED, M.R., said in that case: "The circumstances of this case are highly special and the language is highly special". I propose to make only a very brief but, I hope, for my purpose, a sufficiently correct statement of the singularly complicated facts and documents. The court found as a matter of construction that under a deed of compromise a fund of £25,000 was settled on trust to pay the income to Sir George and his successors in a certain baronetcy born in the lifetime of the first baronet who died in 1917. H The fourth baronet died in 1953 and was succeeded by his son Sir Rowland who was not born in the first baronet's lifetime. Subject to the gift of income, Sir Rowland took a vested interest in the fund, but the trouble was that there were in existence an uncle and a cousin both born in the lifetime of the first baronet one or both of whom in succession might succeed to the baronetcy after I Sir Rowland, each of whom would then take a life interest in the settled sum during his tenure of the baronetcy. Thus there was a gap in the trusts of income, for the draftsman had failed to provide for the events which had happened, namely, the succession to the baronetcy of a person not born in the first baronet's lifetime while possible successors who were so born were alive. The court, by analogy with *Re Conyngham, Conyngham v. Conyngham* (12) ([1921] 1 Ch. 491) (itself a case of vested remainders), held that the income ought to be paid to Sir Rowland. The Master of the Rolls drew attention to the judgment in *Re Conyngham* (12) and particularly to the citation of a passage in JARMAN ON

WILLS (1st Edn.), p. 513, a passage again dealing with vested remainders, and then said: A

"I base myself first and last really, I think, upon this, that there is here, as I construe the document, a vested remainder in favour of the person taking on Dec. 31, 1953, viz., Sir Rowland, liable however to be divested in favour of a life tenant or tenants and possibly in favour of other persons in the event, which has not yet happened, of the death of Sir Rowland and also of his twin without issue to take during the lifetime of his uncle or his cousin or both of them." B

Plainly, that case has no direct application to the present, where the gift is contingent, but the question is whether by analogy to that I ought to apply it to the circumstances of this case. I recognise the possible hardship to David, but it is one of degree. David may succeed to a share of the special fund by surviving the attainment by a younger brother or sister of the age of twenty-one and if that happens it is a perfectly ordinary example of a contingent gift taking effect and it is commonplace in such an event that s. 164 may have operated to divert some of the income which the testatrix intended to be taken by those who survived the contingency into the hands of others such as residuary legatees or next of kin. I do not think that a different result should flow because it may ultimately turn out that David is the person solely entitled. I do not think I can apply a decision such as *Re Whitehead* (11), which depended entirely on the fact that the gift was vested though liable to be divested, to contingent gifts. The ordinary rules applicable to income of contingent gifts must be applied, and, as I have already pointed out, after the period allowed by s. 164, these rules do not in general give the income to members of the contingent class while the interests remain contingent. C D E

Counsel's third point arose at the conclusion of argument. I allowed him to take it by leave and the matter stood over in order that counsel might consider it. The point, which appears to be free of authority, is that *Re Turner's Will Trusts, District Bank, Ltd. v. Turner* (13) ([1936] 2 All E.R. 1435) established that the Trustee Act, 1925, s. 31 (1) (ii), is part of and ancillary to the power of maintenance thereby conferred on trustees and that accordingly having regard to s. 69 (2) of that Act it is an additional power and applies F

"... if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and [has] effect subject to the terms of that instrument." G

Now s. 31 (1) (ii) provides that if a person on attaining the age of twenty-one has not a vested interest in income of settled property the trustees shall

"thenceforth pay the income of that property . . . to him, until he either attains a vested interest therein or dies, or until failure of his interest." H

It is clear that a direction to accumulate is a contrary intention which would exclude the incorporation of this section into the will (see *Re Turner's Will Trusts* (13) and *Re Watt's Will Trusts* (10), where this point might have been, but was not, taken). Counsel, in an attractive argument, submits, however, that s. 164 invalidates and makes void the direction in the will for accumulation after 1956; therefore, as from that date, there was no valid or effectual direction in the will dealing with intermediate income until vesting, so that there is no contrary intention expressed in the will to oust the primary operation of s. 69 making s. 31 applicable. In other words, if you look at the effective operation of the will and there is a lacuna in such operation there is nothing to prevent s. 31 entering and filling it. He submits the same point in a slightly different way by saying that s. 164 directs that, so long as income is directed to be accumulated contrary to the section, it is to go and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed. Consequently, I

A if no accumulation had been directed in the codicil, then s. 31 would on the true construction of the will be an additional power applicable thereto.

It is clearly settled that for the purposes of the Law of Property Act, 1925, s. 164, one must construe the will as it stands without regard to the statutory limitation and then construe the Act on the dispositions contained in the will. One does not construe the will as though it was to be read with and modified by the Act. To construe the codicil in accordance with that principle it is clear that s. 31 (1) (ii) of the Trustee Act, 1925, has no application because of the direction to accumulate itself. There is indeed something to be said for the view that s. 31 (1) (i) does not itself apply because of the very limited directions given by the testatrix for the education of Robert's children, but with that I am not concerned. If that be the true construction of the will, I am at a loss to see on what principle of law those whose interests are still contingent can claim today to be paid the intermediate income as it arises, for there is nothing in the codicil which gives it to them. I do not see how I can ascribe an artificial intention to the testatrix contrary to the terms of her will that those who have attained twenty-one shall be paid the income. I do not in fact know what the testatrix would have directed had she been informed that part of the accumulations that she had directed was invalid. I am really being asked to read s. 69 of the Trustee Act, 1925, as though additional powers applied if there is no "contrary provision" rather than if there is no "contrary intention". On this point counsel for the grandchildren of the testatrix makes a submission with which I must deal in greater detail in a moment. He submits that if there is by reason of s. 164 of the Law of Property Act, 1925, a lacuna in the codicil, then one must first look to the will and, reading the will and codicil together, see if the income is disposed of by the will. He submits that it is so disposed of. Whether that be right or wrong, it does show the artificiality of trying to read in s. 31 of the Trustee Act, 1925, contrary to the intentions of the testatrix. Accordingly, in my judgment, David fails to establish any right to be paid the income pending vesting.

The last question is whether the income is undisposed of and passes as on an intestacy, or, as counsel for the grandchildren of the testatrix submits, under the trusts contained in the will relating to the Wilson Ransome Trust Fund. That is a question of construing the testatrix' testamentary dispositions. The applicable principles of law are clear, first, that the dispositions of a will must not be disturbed more than is necessary to give effect to a revocation by codicil, and secondly, that where there is no express revocation in the codicil, but only an implication of revocation by virtue of the terms of the substituted trust, if that trust falls to the ground the implied revocation falls with it: *Ward v. Van der Loeff*, *Burnyeat v. Van der Loeff* (14) ([1924] A.C. 653 at p. 665). But it is a question of construction in each case.

In this will and codicil there is no express revocation in the codicil of anything in the will. Moreover, by cl. 5 of the codicil, the testatrix expressly confirmed her will and other codicils in all other respects, and counsel for the grandchildren of the testatrix submits that, in accordance with principle, if the dispositions of the codicil fail of effect, then the will must operate. On the other hand, counsel for those interested on an intestacy says that the codicil properly construed does in fact operate as a complete revocation of the relevant part of the will for all purposes. The special fund was taken out of the will and the testatrix clearly intended completely to dispose of the whole beneficial interest in that fund in every event except in the event provided for in cl. 4, if no child of Robert attains twenty-one, which cannot now happen. On the whole, I cannot accept that argument. The testatrix expressed the desire to make provision "out of" the Wilson Ransome Trust Fund for the benefit of the children of Robert. If and in so far as she has failed to secure those benefits by appropriate language, in my judgment, the property thereby undisposed of must be held on the original

trusts declared by the will concerning the Wilson Ransome Trust Fund, and I A must declare accordingly.

Declaration accordingly.

Solicitors: *Warren & Warren*, agents for *Notcutt & Son*, Ipswich, Suffolk (for all parties).
[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

B.P. REFINERY (KENT), LTD. v. WALKER (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Denning and Romer, L.JJ.), January 15, 16, 17, 18, February 19, 1957.]

Rates—Valuation—Plant and machinery—“Structure”—In the nature of a building or structure—Plant conveyed to site in one piece—Whether feat of engineering involved not a test—Catwalks and connecting pipes—Constituent parts of a process boiler separately rateable—Rating and Valuation Act, 1925 (15 & 16 Geo. 5 c. 90), s. 24 (1), (5)—Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480), Schedule, class 4.

Premises used for the refining of crude oil included a topping unit, which comprised several separate items of apparatus connected by pipes through which the crude oil passed in the process of distillation and condensation, and in particular: heat exchangers, being cylindrical objects, fifteen feet long and two feet in diameter, weighing three and a half tons, which were delivered ready-made on the site and consisted of an outer shell with tubes inside, and were arranged in batteries (heat exchange was effected by passing hot liquid through the outer shell and cool liquid in the opposite direction through the inner tubes, in all the heat exchangers in a battery in turn); coolers and condensers which were similar, except that cooling was by water and not oil, the condensers being arranged horizontally and being individually capable of replacement, though, except with difficulty, not without disturbing their batteries; a reflux and product accumulator, being a metal tank thirty-six feet long and eight feet in diameter, weighing thirteen tons and resting in a steel cradle on reinforced concrete piers, which was delivered to the site as a complete unit but was not intended to be moved and was “just as much a permanency as the rest of the plant”; settlers, which were similar and were also delivered to the site in one piece, but weighed forty-six tons; a soda flash tower, used to inject minute particles of caustic soda into the oil, which was twenty-five feet high and was delivered to the site in a single piece and was bolted to the ground and surrounded by a fireproof protection for the first eight or ten feet from its base upwards; catwalks, being metal galleries attached to the plant to enable inspections and adjustments to be made; and the pipes conveying the oil from unit to unit. The Lands Tribunal held that the topping unit was not rateable as a whole, that the heat exchangers, coolers, condensers, and soda flash tower were not rateable, not being in the nature of a building or structure, nor were the catwalks and pipes, but that the settlers were rateable as being plant in the nature of a building or structure. On appeal,

Held: (i) in determining whether any plant or machinery was rateable regard could be had to the terms of Sch. 3 to the Rating and Valuation Act, 1925, in addition to the statement confirmed by the Plant and Machinery (Valuation for Rating) Order, 1927, and substituted for Sch. 3 to the Act of 1925 by virtue of s. 24 (5)*, since that statement was intended to explain Sch. 3 and must fall within its terms (see p. 707, letters F to I, p. 714, letter I, post).

Richard Thomas & Co., Ltd. v. County Valuation Committee & Assessment Committee ([1944] 1 All E.R. 417) followed.

* For the terms of s. 24 (3)-(5), so far as relevant, see p. 706, letters G to I, post.

A (ii) the topping unit was not rateable as a whole under class 4 of the schedule to the Order of 1927, since it was not a still, which did not mean a large congeries of items but a vessel or retort or container which was heated (see p. 708, letter G, p. 715, letter D, and p. 717, letter F, post).

B (iii) per LORD EVERSLED, M.R., and ROMER, L.J.: prima facie the conclusions of the tribunal on the separate items of plant should be treated as matters of fact with which the court should be extremely slow to interfere (see p. 710, letter H, and p. 718, letter D, post).

Cardiff Rating Authority & Cardiff Assessment Committee v. Guest Keen Baldwin's Iron & Steel Co., Ltd., [1949] 1 All E.R. 27 as explained in *Burton v. Ogdens (Brighton), Ltd.* (1952), 23 D.R.A. 246 per SOMERVELL, L.J., at p. 259) applied.

C (iv) the tribunal had properly decided that the heat exchanger coolers and condensers were not rateable since the heat exchangers and coolers were not economisers or chambers for conditioning or treatment within the meaning of the schedule to the Order of 1927, whether regarded singly or as put together in batteries; and the finding that they and the condensers were not structures, even when arranged in batteries, which could be a mere matter of arrangement of independent items, was a question of degree and of fact (see p. 711, letter H, and p. 712, letter D, post).

D (v) (DENNING, L.J., dissenting) the findings of the tribunal that the reflux and product accumulator was a tank within class 4 of the schedule to the Order of 1927 but was not in the nature of a structure (and therefore was not rateable) were, just as were the findings that the settlers were tanks within class 4 and were in the nature of structures, decisions on questions of degree and thus of fact with which the court would not interfere (see p. 713, letter E, and cf. p. 718, letter C, post); but (per LORD EVERSLED, M.R., and DENNING, L.J.) the consideration whether a feat of engineering was involved in transporting them in one piece (referred to by JENKINS, J., in *Cardiff Rating Authority v. Guest Keen Baldwin's Iron & Steel Co., Ltd.* ([1949] 1 All E.R. at p. 36), was not intended as a definition and was not a necessarily satisfactory test whether a particular item of plant was rateable (see p. 713, letter D, p. 716, letter A, post).

E (vi) the soda flash tower was rateable as being a tower for treatment which was in the nature of a structure, within the meaning of the order, notwithstanding the tribunal's decision to the contrary, since the tribunal's test of the mobility of the tower, which had been brought to the site in one piece, was not a conclusive test (see p. 714, letters A and B, p. 718, letter H, post).

G (vii) the tribunal was right in holding the catwalks and tubes not rateable under the order since the catwalks were not "platforms and stagings" which meant platforms and stagings for the support of plant or machinery and the pipes were not flumes or conduits and neither class of plant was a building or structure or in the nature of a building or structure (see p. 712, letter G, post).

H Appeal dismissed, save as regards (vi) above.

I A process boiler at a refinery comprised several items of plant, including a furnace, flues, economiser and soot hoppers, which together made up much the greater part of the boiler, which were structures or in the nature of structures and which were separately identifiable as items of rateable plant within the meaning of the Plant and Machinery (Valuation for Rating) Order, 1927, Schedule, class 4.

Held: the items were individually rateable under the order although the boiler as a unit was not (see p. 714, letter G, p. 717, letter C, and p. 719, letter E, post).

Cross-appeal dismissed.

[As to rateable plant and machinery, see 27 HALSBURY'S LAWS (2nd Edn.) 393, A 394, para. 827; and for cases on the subject, see 38 DIGEST 531, 772 et seq.]

For the Rating and Valuation Act, 1925, s. 24 (1) and Sch. 3, class 4 of the Statement substituted for Sch. 3, see 20 HALSBURY'S STATUTES (2nd Edn.) 130, 157.

For a summary of the Plant and Machinery (Valuation for Rating) Order, 1927, see 18 HALSBURY'S STATUTORY INSTRUMENTS 96.] B

Cases referred to:

(1) *Thomas (Richard) & Co., Ltd. v. County Valuation Committee & Assessment Committee*, [1944] 1 All E.R. 417; sub nom. *Thomas (Richard) & Co., Ltd. v. Monmouth County Valuation Committee*, 170 L.T. 333; 2nd Digest Supp.

(2) *Cardiff Rating Authority & Cardiff Assessment Committee v. Guest Keen Baldwin's Iron & Steel Co., Ltd.*, [1949] 1 All E.R. 27; [1949] 1 K.B. 385; [1949] L.J.R. 713; 113 J.P. 78; 2nd Digest Supp. C

(3) *Burton v. Ogdens (Brighton), Ltd.*, (1952), 23 D.R.A. 246.

(4) *Minister of Health v. R., Ex p. Yaffe*, [1931] A.C. 494; 100 L.J.K.B. 306; sub nom. *R. v. Minister of Health, Ex p. Yaffe*, 145 L.T. 98; 95 J.P. 125; Digest Supp. D

(5) *Edwards v. Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14.

(6) *Bracegirdle v. Oxley, Bracegirdle v. Copley*, [1947] 1 All E.R. 830; [1947] K.B. 349; [1948] L.J.R. 1003; 111 J.P. 324; 2nd Digest Supp.

(7) *Battersea Metropolitan Borough v. British Iron & Steel Research Asscn., British Launderers' Research Asscn. v. Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; [1949] 1 K.B. 434, 462; [1949] L.J.R. 416, 646; 113 J.P. 72; 2nd Digest Supp. E

(8) *British Portland Cement Manufacturers, Ltd. v. Thurrock Urban District Council*, (1950), 114 J.P. 345, 580; 2nd Digest Supp.

Case Stated.

The appellant ratepayers (formerly known as Kent Oil Refinery, Ltd.) appealed to the Lands Tribunal against a decision of a local valuation court of the Central Kent Local Valuation Panel that a hereditament described as "Part oil refinery and premises", Isle of Grain, Strood Rural District, should be assessed at £123,820 net annual value, £30,965 rateable value. Their grounds of appeal were that: (i) the effective capital value placed on the unit as a whole was excessive; (ii) certain plant and machinery which should not have been assessed had been included in the assessment; (iii) the percentage adopted to calculate the net annual value was too high; and (iv) certain boilers had been wrongly assessed and the percentage calculated to calculate the net annual value was too high. An order was made with the consent of both parties under r. 37 of the Lands Tribunal Rules, 1949 to 1951, that the points of law regarding the rateability of the hereditament and the plant and machinery therein be determined at a preliminary hearing. F G H

The ratepayers contended: (i) that on the true construction of class 4 of the Schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, it was legitimate and necessary to consider in relation to each part of a plant or of a combination of plant and machinery first whether it was enumerated in the class and secondly whether it was, or was in the nature of, a building or structure; (ii) that the topping unit which was the subject of appeal comprised a combination of plant and machinery made up of several parts each having its own function, (iii) that neither in law nor in fact did the unit constitute a single functional entity nor was it in its entirety one item of plant or any one item of a combination of plant and machinery specified in class 4. I

The valuation officer contended: (i) that the whole topping unit was a still and was, or was in the nature of, a structure within the meaning of class 4 of the schedule to the order; alternatively (ii) that it was a tower for oil refining

A and condensing and was, or was in the nature of, a structure; and otherwise (iii) that each component or combination of components either was part of the hereditament or should be deemed to be part of the hereditament in that it was part of a plant or a combination of plant and machinery which was, or was in the nature of, a building or structure and was specifically named in or performed the function of an item named in class 4 of the schedule to the order or was deemed to form part of the hereditament under the remaining provisions of the order. He referred in detail to particular items as falling within descriptions in class 4.

The tribunal held that the following were not rateable: the unit as a whole, because it was not a still; heat exchangers, as they were not "chambers for conditioning or treatment", "chambers for cooling" or "economisers" and, whether looked at singly or in a group, were not structures or in the nature of a structure; coolers, since they were not "chambers for cooling" or "chambers for conditioning and treatment" and were not buildings or structures or in the nature of "buildings or structures"; primary tower condensers, which though "condensers (oil)" were not "structures or in the nature of structures"; a primary tower reflux and product accumulator, because it was not a building or structure or in the nature of such; a soda flash tower, which, though neither a tower for oil refining, a tower for chemical reaction, a chamber for chemical reaction nor a chamber for conditioning or treatment, was a tower for treatment, but was not a structure or in the nature of a structure; pipes in excess of six inches in diameter connecting the various parts of the unit, since they were not "conduits"; and catwalks, since they did not fall within the category of "platforms and stagings for plant and machinery" which meant those designed to carry plant and machinery and not merely to provide access to controls. The tribunal held that crude settlers were rateable, since, being admittedly tanks, they were in the nature of structures, their transport to the site as entities involving a feat of engineering.

In dispute also was the rateability of the parts of a boiler unit in a boiler house, which had been put together by the manufacturers on the site. The ratepayers contended: (i) that a boiler, not being mentioned in class 4 of the schedule to the order, was not rateable under that class; (ii) that, although a boiler contained parts which were mentioned in the order, in the installation they formed an integral part of the functional entity of the boiler and were not separately rateable; and, in the alternative, (iii) that, if they were to be separately considered under class 4, they were not, and were not in the nature of, buildings or structures. The valuation officer contended that the following parts of the boiler were deemed to be part of the hereditament and were rateable under the order: a furnace, including and together with the burners and the inlet air duct, as a furnace; the superheater as a superheater; flues as flues; an economiser as an economiser; soot hoppers as hoppers, and the foundations, stagings, platforms, brickwork settings, structural framework and access galleries, as foundations, settings, gantries, supports, platforms and stagings for plant and machinery; each being parts or part of a plant or a combination of plant and machinery and in the nature of buildings or structures within the meaning of the order. The tribunal upheld the contentions of the valuation officer.

I *Michael Rowe, Q.C., and W. L. Roots* for the ratepayers.
Maurice Lyell, Q.C., and P. R. E. Broune for the valuation officer.

Cur. adv. vult.

Feb. 19. The following judgments were read.

LORD EVERSLED, M.R. (read by DENNING, L.J.): These two cases are appeals from the Lands Tribunal, pursuant to the Lands Tribunal Act, 1949, s. 3 (4), relating to the liability for rates of certain parts of premises occupied by B.P. Refinery (Kent), Ltd., or of the plant and machinery thereon. As the name of the ratepayer company implies, the premises in question are used for the purpose of

refining crude oil: and, as I understand it, the process of refining, put in broad and general terms, involves the breaking up or separating of the crude oil into certain "fractions" or groups of hydrocarbon substances having, as between them, different vaporisation or boiling points. The fractions or groups into which the crude oil is thus separated are, in an ascending order of their respective vaporisation or boiling points: Primary flash distillate, benzine, naphtha, kerosene, light gas oil, heavy gas oil, and reduced crude. The last-named is, in fact, the residue of the oil after separation from it of the other six fractions; it constitutes in volume something in the neighbourhood of fifty per cent. of the original crude oil treated. The process is essentially one of distillation and condensation in which use is made of the differing vaporisation points above referred to, and it is carried out on a section of the company's premises called a "topping unit" which covers in space a rectangle of approximately 250 by 295 feet.

The process of which I have stated the main characteristic is one of modern development and design and is in fact very complex. It requires the production and control of very considerable degrees of heat, amounting to as much as 750° F. at certain stages. The process has been described in great detail and with great care in the Case Stated, and both parties were agreed before us that such description is in every respect correct. In the circumstances it would be a waste of time for me to attempt in this judgment a repetition of that description. But in order to make this judgment clear it is necessary for me to refer to certain features or stages in the process, and it is also necessary to state at once that the process is continuous, the oil, or the severed components of the oil, passing continuously through a series of pipes which connect the individual parts of the whole topping unit. The oil and its components go, however, through a number of distinct and physically separate items of apparatus—fractionating towers, heaters, strippers, caustic soda towers, a reflux and product accumulator, heat exchangers, condensers, coolers—to mention the majority but not all of them. The drawing A gives a bird's eye view of the whole refinery, and that part of it known as the topping unit is seen at the north-east corner of the refinery surrounded by a red line. The disposition of the various units of apparatus is also well illustrated in the plan B, which shows that the several items of apparatus are themselves identifiably distinct.

The main claim of the appellant valuation officer put by him before the Lands Tribunal and in this court is that the whole topping unit should be regarded as a single entity, namely, a "still" within the meaning of that term as used in class 4 of the detailed Plant and Machinery (Valuation for Rating) Order, 1927, to which I must later refer. Before the Lands Tribunal, the valuation officer alternatively contended that the whole unit constituted a "tower for oil refining and condensing" within the meaning of those words as also used in class 4 of the Order of 1927. These alternative claims were both rejected by the Lands Tribunal, and before us counsel for the valuation officer has confined himself to the former of them.

The valuation officer further contended before the Lands Tribunal that (if the topping unit was not rateable as a single item, i.e., on the ground that it was a still or tower for oil refining and condensing) nevertheless many of the component items of apparatus fell individually within the scope of class 4 of the Order of 1927 being capable of identification with corresponding items in the order and being in each case (as required by the order) a building or structure or in the nature of a building or structure. On this part of the valuation officer's argument before it, the Lands Tribunal found in a number of instances in favour of the valuation officer. Thus (to take one example) it held that the heaters were, in truth, stills within the terms of the order and that they were rateable as such, being buildings or structures or in the nature of buildings or structures. In the case which I have instanced, and in the other cases where the Lands Tribunal similarly found in the valuation officer's favour, the ratepayers have accepted its

A decision before us. In certain other cases the valuation officer, in his turn, has before us accepted the rejection by the Lands Tribunal of his claim that certain other parts of the unit were rateable. But in seven instances the rejection by the Lands Tribunal of the valuation officer's contentions has been challenged before us by the valuation officer. These seven instances are those of the items of apparatus called heat exchangers, condensers, coolers, the reflux and product accumulator, soda flash tower, catwalks and pipes. In all these instances counsel for the valuation officer has argued in this court that, if the unit itself is not to be treated as a still, the Lands Tribunal wrongly rejected his claim as regards individual items. These contentions on the part of the valuation officer constitute the substance of the first appeal before us.

C The second appeal relates exclusively to a large and elaborate boiler built, not on the topping unit, but on another neighbouring part of the refinery. The boiler appears to have been constructed by the firm of Spearing & Partners, Ltd., and is illustrated on plan E attached to the Case. It is the claim of the ratepayers before the Lands Tribunal that the boiler was a single individual unit which could not sensibly, for the purposes of rating, be broken up into its component parts: and that since no item occurs in class 4 of the Order of 1927 naming a boiler or anything else with which the present boiler, as such, could be identified, this boiler of the ratepayers escapes altogether liability for rates. In connection with this argument, counsel for the ratepayers suggested before us that in one respect the Order of 1927 might be *ultra vires*; and I shall have to return to this suggestion later; though, for reasons which will appear, I do not think it necessary to express my view on it. For, as I have understood the argument of counsel for the valuation officer, if the boiler is not capable of any separation for the purposes of rating into its individual components, then it is not challenged on the part of the valuation officer that the boiler does as such fall outside the scope of class 4 of the Order of 1927 and escapes altogether liability for rates. On the other hand, if the boiler can properly be broken up for the purposes in hand (as the Lands Tribunal held) then certain of its components—in truth, by far the greater part of them—can be identified with items in class 4 of the Order of 1927; and, assuming that these components can further be regarded as buildings or structures or in the nature of buildings or structures (as the Lands Tribunal also held) then these components are separately rateable as such. The second appeal before us is an appeal by the ratepayers, in effect confined to the first question which I have indicated, viz., can the boiler be severed or broken up for the purposes in hand into its component parts? For the ratepayers have not challenged the conclusions of the Lands Tribunal as regards the structural nature of the individual parts if their severance be found legitimate.

G I have sufficiently stated the general nature of the questions before us in these appeals, and I turn at once to make my references to the Rating and Valuation Act, 1925, and to the Plant and Machinery (Valuation for Rating) Order, 1927. H Section 24 (1) of the Act, as amended by the Local Government Act, 1948, s. 70 and Sch. 1, is as follows:

I “For the purpose of the making or revision of valuation lists . . . the following provisions shall have effect with respect to the valuation of any hereditament other than a hereditament the value of which is ascertained by reference to the accounts, receipts or profits of the undertaking carried on therein:—(a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in Sch. 3 to this Act shall be deemed to be a part of the hereditament: (b) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament.”

There is no question here of the hereditament being one the value of which is to be ascertained by reference to the accounts or profits of the undertaking. So far, therefore, as plant and machinery is concerned, rateability depends on the extent to which it is comprehended in Sch. 3 to the Act or the later Order of 1927.

I accept the correctness of the statement of counsel for the ratepayers that, whereas prior to the Act of 1925 machinery and plant (other than loose tools) were generally taken into account in rating, the purpose of the Act was to exclude from rating liability what may broadly be called productive or trade process machinery save so far as such machinery might be brought specifically within the scope of rating by the terms of Sch. 3. This schedule is headed "Classes of machinery and plant to be deemed to be part of the hereditament".

The first class is expressed as follows:

"Machinery and plant (together with the shafting, pipes, cables, wires, and other appliances and structures accessory thereto) which is used or intended to be used, mainly or exclusively in connection with any of the following purposes, that is to say:—(a) the generation, storage, primary transformation or main transmission of power in or on the hereditament; or (b) the heating, cooling, ventilating, lighting, draining, or supplying of water to the land or buildings of which the hereditament consists, or the protecting of the hereditament from fire:

"Provided that, in the case of machinery or plant which is in or on the hereditament for the purpose of manufacturing operations or trade processes, the fact that it is used in connection with those operations or processes for the purpose of heating, cooling, ventilating, lighting, supplying water, or protecting from fire shall not cause it to be treated as falling within the classes of machinery or plant specified in this schedule."

I draw attention in passing to the final words of the proviso quoted, namely, "specified in this schedule". It is on these four words that the suggestion of counsel for the ratepayers that the Order of 1927 might in certain respects be *ultra vires* was founded: for, as the proviso stands, it would appear that manufacturing or trade process machinery was, as such, to be wholly excluded from rating, notwithstanding that it also served the purpose of heating, lighting, etc., within class 1 (b), and notwithstanding, also, that it might otherwise be identified within class 4. I need not pause to cite classes 2 and 3: but class 4 is expressed as follows:

"Such part of any plant or any combination of plant and machinery, including gas holders, blast furnaces, coke ovens, tar distilling plant, cupolas, water towers with tanks, as is, or is in the nature of, a building or structure."

Sub-sections (3), (4) and (5) of s. 24 of the Act provide:

"(3) For the purpose of enabling all persons concerned to have precise information as to what machinery and plant falls within the classes specified in the said Sch. 3, there shall be constituted a committee consisting of five persons to be appointed by the Minister, and the said committee shall as soon as may be after the passing of this Act prepare a statement setting out in detail all the machinery and plant which appears to the committee to fall within any of the classes specified in the said schedule.

"(4) The committee shall as soon as the said statement has been prepared transmit it to the Minister, who shall cause it to be published in such manner as he thinks fit.

"(5) The Minister, after considering the statement and any representations which may be made to him with respect thereto, may, if he thinks fit, make an order confirming it, with or without modifications, and, subject as hereinafter provided, the statement as confirmed by the order shall for all purposes have effect as if it were substituted for Sch. 3 to this Act."

Sub-section (5) concludes with provisions for laying the confirmatory order before the Houses of Parliament and sub-s. (6) envisaged the possibility of revision from time to time of the existing order. It does not appear that practical effect has been given to this latter sub-section, but in due course the committee contemplated by sub-s. (3) was formed and the result of their labours was the

A Plant and Machinery (Valuation for Rating) Order, 1927, being the order to which I have already made more than one reference. It would be tedious and wholly unnecessary to set out in this judgment the elaborate details comprehended by this order. A reference to it shows that in the cases of class 1 and of class 4 the general terms of Sch. 3 to the Act were expanded by a wealth of detailed specification of types of machinery. In the case of class 1, the terms of paras. (a) and (b) to Sch. 3 were, in substance, repeated by way of introductory paragraphs; but in lieu of the four words "specified in this schedule" in the proviso to para. (b) of Sch. 3 to the Act there appear the words in the corresponding part of the order "specified in the schedule to this class".

C The effect of the variation in language, if within the competence of the order, is obvious, that is, on the face of it a piece of plant or machinery which serves manufacturing or trade processes is not brought into rating liability by reason only of the fact that it serves also the purposes of heating, lighting, etc., but it will not be excluded from liability if it also falls, as such, within the scope of class 4, i.e., as a piece of plant or machinery identifiable by reference to the list given in the order and also being, or being in the nature of, a building or structure.

D For the purposes of the present appeal, however, it is, in my judgment, unnecessary to consider whether this change of language was, in truth, ultra vires: it may possibly be that the change in language was not in fact unconnected with the omission in the detailed list in class 4 of the order of the word "boiler" or of any other word which would cover a boiler such as that with which we are concerned. But, as I have followed the argument, the contention of counsel for the ratepayers does not depend on the language of class 1 in the schedule or E in the order but on the simple proposition that the subject-matter of his appeal, the boiler, cannot anywhere be identified with the items in class 4 of the order, and being admittedly a piece of plant or machinery substantially, if not exclusively, established for manufacturing or trade processes, it is therefore outside the scope of rating unless it can for rating purposes be sub-divided into its component parts and these component parts or some of them can, in their turn, F be identified with the terms in class 4.

It will be recalled that, according to the language of s. 24 (5) of the Act, the order, when made, is for all purposes to "have effect as if it were substituted for Sch. 3" to the Act. The question, therefore, at once arises whether it is legitimate, for the purpose of construing the order and determining whether any pieces of plant or machinery fall within its scope, to have regard to Sch. 3 to the Act. The answer to this question has been already provided for us by the decision in this court in *Richard Thomas & Co., Ltd. v. County Valuation Committee & Assessment Committee* (1) ([1944] 1 All E.R. 417). That case concerned G certain electrical power machinery; but in the course of the judgment of this court delivered by SCOTT, L.J., it was made plain that the language of Sch. 3 could still be consulted for the purposes of discovering liability for rates. He said (*ibid.*, at p. 419): "The language of Sch. 3 gives the key". And again, a little lower down:

"This key is of paramount importance for unlocking the problem of the 'statement' [the Order of 1927] on which the appeal depends; for the language of s. 24 (3) and (5) together clearly imports that the 'statement' is to explain and not to alter Sch. 3."

I The intention of Parliament, as expressed in the opening terms of s. 24 (3) was undoubtedly laudable, but its hopes may be said to have been somewhat over-sanguine. A descent into the realm of detailed description of all types and kinds of machines may, if the work of the committee was (as I assume) thoroughly done, well serve to illuminate all the dark places at the time when the catalogue was first composed: but during the passage of thirty years the ingenuity of man has brought into being many new types of machinery not dreamt of in 1927. The arguments in the present case—and to some extent the arguments in the

reported cases to which we have been referred—create at least a suspicion in the mind that some of the expensive litigation that has taken place would have been avoided if the questions concerned had been left for determination on the general terms of Sch. 3 to the Act. It may, however, well be that, on the other side, many cases of doubt have been avoided by the Order of 1927 and have therefore never reached the courts at all. It is none the less legitimate to suggest that there would be much to be said for a modern revision of the enumeration so elaborately put together thirty years ago.

However that may be, reference to the terms of class 4 in Sch. 3 to the Act, which has been held to be legitimate, will be seen to have a strong bearing on the first question put forward by the valuation officer, viz., whether the whole topping unit can be regarded as a single entity, a still. Those terms are, so far as relevant,

“such part of any plant or any combination of plant and machinery, including . . . tar distilling plant.”

The words quoted strongly suggest in the first place that the subject-matter to be rated must be a part only of the entire plant; and, second, by giving as an instance of the totality of a plant that of a “tar distilling plant” they appear to negative the possibility that such a thing as a tar distilling plant could itself be regarded as a single rateable item. It is difficult to see any sensible distinction between a tar distilling plant on the one hand and an oil distillation plant on the other.

I have not so far referred to the composition of class 4 in the Order of 1927. The considerable list of items of machinery is introduced by the words, borrowed from class 4 as it appears in Sch. 3 to the Act:

“The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure.”

The words obviously lend added emphasis to the view that the items intended to be made subject to rates are not collections of individual items making a “plant”, but are rather the specific component items themselves—so far, of course, as they satisfy the second qualification of being, individually, buildings or structures, or of that nature. It is true that certain of the items in the list which follows (and which I do not think it is necessary to recite) might be complete in themselves, and not easily capable of being regarded as “parts” of some larger whole, e.g., a windmill or a weighbridge. Even in these cases, however, the actual mill or the actual weighbridge would presumably be installed as a part of a larger whole, and would not be found in total isolation. But in any case I cannot think that the use of the word “stills” in the context of the list in the Order of 1927, introduced as it is by the words already quoted, and construed in the light of the “key” provided by Sch. 3, can be meant to refer to so large a congeries of items as makes up the present topping unit.

We were referred to numerous dictionary definitions from which it may, no doubt, truly be said that in some contexts the word “still” could be used in this wider, embracing, sense. But when I add to the considerations to which I have alluded a further reference to the general character of the whole unit, as it appears illustrated in plans A and B, I can feel no doubt whatever in my mind that the Lands Tribunal rightly rejected the first contention of counsel for the valuation officer that the whole unit is rateable as such as a “still”, and capable, accordingly, of being sensibly regarded within the meaning of class 4 as constituting something in the nature of a single structure or building.

It becomes necessary, accordingly, to consider the correctness of the Lands Tribunal’s findings as regards the heat exchangers and the other six items which I have already mentioned. One question of general importance calls at once for consideration, namely, to what extent should the conclusions of the Lands

Tribunal on those subject-matters be regarded as questions of fact? On this question guidance has more than once been provided by judgments of this court. In *Cardiff Rating Authority & Cardiff Assessment Committee v. Guest Keen Baldwin's Iron & Steel Co., Ltd.* (2) ([1949] 1 All E.R. 27), the court was concerned with the liability for rating purposes of certain tilting furnaces. It was held that these items of plant were "furnaces" within the meaning of class 4 of the Order of 1927, and were not the less buildings or structures or of that nature, because they were "tilting", that is to say, not permanently fixed in a particular position.

In the course of their judgments, both DENNING, L.J., and JENKINS, J., discussed the kind of tests which should be applied by the rating authority. The relevant passages have been cited before in other subsequent cases, but it is convenient to set them out again in this judgment. Thus, DENNING, L.J., said ([1949] 1 All E.R. at p. 31):

"A structure is something which is constructed, but not everything which is constructed is a structure. A ship, for instance, is constructed, but it is not a structure. A *structure* is something of substantial size which is built up from component parts and intended to remain permanently on a permanent foundation, but it is still a structure even though some of its parts may be movable, as, for instance, about a pivot. Thus, a windmill or a turntable is a structure. A thing which is not permanently in one place is not a *structure*, but it may be 'in the nature of a structure' if it has a permanent site and has all the qualities of a structure, save that it is on occasion moved on or from its site. Thus, a floating pontoon, which is permanently in position as a landing stage beside a pier, is 'in the nature of a structure', even though it moves up and down with the tide and is occasionally removed for repairs or cleaning. It has, in substance, all the qualities of a landing stage built on piles. So, also, a transporter gantry is 'in the nature of a structure', even though it is moved along its site. It has the same qualities as a fixed gantry, save that it moves on its site."

The relevant language of JENKINS, J. (*ibid.*, at p. 36) is:

"It would be undesirable to attempt, and, indeed, I think impossible to achieve, any exhaustive definition of what is meant by the words 'a building or structure or in the nature of a building or structure'. They do, however, indicate certain main characteristics. The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, *in relation to the hereditament*, answer the description of buildings or structures, or at all events be in the nature of buildings or structures. That suggests built or constructed things of substantial size: I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, i.e., things which, once installed on the hereditament, would normally remain *in situ* and only be removed by a process amounting to pulling down or taking to pieces. I do not, however, mean to suggest that size is necessarily a conclusive test in all cases or that a thing is necessarily removed from the category of buildings or structures or things in the nature of buildings or structures because by some feat of engineering or navigation it is brought to the hereditament in one piece. For instance, floating docks or pontoons, items specifically mentioned in class 4, would not, I think, be excluded merely on account of having been towed complete to the hereditament instead of having been built or constructed there. The question whether a thing is or is not physically attached to the hereditament is, I think, certainly a relevant consideration, but I cannot regard the fact that it is not so

attached as being in any way conclusive against its being a building or structure or in the nature of a building or structure. This is, I think, clearly shown by some of the items specifically mentioned in class 4; e.g. floating docks and pontoons would necessarily not be so attached. Nor can I regard the fact that a thing has a limited degree of motion in use, either in relation to the hereditament, or as between different parts of itself, necessarily prevents it from being a structure or in the nature of a structure, if it otherwise possesses the characteristics of such. The list in class 4 includes such things as elevators and hoists, transporter gantries, transversers and turntables, and weighbridges. It is true that things in class 4 are rateable only 'to such extent' as they are buildings or structures, or in the nature of buildings or structures, but I cannot regard this as necessarily excluding from rateability the movable parts of things which, from their inclusion in the list, are clearly regarded as capable of being in the nature of buildings or structures, and from their very descriptions must clearly possess some degree of mobility in relation to the hereditament, or as between the different parts of themselves."

It is, I think, plain that neither DENNING, L.J., nor JENKINS, J., was seeking to lay down exhaustive definitions. Rather, they were indicating by illustration and otherwise the kind of considerations which were proper to be borne in mind. So much was, indeed, said in terms by SOMERVELL, L.J., in the later case of *Burton v. Ogdens (Brighton), Ltd.* (3) ((1952), 23 D.R.A. 246 at p. 259). The *Burton* case (3) was concerned with certain baking ovens which the Lands Tribunal had found to be rateable within class 4 of the Order of 1927. The appeal of the ratepayers was unsuccessful, all the members of this court being of opinion that the questions involved were substantially questions of fact with which the Court of Appeal would not interfere. At the end of his judgment SOMERVELL, L.J., referred to a further statement of DENNING, L.J., in another case* in which, after referring to the *Cardiff* case (2), he had said:

"Once the principles of interpretation have been settled, as they have been settled, the particular application of them to any particular set of facts is essentially a matter for quarter sessions."

SOMERVELL, L.J., concluded his judgment as follows (23 D.R.A. at p. 260):

"If, therefore, I had felt some doubt (which I have not) as to whether I would have decided this matter in the same way, I would have thought it right to regard it on the facts as found a question of fact for the Lands Tribunal with which this court would not interfere."

The two cases, the *Cardiff* case (2) and *Burton v. Ogdens (Brighton), Ltd.* (3), were both cited to the Lands Tribunal, who refer specifically to them in the Case Stated to this court. It is clear, therefore, that the "principles of interpretation" were brought to the attention of the tribunal, and considered by it. The tribunal heard a considerable quantity of evidence, and also, as I understand, twice visited and inspected the topping unit. In such circumstances, I approach the consideration of the tribunal's conclusions on the seven items now remaining for consideration on the valuation officer's appeal with the view that *prima facie* such conclusions should be treated as matters of fact with which this court should be extremely slow to interfere. It is well to bear in mind that by the terms of s. 3 (4) of the Lands Tribunal Act, 1949 itself—under which the present appeals are brought—it is provided that a decision of the Lands Tribunal shall be final, with a proviso that a person "aggrieved by the decision as being erroneous in point of law" may require a Case to be stated for this court. Counsel for the valuation officer indeed conceded, in the course of his reply, that, if

* *British Portland Cement Manufacturers, Ltd. v. Thurrock Urban District Council* (8) (1950), 114 J.P. 580 at p. 582.

A conclusions were reasonably possible conclusions on the facts and evidence before the tribunal, then this court should accept them as final. It has, moreover, to be remembered, as will become apparent when I pass to the matter of the heat exchangers, condensers and coolers, that in large measure the questions involved are questions of degree, and, as such, essentially matters for the final determination of the fact-finding tribunals.

B In the circumstances I can conveniently take together the first three of the seven items, namely, the heat exchangers, the condensers and the coolers. I observe that in each case two conditions must be satisfied for rateability under class 4 of Sch. 3 and the order, namely, (i) that the item of plant or machinery in question must be found or identified in the list set out under class 4 of the order, and (ii) that the item, when so identified, must constitute, as such, a building or structure or something in the nature of a building or structure. Of the three items named, only one, viz., condensers, can readily be identified with any item in the list. That list includes "condensers:—oil" and the tribunal found no difficulty in so describing the condensers in the present case. But it was otherwise with the heat exchangers and coolers, since the list does not contain any express reference to either of these items.

D The essential characteristics and functions of heat exchangers are set forth in para. 11 of the Case Stated. As there appears, a heat exchanger is a cylindrical object some fifteen feet in length and two feet in diameter weighing approximately three and a half tons. It consists of an outer shell inside which is found a number of tubes. The hot liquid is passed through the outer shell and the cool liquid in the opposite direction through the inner tubes, the effect being that the hot liquid heats the cold liquid in the tubes, its own heat being at the same time reduced by the contact. In order to prevent any wastage of heat, the heat exchangers, which are delivered as ready-made units on the site, are lagged and "cleaded". I may add here that in construction and dimensions both the coolers and condensers are not substantially different from the heat exchangers, save that in the two latter cases the cooling or condensing is produced by the use of cold water and not oil.

F It was contended for the valuation officer that the heat exchangers could and should be identified with the item "economisers" in the list of class 4; and it is undoubtedly true that in construction and also in function the two things are very similar, save only that the purpose of the economiser is to use the hot fluid or gases that would otherwise go to waste in order to "pre-heat" the cold fluid or gases passing in the other direction. It is not concerned with the converse process or effect of using the cold fluid or gas to cool the hot, though inevitably such would be the practical result. Notwithstanding this similarity in construction and function, the evidence before the Lands Tribunal, including that of the expert witness for the valuation officer, was unanimous to the effect that no one concerned in the relevant trades would ever describe a heat exchanger as an economiser; and in face of that evidence it seems to me impossible to challenge the validity of the Lands Tribunal's conclusion that heat exchangers for the purposes in hand were not economisers.

H In a final and valiant attempt to identify the heat exchangers and coolers with one or other of the items in the class 4 list, the valuation officer sought to say that these machines, whether regarded singly or when used (as in the case of the heat exchangers) in banks or batteries, constituted "chambers for conditioning or treatment" on the simple ground that a chamber may by definition be called a confined room or space, and that in fact the external contours of the heat exchangers or coolers enclosed a space. The same argument was applied also to the condensers. Again, however, I can see no reason whatever for differing from the view taken by the Lands Tribunal. In common sense and in ordinary speech, I cannot think that these items can fairly be so described.

There remains the second necessary condition (in the case only of the condensers of practical significance having regard to the tribunal's previous conclusions on identification of the items with the items in the class 4 list), i.e., the question whether they can, singly or as put together in banks or batteries, be regarded as structures. Photograph No. 37 gives an excellent illustration of the way in which the heat exchangers are in fact so grouped in batteries, the process being that the fluids, hot and cold, pass through all the exchangers in the battery in series so that the process of heat exchange is not completed till the fluids have passed through the entire battery. There is obvious force in the argument, when illustrated by the photograph, that such a battery of items or machines constitutes at least something in the nature of a building or structure. But there is force, also, in the contrary suggestion that, though the framework, shown in the photograph, into which the individual items are fitted is in the nature of a building or structure (and it is conceded that the company is rateable in respect of it), the conjunction of the various items is merely a matter of their convenient arrangement and that they remain, in truth, separate and individual pieces of plant. Moreover, although it was found that in the case of the condensers (which are disposed horizontally and not, like the heat exchangers, vertically) it would be a difficult matter to remove one condenser without disturbance of the whole battery, nevertheless they do remain wholly distinct and capable of individual replacement. In the circumstances the question is, to my mind, essentially one of degree and therefore, as I think, one of fact on which the conclusions of the tribunal ought not to be disturbed.

I pass over for the moment the next two items of the seven in my list, namely, the reflux and product accumulator and the caustic soda tower, and pass to the last two items, the catwalks and the pipes: for I can deal with these last named briefly.

"Catwalks" is the name applied to the metal galleries which are attached to the various pieces of plant for the purposes of enabling inspection and manual adjustment, where necessary, to be carried out. It was sought on the valuation officer's behalf to say that they fell within the description of "platforms" in the formula "foundations . . . platforms and stagings for plant and machinery". The tribunal was of opinion that the words "platforms and stagings" were limited by their context to platforms and stagings for the support of plant or machinery, and did not comprehend platforms merely used in connection with plant and machinery as in the present instances. This question is no doubt a matter of construction and therefore of law. In my view, however, the opinion of the tribunal in this respect was correct. It follows that the platforms do not find a place in class 4 and are therefore excluded from rateability. I see, also, no ground for challenging the view of the tribunal that the pipes in the present case cannot fairly be assimilated with the "flumes and conduits" mentioned in the list. The pipes with which we are concerned serve in effect the function of a conveyor belt in other types of plant and are very different in nature and essential characteristics from, e.g., a gas pipe or conduit built into the ground. I add that I also entertain no doubt that the catwalks and the pipes cannot in any case be regarded as constituting a building or structure or anything in the nature of a building or structure, and I therefore feel no hesitation in rejecting the appeal of counsel for the valuation officer on these two items.

I now return to the reflux and product accumulator, the first of the two items in my list which I have passed over. The nature and functions of the accumulator are stated in para. 17 of the Case; from which it appears that an accumulator is a metal tank thirty-six feet long, eight feet in diameter, weighing thirteen tons, and resting in a steel cradle on reinforced concrete piers. The tank was delivered to the site as a complete unit but (as stated in the Case) it

"is not intended to be moved and is just as much a permanency as the rest of the plant."

A The description of this tank bears a strong resemblance to the description given of the so-called settlers. The latter (see para. 12 of the Case) are in dimensions much the same as the accumulator. They also, having been brought to the site in one piece, rest on reinforced concrete piers. They

“are not intended to be moved save for renewal or on redundancy and to that extent are just as much a permanency as the rest of the plant.”

B They weighed, however, not thirteen tons but forty-six.

C It was the opinion of the Lands Tribunal that both settlers and the accumulator were “tanks” and fell accordingly within the list in class 4 of the Order of 1927. But, whereas the tribunal held the settlers to be structures, or in the nature of structures, they found that an accumulator was neither. I confess that I have felt some doubt whether the tribunal had based their distinction between the two things solely on the difference in weight: and, if so, whether such an exclusive test was justified in the light of the judgments of this court from which I have quoted. The Lands Tribunal in more than one place in the Case Stated refers to the phrase (used by JENKINS, J., in his judgment in the *Cardiff* case (2) from which I have quoted) “feat of engineering”. I agree with the view of DENNING, L.J., in the judgment which he is about to deliver and which I have had the advantage of reading in advance, that it would not be right to treat as a necessarily satisfactory test the answer to the question whether a particular item of plant or machinery was in fact, or could be, brought to the site in one piece or “ready-made” without a “feat of engineering”; and that JENKINS, J., did not intend that phrase as a definition. On the whole, however, I have come to the conclusion that I should regard this matter of the accumulator as properly one of fact in so far as it is essentially one of degree; I am not therefore prepared to interfere with the decision as regards the accumulator.

E But as to the last item, namely, the soda flash tower, I have in the end reached the opposite conclusion. As will be seen from para. 14 of the Case, it is necessary in order to prevent corrosion that there should be injected into the oil minute particles of caustic soda in a completely dry state. The function of the soda flash tower is that all traces of the water in which the soda had previously been mixed should be removed and the oil be enabled to pass into the rest of the apparatus free of water but having the minute soda particles suspended in it.

F The tower is some twenty-five feet high and was delivered to the site in a single piece. It is there bolted to the ground and surrounded by a fireproof protection for the first eight or ten feet from its base upwards—this surround being from a practical point of view no less an essential part of the tower than is the brick surround of the primary tower. A reference to the photographs shows that this soda flash tower is one of several not dissimilar in general appearance and including the primary and secondary towers and the stripper, all of which were held (and are now conceded) to be in the nature of structures.

G The reasons for the tribunal’s conclusion are found in para. 35 (m) of the Case. The valuation officer may, I think, have been somewhat embarrassed by his having suggested no less than five possible identifications for the tower in the class 4 list. For my part, however, I think the tribunal were well entitled to treat the tower as a “tower for treatment” within that list. Is it, however, a structure or in the nature of a structure? As I understand the tribunal’s negative answer to this question, it was founded on the circumstance that the tower, being brought to the site in one piece, was not so heavy or so large as the accumulator, and fell, therefore, within the reasoning given in para. 35 (1) for the rejection of the accumulator, for example, that the bringing to the site of the tower in a single piece could not be described as a “feat of engineering”.

I I have felt great hesitation on this matter whether I should not, as in the previous instances, treat it as a question of fact. On the whole I have felt unable to resist the conclusion that the tribunal in this instance did not (for reasons already indicated) apply the proper test—in other words, that it treated the

single question of mobility as really conclusive. I cannot in this case think that such a test was right or was indeed in conformity with the judgments in the *Cardiff* case (2). If regard is had to the nature of this tower, as it is shown by the photographs, it seems to me that the conclusion is really inevitable that the tower was, like the other large towers in the unit which I have mentioned, in the nature of a structure. Put otherwise, there seems to me to be not a similarity, but an essential difference, between a tower set up and bolted to the ground, with fire-protecting covering constructed round eight or ten feet of its base and reaching to a height above that of a small house, on the one hand; and on the other, a tank resting on concrete piers, which piers are admittedly themselves structures or in the nature of such. In this one instance, therefore, I would allow the appeal of counsel for the valuation officer and hold that the soda flash tower should be regarded as falling within the scope of class 4 of the Order of 1927.

There remains the cross-appeal. I have referred already to the nature of the question involved and to the suggestion made by counsel for the ratepayers that the Order of 1927 might be ultra vires in so far as it purported to limit the exemption from rateability of plant or machinery used for manufacturing purposes or trade processes to exemption under class 1 only. Though it is in the event unnecessary for me to express a concluded opinion, I think for my part that there would be much force in the argument that it would not have been competent for the Order of 1927 to include such plant or machinery, as such (i.e., as a single item specified or identifiable in the list under the class) under class 4. But the order has not done so. It is no part of the argument of counsel for the valuation officer that the boiler as such is so comprehended under class 4 of the order. And, whatever be the answer to the point of counsel for the ratepayers, I do not think it was ultra vires for the committee or Minister to include in class 4 items which, being individually structures or in the nature of structures, were component parts of a piece of plant or machinery which in its totality was exempted by Sch. 3 to the Act.

I have personally felt some sympathy for the view put forward by counsel for the ratepayers that you could not sensibly, for the purposes in hand, split up the boiler into component parts; that it was and is a single indivisible piece of plant, namely, a boiler. But, as I have earlier said, counsel for the ratepayers did not (as I followed him) challenge the validity of the tribunal's findings, as findings of fact, that the several items specified in para. 48 of the Case were not only identifiable with items in the class 4 list in the Order of 1927 but were also, all of them, structures or in the nature of structures. This concession seems to me in the present case to be conclusive against the cross-appeal—and none the less so because, in sum, the several items make up by far the greater part of the whole boiler. The items are, severally, parts of a plant which fall within the descriptions in class 4 and are structures or in the nature of structures. They are therefore individually rateable although the plant as a single unit is not.

I would therefore dismiss the cross-appeal; and dismiss also the appeal save for the single instance of the soda flash tower.

DENNING, L.J.: Much depends in this case on the true interpretation of the order of the Minister of Health made in 1927. In construing that order it is, I think, legitimate to look at Sch. 3 to the Rating and Valuation Act, 1925. After all is said and done, it is Sch. 3 which Parliament itself considered. Parliament there set out the broad principles and left it to the committee to work out the details. If the committee went beyond their terms of reference and included details not warranted by the principles laid down by Parliament, then to that extent their statement would be ultra vires. Although the statement was confirmed by the Minister, it would not be saved by the provision that, as confirmed, it:

“shall for all purposes have effect as if it were substituted for Sch. 3 . . .”

- A Parliament only intended the statement to have that effect on the assumption that the committee kept within their terms of reference without any misunderstanding of them. It is true that the Minister's order was laid before Parliament, and no address presented against it, but that is very different from its being considered by Parliament. It is still open to the Queen's courts to examine the order to see if it conforms to the general principles laid down by Parliament and
- B is within the powers conferred by it, see *Minister of Health v. R., Ex p. Yaffe* (4) ([1931] A.C. 494), and the Report of the Committee on Minister's Powers, p. 40. In these circumstances the right way to interpret the order is this: The order is the operative instrument. It gives the details of all the plant and machinery that can be rated. Nothing can be added to it by looking at the schedule; but in case of difficulty it is permissible to look to the schedule to explain it (see
- C *Richard Thomas & Co., Ltd. v. County Valuation Committee* (1), [1944] 1 All E.R. 417 at p. 419, per SCOTT, L.J.). If, however, the order should seek to rate plant and machinery which is not warranted by Sch. 3, as properly construed, then to that extent the order would be ultra vires.

- Turning now to the details, I come first to the word "still." If the word "stills" in the order were construed by itself, without regard to Sch. 3, I
- D should have thought that the whole of this oil distillation plant—from the point where the crude oil starts to be heated to the point where the condensed vapour leaves the cooler—might properly be described as a still: but when I see that in Sch. 3 there is mention of a "tar distilling plant", I come to the conclusion that in this order the word "still" refers only to the vessel or retort or container which is heated and not to the rest of the plant. That is a perfectly correct
- E technical meaning which should be adopted. If the committee had intended to specify the whole of the plant, they would have used the words "oil distilling plant" (following Sch. 3) and not the word "stills".

- Next I come to the separate components of the plant. The question in nearly every item is whether it is "in the nature of a structure." Counsel for the ratepayers submitted that the findings of the tribunal were findings of fact which
- F could not be challenged in this court. I do not think he is entirely correct about this. The primary facts are all found by the tribunal and are not in dispute. The only question is what is the proper inference or conclusion from the primary facts. If the tribunal, in coming to its conclusion, discloses by its reasoning that it has misunderstood or misinterpreted the words of the statute, then it falls into error in point of law. Even if it does not disclose its reasoning, but asserts a
- G conclusion which could not reasonably be entertained by a man who properly understood the meaning of the statute, then again it falls into error in point of law. There is, however, a considerable area where two reasonable men, each of whom properly understood the statute, could reasonably come to different conclusions. In such cases the mere fact that the tribunal comes to a different conclusion from that to which some of the members of this court might come
- H does not mean that the tribunal falls into an error in point of law. The question is then one of degree in which the tribunal of fact is supreme so long as it does not step outside the bounds of reasonableness. This is, I think, all shown by the decision of the House of Lords in *Edwards v. Bairstow* (5) ([1955] 3 All E.R. 48), which seems to confirm authoritatively the principles laid down in *Bracegirdle v. Oxley* (6) ([1947] 1 All E.R. 830) and *British Launderers' Research Assoc. v. Hendon Borough Rating Authority* (7) ([1949] 1 All E.R. 21) and applied by this court in cases about these very words "in the nature of structure" in *Cardiff Rating Authority v. Guest Keen Baldwin's Iron & Steel Co., Ltd.* (2) ([1949] 1 All E.R. 27); *British Portland Cement Manufacturers, Ltd. v. Thurrock Urban District Council* (8) ((1950), 114 J.P. 345), and *Burton v. Ogdens (Brighton), Ltd.* (3) ((1952), 23 D.R.A. 246). In several passages of the Case Stated the tribunal seems to have regarded it as a characteristic of a structure or the nature of a structure that it should be built up from component parts on the spot: and in consequence

that, if a part of the plant was brought to the site all in one piece, it could not be said to be of the nature of a structure unless it was brought there by some "feat of engineering". Those words were used by JENKINS, J., in the *Cardiff* case (2) but I am sure he did not mean them to be used as a definition; and it is misleading to use them so. Many will remember seeing prefabricated houses being transported on lorries. When erected they were structures or in the nature of structures, but it did not require a "feat of engineering" to transport them to the spot. This illustration brings out the point. It is, I think, a characteristic of a structure that it is built up of component parts on the site. But a thing may be in the nature of a structure, even though it is not built up on the site, but is brought there all in one piece. The nature of the thing depends on its characteristics when erected, not on whether it requires a feat of engineering to bring it there. Take, for instance, the soda flash tower. It is twenty-five feet high, four feet in diameter, weighs nine and a half tons, is bolted to the ground and surrounded at its base by a fireproof wall eight or ten feet high. If it had been built up on the site, it would be regarded by everyone as a structure, just as much as a "water tower with tank" (which is expressly mentioned in Sch. 3). Although this tower was not built up on the site, it is of the same nature as if it had been. It is of the nature of a structure and is rateable.

By contrast take the condensers. They are cylinders filled with a bundle of tubes. They are sixteen feet long, nearly three feet in diameter, weigh three and a quarter tons and are placed horizontally one above the other. No one looking at one of those by itself would say it was a structure or in the nature of a structure. It is just a piece of plant. Then does the fact that there are twelve of them, connected in series, make any difference? I think not. They are just twelve pieces of plant connected together. Likewise the heat exchangers and the coolers which are similar in nature and size to the condensers.

Next I come to the item which has troubled me most. It is the accumulator which is a metal tank thirty-six feet long, eight feet in diameter, weighing thirteen tons and resting in a steel cradle on reinforced concrete piers. Contrast this with the crude settler which is a metal tank thirty-eight feet long, nine feet in diameter, weighing forty-six tons, and rests on reinforced concrete piers. The only appreciable difference between these two tanks is that the crude settler weighs forty-six tons and the accumulator thirteen tons. Yet the Lands Tribunal has found that the crude settler is in the nature of a structure, but that the accumulator is not. The reason the tribunal give for the distinction is that the transport of the crude settler to the site should be regarded as a "feat of engineering" but that the transport of the accumulator could not be so regarded. I do not think that is the right test. I should have thought it was a feat of engineering in each case. In any case it is a mistake to substitute the test "feat of engineering" for the words of the statute. I should have thought that each of these enormous and permanent tanks was in the nature of a structure just as much as "water towers with tanks" mentioned in Sch. 3.

Another matter that has troubled me a little is the great pipes that carry the liquid from the top of the tower to the bottom. If they had been "conduits", I should have thought they were rateable. They are in the nature of a structure, just as oil pipe lines that are laid underground: but I am inclined to think that these particular pipes would not ordinarily be described as "conduits" and are therefore not rateable. On all the other components of this plant, I agree with all that the Master of the Rolls has said.

Now I come to the cross-appeal about the boiler unit. Counsel for the rate-payers says that it is a process boiler to produce steam for the processes of refining oil—as distinct from a heating boiler (for example to supply central heating) or a power boiler (for example to drive machinery)—and that a process boiler is not rateable.

- A If it were permissible to look at Sch. 3 (without reference to the order), I would agree that a process boiler does not come within class 1, but I see no reason why it should not come within class 4. The proviso to class 1 makes it clear that process boilers are not brought within class 1 simply because they are also used for heating water: but it leaves it open to them or any parts of them to be brought within class 4, if they are structures or in the nature of structures.
- B Turning now to the order (which is the operative instrument), the strange thing is that boilers are expressly mentioned in the details to class 1, but not at all in the details to class 4. I cannot understand this. I should have thought that the committee, when engaged in working out the details of class 4, would have included such part or parts of a boiler as is a structure or in the nature of a structure. Nevertheless in view of its omission from class 4, it is plain that a
- C process boiler cannot be rated as such. But I see no reason why the several parts of a process boiler should not be rated under class 4 if they can properly be brought within it. The furnace, the flues, the economiser and the soot hoppers all come within the details specified in class 4. They are all structures or in the nature of structures, and are not less so because they are attached to other structures which are not rateable. They are therefore rateable. I think the
- D Lands Tribunal was right on this matter and would dismiss the cross-appeal.

ROMER, L.J.: I have had the advantage of reading in advance the judgment which the Master of the Rolls has delivered. I agree with the conclusions at which he has arrived and with the reasons on which they are based.

- E The main submission of counsel for the valuation officer was that the greater part of the unit of the oil refinery at the Isle of Grain, which is referred to in the Case as the crude distillation unit or topping unit, constitutes a functional entity which is a "still" and which is rateable as such under class 4 of the Order of 1927. I am quite unable to accept this contention. It is true that in some contexts and for some purposes the word "still" has a wider meaning than that of a retort or other vessel used for purposes of distillation; and that
- F it may comprehend an entire distilling apparatus. It appears to me, however, difficult in the extreme to regard the extensive and complicated distillation plant which is now in question, comprising as it does all the units of equipment enumerated in para. 8 of the Case, as a "still" for the purposes of class 4 of the order. The word as there used is clearly referable to a part only of a distillation plant just as, for example, the words "condensers—tar" in class 4 are descriptive of parts of "tar distilling plant" which is mentioned, as a comprehensive
- G entity, in class 4 of Sch. 3.

- H In any case, it seems to me that no part of a plant is rateable under class 4 of the order unless it is a building or structure, or in the nature of a building or structure. Anything that consists of a number of separate buildings or structures cannot be rated under class 4 on the ground only that it comprises a part of a plant. A glance at plan B (which forms part of the Case) shows clearly enough the difficulty of regarding the topping unit as an individual building or structure or as being of the nature thereof; and such indeed was the view of the Lands Tribunal.

The tribunal (who obviously took very great trouble over this case) visited the premises twice and as a result of its inspection expressed the following opinion (para. 31 (d) of the Case):

- I "It seemed to us that where there were a number of entirely separate pieces of plant placed at intervals over an area 250 feet by 295 feet, each with its particular function and, in the case of the pumps, housed in two entirely separate buildings at a distance of more than fifty yards from each other, it was impossible to describe the whole as being a building or structure or in the nature of a building or structure merely because the different parts were connected by pipes to enable the raw material to be carried from one part to another even though that interconnection was necessary to the

proper working of the whole. In our view anyone looking at the unit would regard it as a number of separate pieces of plant and buildings or structures housing or forming part of the plant."

I agree with these views of the Lands Tribunal and have no difficulty in rejecting the valuation officer's argument that the topping unit is rateable as a "still".

It therefore becomes necessary to consider the liability to rates of the various component parts of the unit which, after concessions and counter-concessions have been made, still remain in dispute. Of these I have nothing to add to what the Master of the Rolls has said except for a word or two with regard to the reflux and product accumulator and to the soda flash tower. I agree with the Master of the Rolls that we should not disturb the finding of the tribunal with regard to the accumulator, even though we ourselves might perhaps have taken a different view. The tribunal's decision in differentiating between the crude settlers on the one hand and the accumulator on the other has been criticised as irrational. They had, however, the advantage of seeing these respective units and I am not persuaded that they erred in principle in deciding a question, which is, after all, one of degree. It is now established that such questions are essentially within the province of the Lands Tribunal to decide; and I would refer to the judgment of BIRKETT, L.J., in *Burton v. Ogdens (Brighton), Ltd.* (3) ((1952), 23 D.R.A. 246), where, after citing JENKINS, J.'s observations in *Cardiff Rating Authority v. Guest Keen Baldwin's Iron & Steel Co., Ltd.* (2) ([1949] 1 All E.R. 27), as to the characteristics of "structures", the lord justice said (23 D.R.A. at p. 261):

"When I read the immense detail in the Case Stated and the specific findings dealing with those characteristics and realise that the Lands Tribunal having the *Cardiff* case (2) before it followed it very closely, I cannot think that there is any ground on which this court could interfere with its decision . . ."

So also on this matter of the accumulator I do not think that this court should interfere.

On the other hand the question whether the soda flash tower is properly to be regarded as being in the nature of a structure is not, as I think, merely one of degree. This tower, as is stated in para. 15 of the Case, is twenty-five feet high, four feet in diameter and weighs nine and a half tons. It is bolted to the ground at ground level and after erection was surrounded at its base by a fire-proof protection for the first eight or ten feet. The tower could not stand without being bolted to the ground and it clearly possesses the quality of permanence. In these circumstances I should have thought myself that it is plainly in the nature of a structure. The tribunal adopted the contrary view solely, it seems, on the ground that its transport to the site as a single entity did not involve a feat of engineering. In my judgment this one consideration is insufficient to displace the others to which I have referred and I would allow the appeal so far as it relates to this unit.

There remains the question of the boiler. This is unquestionably a process boiler and is, as such, exempted from liability to rating under the joint effect of s. 24 and the proviso to para. 1 (b) of Sch. 3 to the Act of 1925. Although it is not necessary to decide the point, it accordingly appears to me that it would have been ultra vires the committee which was set up under s. 24 to have included process boilers as rateable subjects by their own order; for so to have done would have overridden the exemptions granted by the Act—which cannot be superseded by the committee's order (*Richard Thomas & Co., Ltd. v. County Valuation Committee* (1), [1944] 1 All E.R. 417). The committee did not in fact include process boilers in the Order of 1927 but the question arises whether they could properly include in that order such parts of process boilers as are in the nature of structures—even though, by so doing, they could virtually eliminate

A (as in the present case) the exemption afforded to the process boilers themselves. This depends on the true construction of para. 4 of Sch. 3 to the Act. Does "any plant" in that paragraph inferentially exclude plant which has itself been exempted by the proviso to para. 1 (b)? Or does para. 4 include structural parts of any plant whatever? If the former, then the committee could not rate parts (even though structural) of process boilers; if the latter, they could. I see no sufficient reason to qualify the apparent generality of the words "any plant" in para. 4 of Sch. 3. If Parliament had wanted to extend to the parts of process boilers the exemption just previously conferred on the boilers as units, one would have expected an express provision to that effect.

Accordingly, if the "parts of a plant" which are dealt with by class 4 of the Order of 1927 were intended to include parts of process boilers, such inclusion could not be challenged on the ground of ultra vires. But, as a question of construction of the Order of 1927, ought the parts of boilers referred to in class 4 to be confined to parts of non-process boilers, having regard to the proviso to class 1 (b) of the schedule to the order? That proviso exempts from the schedule to class 1 (b)*—but not from the schedule to the order—process boilers and their accessories. I do not think that there is any more reason for cutting down the apparent generality of the words "the following parts of a plant" in class 4 of the Order of 1927 than there is for qualifying "such part of any plant" in para. 4 of Sch. 3 to the Act of 1925. It appears to me accordingly (a) that on the construction of the Order of 1927 "parts of a plant" in class 4 include such parts of a process boiler as are therein specified (provided, of course, that they are of a structural nature) and (b) that such inclusion is not in conflict with the Act of 1925. The only remaining question is whether such parts escape from liability if they constitute integral parts of the boiler itself. I can find no sufficient ground for exempting them merely because they are incorporated integrally in the boiler. It seems to me that a boiler like that in question is "plant" and that, e.g., a superheater is no less a "part" of that plant because it is built into it; indeed, such a superheater is in some sense more a part of the boiler than one which is built separate physically from the boiler. An axle is a part of a motor car even though it is an integral part of the chassis, and cannot very well be separated from it.

It might indeed be doubted whether an integral part of a boiler could be truly described as being in the nature of a structure but the tribunal has found that the relevant parts of the boiler in this case possess that characteristic and counsel for the ratepayers is not contesting this if he is wrong on his other points. It appears to me accordingly that the decision as to the boiler should be affirmed.

Appeal dismissed except as to the soda flash tower (held rateable). Cross-appeal dismissed. Leave to appeal to the House of Lords granted to both parties.

Solicitors: *Linklaters & Paines* (for the ratepayers); *Solicitor of Inland Revenue* (for the valuation officer).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

* In Sch. 3 to the Rating and Valuation Act, 1925, as substituted by the Schedule to the Order of 1927 class 1 (b) has itself a schedule which follows after a proviso to class 1 (b) (see 20 HALSBURY'S STATUTES (2nd Edn.) 156).

LEVETT v. LEVETT AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Hodson and Ormerod, L.J.J.),
February 13, 14, 1957.]

*Divorce—Foreign decree—Petition by wife ordinarily resident in Germany—
Decree granted to husband on cross-petition—Husband domiciled in England
—No recognition of foreign decree—Matrimonial Causes Act, 1950 (14*

Geo. 6 c. 25), s. 6, s. 18 (1) (b).
*Divorce—Discretion—Appeal—Exercise of discretion on appeal—Discretion
statement—Matters in discretion statement not fully explored—Matrimonial
Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (2), proviso.*

The husband was an Englishman domiciled in England. The wife was German by birth. The parties were married in 1947 in Germany. At the end of 1947 they came to England where they lived together until February, 1952, the wife then returning to her parents in Germany. In July, 1952, the wife instituted proceedings for divorce in Germany on the ground of cruelty. In those proceedings the husband cross-petitioned for divorce on the ground of the wife's adultery with one B. The German court held that it had jurisdiction as the wife had her ordinary residence within the area of jurisdiction of that court; the wife not proceeding with her prayer for a divorce, the court found the adultery proved and granted the husband a decree on his cross-petition. The husband petitioned the English court for a declaration that the marriage had been dissolved by the decree of the German court, alternatively for a divorce on the ground of the wife's adultery with B. and with one S., praying for the exercise of the court's discretion in respect of his own adultery. At the hearing before a commissioner the court took the view that the husband's participation in the German divorce proceedings amounted to connivance at or conduct conducing to the wife's adultery with S. On appeal by the husband,

Held: (i) the decree of the German court would not be recognised as the English court would not have had jurisdiction in like circumstances, since neither s. 18 (1) of the Matrimonial Causes Act, 1950*, nor that sub-section together with s. 6, enabled a husband domiciled abroad to obtain, in divorce proceedings brought by his wife under s. 18 (1) (b) as being resident in England, a decree of divorce on a cross-prayer in his answer to her petition.

Travers v. Holley & Holley ([1953] 2 All E.R. 794) and observations of DAVIES, J., in *Dunne v. Saban* (formerly *Dunne*) ([1954] 3 All E.R. at p. 592) applied.

(ii) the court would exercise their discretion by granting to the husband a decree of divorce notwithstanding that the commissioner had refused a decree, since by wrongly directing himself to questions of connivance and conduct conducing on the part of the husband the commissioner had reached the conclusion that the case did not call for any exercise of discretion.

The form, treatment and frankness of a discretion statement considered (see p. 724, letter I, to p. 725, letter I, post).

Appeal allowed on (ii) above.

* Section 18 (1) of the Matrimonial Causes Act, 1950, provides: "Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:—(a) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England; (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man."

A [Editorial Note. As regards the absence of jurisdiction at a husband's instance in proceedings by a wife under s. 18 (1) of the Matrimonial Causes Act, 1950, compare *Russell v. Russell and Roebuck* (p. 737, post).

As to the recognition by English courts of foreign decrees of divorce where similar jurisdiction claimed by English courts, see 7 HALSBURY'S LAWS (3rd Edn.) 113, para. 200, note (u); and for cases on the subject, see 11 DIGEST (Repl.)

B 483, 1095-1097.

For the Matrimonial Causes Act, 1950, s. 6, s. 18 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 396, 405.]

Cases referred to:

(1) *Travers v. Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; 3rd Digest Supp.

C (2) *Dunne v. Saban* (formerly *Dunne*), [1954] 3 All E.R. 586; [1955] P. 178; 3rd Digest Supp.

(3) *Pryor v. City Offices Co.*, (1883), 10 Q.B.D. 504; 52 L.J.Q.B. 362; 48 L.T. 698; 16 Digest 107, 66.

(4) *Hollingsworth v. Hollingsworth*, [1952] 2 All E.R. 284; [1952] P. 277; 3rd Digest Supp.

D Appeal.

This was an appeal by the husband, Ronald Albert Levett, from an order made by Mr. Commissioner BUSH JAMES, Q.C., on Oct. 1, 1956, dismissing his petition. The parties were married on May 28, 1947, at the garrison church of the British Army of the Rhine at Luneburg, Germany, and there was one child of the marriage. The husband was an Englishman domiciled in England, the wife was before marriage a German national. In about November, 1947, they came to England where they lived together until February, 1952. The wife then left the husband and returned to her parents' home in Germany. On July 24, 1952, the wife presented a petition for divorce in Germany on the ground that the conduct of the husband was incompatible with matrimonial duties. It was alleged that the jurisdiction of the German court followed from the ordinary residence of the wife in Germany, and that according to the law of domicile of the husband, viz., England, the divorce to be granted by the German court would be acknowledged by the English courts. The petition further alleged that in accordance with art. 17 of the introductory law to the German Civil Code English law was applicable; and that the relevant provision was s. 2 of the Matrimonial Causes Act, 1937, where cruelty was mentioned as a ground for divorce, and that the notion of cruelty largely coincided with that of conduct incompatible with matrimonial duties under German law. On May 21, 1953, the husband cross-petitioned in the German court on the ground of his wife's adultery with one Bernhard. The hearing took place before the provincial court at Munster, Westphalia, on May 22 and June 22, 1953. At the final hearing the wife made no application in respect of her petition and that court gave judgment for the husband on the cross-petition and granted him a decree of divorce which was made absolute on Aug. 2, 1953. The German court found that its jurisdiction followed from art. 606, para. III, cl. 1, of the Code of Civil Procedure as the wife had moved her ordinary residence into the jurisdiction of the court, and that the decisions of German courts in matrimonial causes were recognised by English law. On Apr. 3, 1954, the husband presented a petition in England for a declaration that the decree of divorce granted by the provincial court of Munster had dissolved his marriage, alternatively, that the marriage might be dissolved on the ground of his wife's adultery with one Bernhard. On Oct. 12, 1954, the petition was amended by asking the court to exercise its discretion to grant a decree notwithstanding the husband's adultery during the marriage. On June 28, 1955, the petition was re-amended by pleading the wife's adultery with George Frederick Smith from about December, 1952, onwards. Mr. Commissioner BUSH JAMES, Q.C., held that the German court wrongly applied

English law and seemed to have been totally unaware of s. 18 of the Matrimonial Causes Act, 1950. He, therefore, refused to make the declaration prayed for. He found that the wife had committed adultery with the co-respondent Smith but did not find her alleged adultery with Bernhard to have been proved. The commissioner refused to make a decree because the proceedings in Germany constituted an anticipatory consent by the husband to adultery committed by the other spouse. The commissioner further held that if the husband had satisfied him that there had been no connivance or conduct conducing he would have declined to exercise the court's discretion in respect of the husband's own adultery because he (the commissioner) had considerable doubt whether the husband had been frank with the court. He, therefore, dismissed the petition.

N. F. Stogdon for the husband.

The wife and co-respondent did not appear and were not represented.

LORD EVERSHERD, M.R.: I will ask HODSON, L.J., to deliver the first judgment.

HODSON, L.J.: The first ground on which the petition was presented, that the marriage had already been dissolved, and the relief sought being merely a declaration to that effect, rightly, in my opinion, failed. The position was that in June, 1953, the husband had been granted a decree of divorce against the wife on the ground of her adultery with a man said to have the Christian name of Bernhard, by the provincial court at Munster, Westphalia, in Germany. The decree was confirmed in a final form on Aug. 2, 1953. That decree came into existence in the following circumstances: the wife, who was born a German girl, had left her husband in England and gone back to her home in Germany; she there instituted proceedings for divorce in the German court against her husband who was English and who was domiciled in England; the ground which she put forward was cruelty. The German legal procedure provided for the husband to be assisted in his defence, and although he was not required to go to Germany to deal with the matter, he was put in the position of being able himself not only to deal with the charges of cruelty, but also to ask for relief himself on the ground of his wife's adultery. We have not examined in detail the German record and it is unnecessary to consider the circumstances in which the German court took jurisdiction in the present case. It appears that the wife's claim based on cruelty was withdrawn, and the husband obtained relief on the ground of adultery with a man said to be Bernhard. Some question was raised as to the sufficiency of the evidence of adultery; it is, however, unnecessary to go into that. It appears from the material which is before this court that, probably before the institution of the German proceedings and certainly before the German decree was pronounced, the wife had committed adultery with a man who is named in the present petition as a second co-respondent. He was so named by an amendment to the petition as late as June 23, 1955, when the husband for the first time became aware of that adultery. It is clear from the wife's admission, which was signed by her, and from an admission signed by the co-respondent Smith, that she and Smith had lived together as man and wife since August, 1953; it is also clear from the statement of the wife that she has a child by Smith born on Sept. 25, 1953, and that she must have committed adultery with Smith at about the end of the year 1952. From that statement of facts it is clear to my mind that the adultery of the wife with Smith was not in its inception in any way connived at or conduced to by the German proceedings, in so far as the husband was responsible for those proceedings, in which he took part by way of claim for counter-relief; and accordingly, before I leave my discussion of the facts, it is sufficient to say that, so far as I can see, there is no justification for any finding against the husband of connivance, which would be an absolute bar to divorce, or conduct conducing, which would be a discretionary bar to divorce.

A The husband contended before the commissioner and before this court that the German decree ought to be recognised on the ground which was dealt with in this court in *Travers v. Holley & Holley* (1) ([1953] 2 All E.R. 794), the effect of which is I think accurately summarised by DAVIES, J., in *Dunne v. Saban* (formerly *Dunne*) (2) ([1954] 3 All E.R. 586 at p. 592) as follows:

B “In my judgment the observations in *Travers v. Holley & Holley* (1) merely decide that this court will recognise the right of other [foreign] courts to encroach on the principle of domicile only to the extent to which this court also does.”

C The position in this country being that domicile is the foundation of jurisdiction and that there are exceptions to that rule, I must deal with the material exception. Section 18 of the Matrimonial Causes Act, 1950, provides additional jurisdiction in proceedings by a wife. That additional jurisdiction is in terms expressed to be available for a wife. Section 18 (1) (b) reads as follows:

D “in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.”

I now read s. 18 (1) itself:

E “Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases . . .”

and then follow, amongst others, para. (b), which I have already read.

F It has been argued here that, having that provision of the Act of 1950 in mind, following the principles enunciated in *Travers v. Holley* (1), this court ought to recognise the German decree as being a valid decree of divorce. I confess that I have found great difficulty in understanding how the argument can be addressed to this court on the facts of the present case. The difficulties in the way of applying *Travers v. Holley* (1) to the present case are numerous. I shall be forgiven if I do not attempt to deal with them all, because one difficulty seems to me to be fatal in the present case. Assuming that the wife had been deserted by her husband in Germany and even assuming that she had been resident within the jurisdiction of the German court for a sufficient time to bring the doctrine into force, so that the situation was exactly the same mutatis mutandis as that contemplated by s. 18 (1) (a) of the Act of 1950, yet to my mind s. 18 of the Act of 1950 would afford no support for the proposition that a husband, because he was respondent to proceedings brought by a wife, ought himself to be enabled to obtain relief on his answer. The courts in this country under s. 18 have jurisdiction to entertain proceedings by a wife; it is quite true that the meaning of the word “proceedings” may vary according to its context, and in one authority to which our attention was drawn, *Pryor v. City Offices Co.* (3) ((1883), 10 Q.B.D. 504), from the decision of this court it was quite clear that the word “proceedings” may cover the whole of the proceedings in question, beginning with the claim and including a counterclaim. It does not follow, to my mind, that in the present context, in considering the question of proceedings being entertained by a wife, the word “proceedings” includes anything that may follow in the same suit. The position is, I think, exactly the same as if Parliament had used more homely language and said that the court should have jurisdiction to listen to a request or to hear a claim by a wife for a particular form of relief. That approach to this section makes it impossible to hold that a husband, in answer to a wife’s claim, could get himself under the umbrella of this section so as to make use of the argument based on reciprocity.

I Counsel for the husband sought to obtain some support for his argument from a decision of COLLINGWOOD, J., in *Hollingsworth v. Hollingsworth* (4) ([1952] 2 All

E.R. 284). In that case the petitioner had obtained the leave of the judge to present a petition for divorce notwithstanding the fact that three years had not passed since the celebration of the marriage, and the respondent filed an answer containing a cross-prayer for relief asking for divorce. It was held there that s. 2 of the Matrimonial Causes Act, 1950, related solely to the petition and imposed a restriction on the initiation of a suit for divorce which did not apply to the cross-prayer in an answer. It was argued, that the marriage not having subsisted for three years, the respondent could not ask for cross-relief unless permission were given, because the intention of the legislature was that no cross-relief should be given to anybody in the position of a petitioner within three years without leave in special circumstances. The learned judge, however, took a different view and rejected the argument, relying on the language of s. 6 of the same Act, which provides as follows:

“If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.”

That was a justification for the view which the learned judge took in dealing with the problem which he had before him and I express no opinion one way or the other whether the answer which he gave was correct. It was obviously a sensible and practical solution of the problem, because he pointed out that if he did not arrive at that answer, the husband would in the circumstances obviously get leave to ask for relief on his answer, because it would be so manifestly unjust if his wife were entitled to ask for relief while he was not. In my opinion that does not touch the present case, because s. 6 puts a person who seeks relief in the answer in the same position as if he or she had presented a petition seeking the same relief.

As LORD EVERSHERD, M.R., showed in the course of the argument, whereas a wife, deserted in this country by a man who disappeared and went to one of the United States of America, would be entitled *prima facie* to rely on s. 18 (1) (a) of the Act of 1950, the husband would not be in a position in his answer to present a petition seeking relief, namely, divorce, unless he was domiciled in this country; and to my mind no assistance can be gained from s. 6 in the sense that it can be said that s. 6 of the Act of 1950 governs the operation or the effect of s. 18. So much for the prayer for a declaration, which in my view fails.

On the other part of the case, the learned commissioner having found adultery with the co-respondent Smith clearly proved, refused to exercise his discretion in favour of the husband. This court would not in the ordinary way interfere with the exercise of the discretion of the learned commissioner, but I think this is an exceptional case and one in which we should interfere, because it is plain from the judgment, that he came to the conclusion that no exercise of discretion was called for at all, because he held that the husband by his participation in the German divorce proceedings had connived at his wife's adultery with Smith. He did nothing of the kind. On the facts proved, he did not connive. So the absolute bar goes. Moreover, the learned commissioner thought that if he were wrong in his finding of connivance, the husband, by his conduct in those German proceedings, conduced to the adultery of the wife. For the reasons which I gave earlier in this judgment, that ground also is plainly wrong. The husband in no way conduced to the inception, which I think for this purpose is the material moment to consider, of his wife's adultery with Smith. There is one other matter which I should mention. The commissioner criticised the form of the discretion statement and the way in which it was adopted by the husband. The discretion statement reads as follows:

“The court will be asked to exercise its discretion to grant me a decree of divorce notwithstanding my adultery as set out below. 2. In September, 1953 [a named woman] came to live at my house. She occupied a separate

A room from me and no intimacy took place between us until the end of April, 1954. Since that time she and I have lived together as man and wife at Southdown, Alfriston, Sussex, and have frequently committed adultery together. 3. On Sept. 3, 1955, the said [woman] gave birth to a child . . . of which I am the father. 4. [This woman] and I intend to marry if the court sees fit to grant me a decree of divorce. 5. Save as set out above I have never committed adultery."

That document, as appears from the form in which it is made, was a document of a kind which would not be drafted by the husband himself but by his lawyers, and signed by him as summarising the facts which he had to disclose to the court as the relevant facts. I see no reason to criticise that document. Assuming in the husband's favour that it is true—and there is no reason to doubt it—he disclosed the relevant facts and added to the relevant facts another matter which was material, namely, that he hoped and intended to marry this woman with whom he was living if he were free, which is always a matter to be taken into consideration. The commissioner, however, was thoroughly dissatisfied with this statement, and said:

D " [The husband] is legally aided, and this inordinate delay cannot be attributed to the [husband's] financial position. Again had the petition simply asked for a decree on the ground of adultery, the case would have almost certainly been over before the child was born. In saying this, I do not want it to be thought that I am overlooking the substance of the discretion statement, which to say the least, I find disturbing. The [husband] was entitled to anticipate a more speedy trial than he received, but having been asked as I must assume he was, whether he had committed adultery himself, and having answered no and sworn a petition to that effect, he immediately entered into an adulterous relationship. In my view, it was a very wrong course of action to take, and one which does not commend itself to the court."

F So far, I have no quarrel with that statement as to the husband's adultery having taken place almost immediately after he had come to the court and asked for relief; and no doubt at one time that might have been considered a strong ground for refusing relief, at any rate, unless some very good explanation was given of why the events happened in the way they did. The judgment goes on as follows:

G " Further, a discretion statement should contain ' the facts which it is material for the court to know '. To take one example, I should have thought it material to state, which it does not, whether this association was envisaged or planned before or after the presentation of the petition. No doubt the [husband] did not draft his own statement, but it is hardly full and frank. I asked him whether it contained the whole truth, and he was content to answer ' Yes '."

I If the commissioner had pursued the question he put to the husband on this topic, as he would have been well entitled to do, he might have found out how it was that the husband came to have this woman living in his house and how it came about that the relationship developed in the way in which it did; but he did not take that course, and to my mind there was no justification for saying that the discretion statement was not full and frank. In my judgment, so far as one can tell, it was full and frank, and the fact that matters were not further explored which might have been explored does not in any way justify this court in holding that there was any lack of frankness in this matter.

The main ground, however, on which I think this court ought to interfere is the ground that the commissioner took undoubtedly, in my view, a wrong course in applying his mind to the question of conduct conducive and connivance, which really did not arise in the present case; and when those matters are out

of the way, having regard particularly to the circumstances of the case, that the husband is apparently in a permanent liaison with a woman whom he desires to marry and by whom he has had a child, I think this court ought to exercise its discretion and pronounce a decree in his favour.

ORMEROD, L.J.: I agree. As was correctly stated by the learned commissioner, applying the test laid down in *Travers v. Holley & Holley* (1) ([1953] 2 All E.R. 794) the question which he had to consider was whether the circumstances in which the wife in these proceedings could petition for divorce in Germany were sufficiently similar to the circumstances in which a wife in a like case could petition for divorce in this country by virtue of s. 18 (1) (b) of the Matrimonial Causes Act, 1950. The learned commissioner appears in his judgment to have considered this purely on the basis of whether the conditions of residence in Germany were similar to the condition of residence imposed by the sub-section, that is, ordinary residence in this country for a period of three years immediately preceding the presentation of the petition. In Germany, according to the evidence given by an expert in German law, the test is that the petitioner should be ordinarily resident. There is no period of time laid down, and it is a question, in the whole of the circumstances in each case, for the court to decide whether there is jurisdiction on the ground of the petitioner being ordinarily resident. That is the only matter which the learned commissioner considered. He came to the conclusion that there was not sufficient similarity in jurisdiction between this country and Germany to warrant a declaration in the form asked for. There was, however, a further factor to be considered. The fact was that although in Germany the wife presented a petition, she did not proceed with it. The husband was allowed to enter a cross-petition and the decree was granted on the cross-petition of the husband. I think that that is a matter which is of considerable importance in considering this part of the case.

Counsel for the husband argued that the jurisdiction is similar here on a proper construction of s. 18 of the Act of 1950. He argued, as I understand it, that as a wife would be entitled to present a petition after being ordinarily resident in this country for a period of three years, such presentation would be "proceedings" within s. 6 of the Act and the presentation of a cross-petition by the husband merely a step in those proceedings, and that, therefore, the husband must be entitled to present his petition and have the matter heard. Counsel based his argument on the combined result of s. 6 and s. 18. Section 6 of the Act provides that:

"If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief."

In other words, under s. 6 undoubtedly a respondent may present a cross-petition and may obtain relief in proper circumstances. The argument is that if it is allowed by s. 6, there is no reason why there should be any limitation of the right in the case of a petition under s. 18, and, therefore, if the wife may present a petition, the husband must equally be able to cross-petition. I cannot agree with this contention. As I see it s. 18 was enacted for the purpose of enabling a deserted wife to obtain a relief which she would not otherwise get because she had not the necessary domicile in this country, but does not go so far as to extend that right to the husband so as to enable him to present a cross-petition. In my view that would be taking a wider view of the section than the words of the section warrant. Section 6 deals not only with petitions presented by wives but with petitions presented by either spouse, and in my view it would be wrong to say that because of s. 6, s. 18 gives to a husband the right to present a cross-petition. For these reasons I am satisfied that the declaration should not stand.

A With regard to the other question I have nothing to add. I agree that there should be a decree in the present case for the reasons already given.

LORD EVERSHERD, M.R.: I am also of the same opinion and think that, although the husband is not entitled to the declaration which he has sought, he is entitled to a decree for dissolution of the marriage. Although, as regards the second point, we are differing from the conclusion of the learned commissioner and, on the first point, have reached a similar conclusion by a somewhat different route, I do not think it would serve any useful purpose for me to add to the reasons which have fallen from my brethren, and with which I find myself in full concurrence. I therefore say no more, save this, that in so leaving it I hope I shall not be thought to indicate any disrespect to the learned commissioner. The appeal is allowed accordingly to the extent that a decree will be granted, I take it, as prayed by the petition.

Appeal allowed: Decree nisi granted.

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Barwell & Blakiston*, Seaford (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

S. BERENDSEN, LTD. v. INLAND REVENUE COMMISSIONERS.

E [CHANCERY DIVISION (Wynn-Parry, J.), February 5, 6, 1957.]

Profits Tax—Computation of profits—Deduction of director's remuneration—"Controlling interest" of directors—Directors not holding majority of shares—Majority of shares held by another company—Director owning majority of shares of that company—Conclusiveness of register of members—Finance Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 54), Sch. 4, para. 11—Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 33), s. 34.

F The directors of the taxpayer company owned less than fifty per cent. of the share capital but one of them owned more than fifty per cent. of the shares in another company, which owned more than fifty per cent. of the shares in the taxpayer company. He was therefore able to control the voting by the other company in the taxpayer company's meetings. The taxpayer company was assessed to profits tax on the basis that it was a director-controlled company and that the deduction to be allowed in respect of the remuneration of the directors for profits tax purposes must therefore be limited by virtue of para. 11 of Sch. 4 to the Finance Act, 1937, as amended by s. 34 of the Finance Act, 1952.

H **Held:** the taxpayer company was not a company whereof the directors had a controlling interest within the meaning of para. 11 of Sch. 4 to the Finance Act, 1937, as amended by s. 34 of the Finance Act, 1952, because (except possibly in the case of bare trustees) the company's register of members was conclusive as to the owners of shares for the purpose of ascertaining who controlled the company, and it was not permissible to look beyond the register in order to ascertain whether a director of the company had control of another company owning shares of the former.

Inland Revenue Comrs. v. Silverts, Ltd. ([1951] 1 All E.R. 703) applied.

Dictum of SCOTT, L.J., in *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* ([1941] 2 All E.R. at p. 655) not followed.

Appeal allowed.

[For the Finance Act, 1937, Sch. 4, para. 11, see 12 HALSBURY'S STATUTES (2nd Edn.) 385; and for the Finance Act, 1952, s. 34, see 32 HALSBURY'S STATUTES (2nd Edn.) 186.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. J. Bibby & Sons*, [1944] 1 All E.R. 548; 170 L.T. 370; *affd.* H.L., [1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; 2nd Digest Supp.
- (2) *Inland Revenue Comrs. v. Silverts, Ltd.*, [1951] 1 All E.R. 703; [1951] Ch. 521; 29 Tax Cas. 491; 2nd Digest Supp.
- (3) *British American Tobacco Co., Ltd. v. Inland Revenue Comrs., Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.*, [1941] 2 All E.R. 651; [1941] 2 K.B. 270; 111 L.J.K.B. 1; 165 L.T. 275; *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.*, *affd.* H.L. [1943] 1 All E.R. 13; [1943] A.C. 335; 112 L.J.K.B. 81; 169 L.T. 98; 29 Tax Cas. 49; 2nd Digest Supp.

Case Stated.

The appellant company appealed to the Special Commissioners of Income Tax against assessments to profits tax in the sums of £2,683 6s., £928 18s., £946 15s. and £1,100 for the chargeable accounting periods of the twelve months ending on Dec. 31, 1951, 1952, 1953 and 1954 respectively. The question for determination was whether the company was one whereof the directors had a controlling interest within the meaning of para. 11 of Sch. 4 to the Finance Act, 1937, as amended by s. 34 of the Finance Act, 1952. If it was, the remuneration of the directors was required to be limited in accordance with para. 11 in computing its profits for profits tax purposes. The company was incorporated in 1912 and carried on the business of merchanting agricultural machinery. Its issued share capital was one thousand shares of £5 each, registered in the following names: Ludwig Elsass, 300, Sophus Berendsen A/S 590, P. L. Burgin one, E. Hertel 100, A. Elsass nine. Each share carried one vote at company meetings. Sophus Berendsen A/S, was a Danish company, having been incorporated in Denmark. It and E. Hertel owned their shares beneficially but the remaining shareholders held the shares registered in their names as nominees of the Danish company. The directors of the company were Ludwig Elsass, E. Hertel and P. L. Burgin, who between them had a total of 401 shares registered in their names, carrying less than fifty per cent. of the votes at company meetings. Ludwig Elsass owned 395 of the six hundred issued shares of the Danish company and was thereby entitled to exercise a majority of the votes in the Danish company in open meeting.

The company contended that, as the total number of its shares registered in the names of its directors carried less than fifty per cent. of the votes at company meetings, the company was not director-controlled. The Crown contended that the Danish company's shareholding should be added to the shares held by the company directors because one of the directors, Ludwig Elsass, held a majority of the shares in the Danish company and so controlled the voting power of that company and that the directors therefore had a controlling interest in the company. The commissioners held that the directors had a controlling interest in the company and dismissed the appeal. The company appealed.

F. N. Bucher, Q.C., and *R. Buchanan-Dunlop* for the company.

R. O. Wilberforce, Q.C., *Sir Reginald Hills* and *E. Blanshard Stamp* for the Crown.

WYNN-PARRY, J.: This case raises the question of what is the meaning of the phrase in para. 11 of Sch. 4 to the Finance Act, 1937, "a company the directors whereof have a controlling interest therein". That phrase, and also that part of it consisting of the words "a controlling interest", has been the subject of consideration before the courts on several occasions. All the relevant cases are conveniently found in vol. 29 of the Reports of Tax Cases. I will consider first *Inland Revenue Comrs. v. J. Bibby & Sons* (1) ([1944] 1 All E.R. 548; [1945] 1 All E.R. 667), and I will borrow (if I may so put it) my statement of the point raised in it from the judgment of *SIR RAYMOND EVERSHED, M.R.*,

A in *Inland Revenue Comrs. v. Silverts, Ltd.* (2) ([1951] 1 All E.R. 703). He says (at p. 706):

B “In the *Bibby* case (1) the question was, as in the present case, whether the directors of the company held a controlling interest therein. The question arose in fact under s. 13 (9) of the [Finance (No. 2) Act], 1939, whereby, for the purpose of excess profits tax, the profits of the company increase or decrease by a statutory percentage in relation to the capital employed in the business, and in that case it was in the interest of the company to show that its directors did hold a controlling interest therein. The answer to the problem depended on whether there should be included as part of the ‘controlling interest’ shares held by directors, not in their own right, but as trustees under a settlement of the ordinary kind. The C House of Lords (again affirming the decision of this court) answered the question affirmatively. LORD GREENE, M.R., who had read the judgment of the Court of Appeal, indicated that the result would have been different had the trustees been bare trustees only, and that in such case the ‘controlling interest’ would be in the beneficial owner. But the noble Lords in the D House of Lords took so strongly the view that the question of control was to be determined by reference to the situation of the voting power under the company’s regulations that they preferred rather to reserve than to affirm even the exception of a bare trustee.”

E In the Court of Appeal LORD GREENE, M.R. (whose judgment was the judgment of the court), considered the matter from the point of view of what I might conveniently describe as “trust law” and, towards the end of his judgment, he said ([1944] 1 All E.R. at p. 552):

F “It appears to us that, apart from the special case of a bare trustee, there is no half-way house between an interpretation which limits the expression to the case of beneficial ownership and one which includes ownership by trustees, irrespective of the fact whether or not they also have some beneficial interest in the shares which give control.”

G It must follow from the reasoning of LORD GREENE, M.R., that, in rejecting the argument that any attention should be paid to beneficial interests in the case of a trust, he was, in effect, treating the register of members as the deciding factor, though the emphasis of his judgment is not on the register, but on a consideration of what I have described as “trust law”. In the House of Lords, however, it emerges from the speech of every one of their Lordships that the emphasis is to be placed on the state of the register.

LORD RUSSELL OF KILLOWEN said ([1945] 1 All E.R. at p. 669):

H “My Lords, I agree with the view of the Court of Appeal. When the section speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words ‘controlling interest’ is not the extent to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding-up, but the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. I In other words, the test which is to exclude a company’s business from sub-s. (9) (a) and include it in (9) (b), is the voting power of its directors, not their beneficial interest in the company . . . The words ‘controlling interest’ meaning ‘controlling voting power’: that is the interest in view, not beneficial interest. As at present advised I agree with the Court of Appeal in the view that there is no half-way house between a construction which restricts the controlling interest to shares which are in the absolute beneficial ownership of the trustees and a construction which includes all shares of which the directors are registered holders.”

LORD MACMILLAN said (*ibid.*, at p. 670):

"The control of a company resides in the voting power of its shareholders. In the respondent company the ordinary shares alone confer a right to vote at a general meeting. The directors are the registered proprietors of a majority of the ordinary shares. It would, therefore, appear to follow that the directors have a controlling interest in the company . . . In my opinion the Court of Appeal rightly rejected the contention of the Inland Revenue Commissioners. The question whether the directors of the respondent company have the control of it by their voting power as shareholders must in my view be determined by the memorandum and articles of the company and by the register of shareholders."

LORD PORTER said (*ibid.*, at p. 672):

"My Lords, I have had an opportunity of reading and agree with the opinions of LORD RUSSELL OF KILLOWEN and LORD SIMONDS. I cannot doubt that by the expression 'a company the directors whereof have a controlling interest therein' is meant a company in which the directors by means of their shareholding are able to direct the affairs of the company according to their will."

LORD SIMONDS said (*ibid.*):

"What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry a resolution at a general meeting of the company. Can the directors of the respondent company by the exercise of their voting rights carry such a resolution? Yes: for they are the registered holders of more than half the ordinary shares of the company. Therefore they have a controlling interest in the company."

Now, in *Inland Revenue Comrs. v. Silverts, Ltd.* (2) SIR RAYMOND EVERSHED, M.R., cited several of the passages which I have just cited from the *Bibby* case (1) and he then expressed the view of the Court of Appeal as to what was the ratio decidendi of the *Bibby* case (1) in these words ([1951] 1 All E.R. at p. 708):

"In our judgment, the ratio decidendi in *Bibby's* case (1) is that, in accordance with well-established principles relating to limited companies, a question of the rights of members vis-à-vis the corporation (such as that of voting control under its regulations) is to be determined by reference, and by reference only, to the share register beyond which it is not (save, possibly, in the case of mere 'nominee' shareholders) permissible to look, and not that, in the case of a trust, the powers and discretions of exercising votes in regard to shares must be treated as reposing in the trustees without regard to the terms of the trust or the right of beneficiaries to direct such exercise."

That language makes it clear beyond doubt to my mind that the Court of Appeal in *Silverts' case* (2) was laying down (and, as I see it, intending to lay down as a general proposition following from *Bibby's case* (1)) that, in answering such a question as that before me, the register of members is conclusive.

The Court of Appeal in that case had to consider two earlier cases, *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* and *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (3) ([1943] 1 All E.R. 13) (both reported together). The questions in those two cases were different although they were heard together both before LAWRENCE, J., and before the Court of Appeal.

Again, for the purpose of stating the facts, I will borrow from the judgment of SIR RAYMOND EVERSHED, M.R., in *Silverts' case* (2). He said ([1951] 1 All E.R. at p. 706):

"In the *British American Tobacco case* (3), the question before the court arose under para. 7 of Sch. 4 to the Act of 1937, which provides that in the

A case of a business carried on by a corporate body there shall, for the purposes of computing the tax, be included in its profits the profits of other corporate bodies (not themselves liable to be assessed to the tax) 'in which the first-mentioned body corporate has a controlling interest . . .' The question was as to the inclusion in the profits of the British American Tobacco Co. of bodies corporate in which it held itself no interest but in which (admittedly) the controlling interest was held by other companies in which in turn the British American Tobacco Co. itself held (admittedly) a controlling interest. Though the precise problem differed from that in the present case, it equally involved the scope and meaning of the formula 'controlling interest', and it has been agreed before us that the formula ought to be treated as having the same sense in all places where it is used in Sch. 4 to the Act of 1937 and where it is used in the relevant provisions of the Finance (No. 2) Act, 1939, which was the material Act in the *Bibby* case (1).

"In the *British American Tobacco* case (3), the House of Lords, affirming the decision of this court, held that the controlling interest was none the less in the British American Tobacco Co. because it was held, as it were, at a remove. VISCOUNT SIMON, L.C., with whom all the other noble Lords concurred, said ([1943] 1 All E.R. at p. 15): 'I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company.'"

Now, SIR RAYMOND EVERSHED was examining the *British American Tobacco* case (3) and the *Bibby* case (1) because, as he said in an earlier passage of his judgment, at first sight those two decisions presented a problem requiring reconciliation. Then he said ([1951] 1 All E.R. at p. 705):

"The solution of the present question depends on the proper method of reconciling the *British American Tobacco* case (3) and the *Bibby* case (1), or, perhaps more accurately, on the correct appreciation of the scope of those decisions."

Having examined the two cases, he then comes to this conclusion (*ibid.*, at G p. 709):

"In our opinion, this result involves no conflict with the *British American Tobacco* case (3). Although (as already stated) the formula 'controlling interest' ought to be treated as being used in the same sense in the Acts of 1937 and 1939, namely, in the ordinary sense of the English language, yet (as observed by ROMER, J.) the questions posed in the *British American Tobacco* case (3) and in the *Bibby* case (1) were different. In neither case was the question the general one: 'Who controls the company?' In the *British American Tobacco* case (3) the question was whether (in the ordinary and proper sense of the words) company A held a controlling interest in company C, though the control was exercised not directly but indirectly through the agency of company B. If the question were raised under some other taxing provision: 'Has company B a controlling interest in company C?' an affirmative answer to that question might be given consistently with the affirmative answer to the first question in the *British American Tobacco* case (3). So, in the *Bibby* case (1) and in the present case, the question: 'Have the directors a controlling interest in the company?' falls to be answered, aye or no, without regard to the possible question (if asked) whether some other person or body has (indirectly) a controlling interest in the same company."

That is a conclusion which quite clearly binds me, because I am concerned with the answer to the same sort of question as had been raised in *Silverts'* case (2) and there only remains for consideration, therefore, the case of *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* (3). It is necessary to consider that case because, at first sight, at any rate, taken literally, the decision would appear to conclude the matter in favour of the Crown and against the company. Again for convenience I will borrow from the judgment of SIR RAYMOND EVERSHED in *Silverts'* case (2) for the purpose of showing what was the problem in the case of *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* (3). He says ([1951] 1 All E.R. at p. 709):

"We referred earlier in this judgment to *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* (3). Although *Clark's* case (3) was heard and decided in the Court of Appeal with the *British American Tobacco* case (3), the question to be determined was (as in the present case) whether the directors of the company held a controlling interest therein within the meaning of para. 11 of Sch. 4 to the Act of 1937, and not (as in the *British American Tobacco* case (3)) whether under para. 7 of the same schedule a body corporate held a controlling interest in another body corporate not itself subject to the tax imposed by the Act. The facts were that certain shares which were at all material times registered in the names of two directors of the company had been held in fact on trust for one of the directors for life and subject thereto for the other of them absolutely. The two directors had then sold their respective interests in the shares to another company (the Phoenix company) so that the Phoenix company became absolutely entitled to the shares. The two directors between them held (admittedly) a controlling interest in the Phoenix company. As part of the sale agreement, the two directors undertook to execute such transfers of the shares as the Phoenix company might require so as to vest in the Phoenix company the legal estate in the shares. But the shares in fact (as already stated) remained, at all material times, registered in the names of the two directors, who may, accordingly, be said to have been bare trustees thereof for the Phoenix company.

"The Clark company sought to maintain (as do *Silverts, Ltd.*, in the present case) that the directors did not have a controlling interest in the company, and the argument for the company rested on the assertion that, in the circumstances of the case, the control was in the Phoenix company and that no regard should be paid to the fact that the Phoenix company was itself controlled by the two directors. This court rejected that argument, holding (as in the *British American Tobacco* case (3)) that the control in fact lay with the directors. According to the judgment of SCOTT, L.J. ([1941] 2 All E.R. at p. 655), the phrase 'controlling interest' '... contemplates such a relationship as brings about a control in fact, by whatever machinery or means that result is effected'."

Then SIR RAYMOND EVERSHED, M.R., makes this comment on *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* (3) ([1951] 1 All E.R. at p. 710):

"But the Phoenix company was not on the register. The directors were. No point appears to have been made in the argument of that essential fact. Had the point been made, the result would, indeed, have been, in our judgment, the same. In the circumstances, the case can bring no comfort or support to either side in the present case."

Now I turn back to the judgment of SCOTT, L.J., in *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* and *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (3) and it will be observed that, of the four pages which his judgment occupies in the report, three are devoted to the *British American Tobacco* case (3), the position of which has been so clearly considered by the

A Court of Appeal in *Silverts'* case (2). It is only on the last page of the judgment that he turns to deal with the appeal of F. A. Clark & Son, Ltd. saying ([1941] 2 All E.R. at p. 655) that it

“ was heard in both courts with the appeal of the *British American Tobacco Co., Ltd.* (3), because it too depended on the meaning of the phrase ‘controlling interest’.”

B Later in his short remarks on this case, he says (*ibid.*):

“ The case was heard by different commissioners from those who heard the case of the *British American Tobacco Co., Ltd.* and they came to the conclusion that the two directors had not such a ‘controlling interest’. However, there was no dispute about the facts, and the issue depended on a pure question of law. It is the same question as that in the case of the *British American Tobacco Co., Ltd.* except that the phrase ‘controlling interest’ is applied to directors who control the company, instead of to one company controlling another. The judge could find no sufficient legal ground for giving the phrase one meaning in para. 7 and another in paras. 4 and 11, and we agree with him. In each case, the decision must depend on the meaning of the phrase. In my opinion, when standing alone in the context of any one of the three paragraphs, it contemplates such a relationship as brings about a control in fact, by whatever machinery or means that result is effected. This appeal like the other must be dismissed with costs.”

D That was the judgment of the court.

E Now, it is not perhaps an easy task for a judge of first instance to decide how to deal with the problem with which I am faced, having regard to the explanation of the *British American Tobacco* case (3) so clearly set out in the judgment of SIR RAYMOND EVERSHED, M.R., in *Silverts'* case (2), and the statement by the Court of Appeal in *Clark's* case (3) that the phrase when standing alone in the context of any one of the three paragraphs means the same. On the analysis of the *British American Tobacco* case (3) by SIR RAYMOND EVERSHED, M.R., it is clear that that case has nothing to do with the problem with which I am faced today but similar problems were raised in *Clark's* case (3), *Bibby's* case (1), *Silverts'* case (2) and the case before me. I have the passage in SIR RAYMOND EVERSHED's judgment commenting on the position in *Clark's* case (3), that the Phoenix company was not on the register and the directors were. I also have to take into consideration the fact that *Clark's* case (3) preceded *Bibby's* case (1). I do take into account the point made by counsel for the Crown that in the statement of their decision the commissioners did refer to the fact that on Dec. 23, 1937, the Phoenix company became the registered holder of the shares in question. At the same time I cannot help taking the view that this doctrine that the register is to be the sole test had not been developed at the time of *Clark's* case (3) as it was so very clearly developed in the House of Lords in *Bibby's* case (1).

G It appears to me that I should be going against the trend of modern authority if I were to take what appears to me to be a narrow view and found my decision on the latter part of the judgment of SCOTT, L.J., in *Clark's* case (3).

H In *Silverts'* case (2) SIR RAYMOND EVERSHED, M.R., said ([1951] 1 All E.R. at p. 707):

I “ Counsel for the company, pinning himself to the *Bibby* decision (1), says that (save for the possible case of a bare trustee) the matter is concluded by reference to the share register, subject only to this (and he claims so to ‘reconcile’ the *British American Tobacco* case (3) and the *Bibby* case (1)), that where the registered shareholder is a body corporate you may, at any rate for certain purposes, look beyond the register and seek the individuals who themselves control that body corporate.”

Now, of course, if that proposition were to be accepted, it would remove any conflict there may be between *Clark's* case (3) and *Silverts'* case (2), and, indeed,

Bibby's case (1), but, having regard to the passage which I have read and also again adverted to at [1951] 1 All E.R. at p. 709 where SIR RAYMOND EVERSHED commented on the facts in *Clark's* case (3), I think that I must come to the conclusion that the Court of Appeal did not accept the proviso which Mr. Pennycuik was putting forward as part of his proposition. Faced as I am with this difficulty created by the apparent conflict between *Silverts'* case (2) following *Bibby's* case (1), on the one hand, and the judgment of SCOTT, L.J., in *Clark's* case (3), on the other, and bearing in mind that SCOTT, L.J., dealt with the problem in *Clark's* case (3) at the end of his judgment on the *British American Tobacco* case (3), which raised a totally different problem, I come to the conclusion that I have to follow the judgment of the Court of Appeal in *Silverts'* case (2) and to accept as of general application the proposition that, in answering a question such as that which is raised before me, the register ought to be treated as conclusive and that I ought not to go behind it. There is no question in this case of any attempt at tax evasion. That situation is expressly provided for by s. 32 of the Finance Act, 1951. For those reasons, in my view this appeal succeeds.

Appeal allowed.

Solicitors: *Denton, Hall & Burgin* (for the company); *Solicitor of Inland Revenue*.

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. LOBELL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Gorman, JJ.), March 4, 11, 1957.]

Criminal Law—Burden of proof—Self-defence—Degree of proof required.

Where the defence of self-defence is set up in a criminal case, the onus of proving the accused's guilt remains on the prosecution; and if, on the whole of the evidence, the jury are in doubt whether the act was done in necessary self-defence, they should find the accused not guilty.

Direction of BOSANQUET, J., in *R. v. Smith* ((1837), 8 C. & P. at p. 162) disapproved.

A convenient way of directing the jury, where the defence of self-defence is raised, stated (see p. 736, letters D and E, post).

Appeal allowed.

[As to self-defence against assault and in resistance to felonious violence, see 10 HALSBURY'S LAWS (3rd Edn.) 743, para. 1429, and 721, para. 1382.

As to the burden of proof in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 436-437, para. 809; and for cases on the subject, see 14 DIGEST (Repl.) 493-495, 4764-4791.]

Cases referred to:

- (1) *R. v. Smith*, (1837), 8 C. & P. 160; 173 E.R. 441; 15 Digest 783, 8408.
- (2) *Woolmington v. Public Prosecutions Director*, [1935] A.C. 462; 104 L.J.K.B. 433; 153 L.T. 232; 14 Digest (Repl.) 493, 4768.
- (3) *Mancini v. Public Prosecutions Director*, [1941] 3 All E.R. 272; [1942] A.C. 1; 111 L.J.K.B. 84; 165 L.T. 353; 14 Digest (Repl.) 337, 3294.
- (4) *Chan Kau alias Chan Kai v. R.*, [1955] 1 All E.R. 266; [1955] A.C. 206; 3rd Digest Supp.

Appeal.

Appeal by Harry Lazarus Lobell against conviction and sentence. The appellant was convicted before JONES, J., at Manchester Assizes on Dec. 12, 1956, of wounding with intent to inflict grievous bodily harm and was sentenced to four years' imprisonment. He was acquitted on a charge of wounding with

A intent to murder. At the close of the argument on Mar. 4, 1957, the Court of Criminal Appeal quashed the conviction.

J. R. D. Crichton, Q.C., and I. R. Taylor for the appellant.

Sir Noel Goldie, Q.C., and D. Summerfield for the Crown.

Cur. adv. vult.

B Mar. 11. LORD GODDARD, C.J., read the following judgment of the court: The appellant was convicted before JONES, J., at the Crown Court at Manchester of wounding with intent and was sentenced to four years' imprisonment. At the trial the sole defence set up by the appellant was that, in inflicting the wound, he was acting in self-defence. This appeal is brought on the grounds that the direction of the learned judge that the burden of proving this defence was on the appellant was erroneous, and that the judge did not direct the jury that the degree of proof required from the defence was of a less degree than that required from the prosecution. It is unnecessary to state the facts in any detail as the whole appeal is concerned with the direction as to the burden of proof; it is enough to say that there was considerable enmity between the wounded man, one Evans, and the appellant, who was a butcher with a stall in the meat market.

D There was evidence of threats which had been uttered by Evans against the appellant. He had on a previous occasion with a knife in his hand said that he would kill Evans, who had retorted that, if the appellant moved his arm, he would break it. On the day of the wounding alleged in the indictment it was said that Evans approached the appellant uttering threats, that the latter then threw a brick at Evans who, however, continued to advance towards him in a threatening manner, whereupon he picked up a knife which he said he had brought for his protection and stabbed him. The appellant then drove off to the police station and said he had stabbed a man in self-defence.

E It is unnecessary to set out verbatim the passages in the learned judge's full and careful summing-up which have been criticised by counsel for the appellant because there is no doubt, and the prosecution has not contended otherwise, that he directed the jury that it was for the appellant to establish to their satisfaction his plea of self-defence. The onus was clearly put in the summing-up on the appellant. There is no doubt that, in so doing, the learned judge had the support of *R. v. Smith* (1) ((1837), 8 C. & P. 160), where BOSANQUET, J. (*ibid.*, at p. 162), apparently with the approval of BOLLAND, B., and COLTMAN, J., charged the jury that before a person can avail himself of this defence he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. In that case the learned judge said the accused would be justified. He no doubt had in mind the provisions of 9 Geo. 4 c. 31, s. 10, now replaced and re-enacted by s. 7 of the Offences against the

H Person Act, 1861, which enacts that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence or in any other manner without felony. This passage from the summing-up has for many years appeared in ARCHBOLD* as the proper direction to be given in such cases and certainly puts the onus of establishing a defence of killing *se defendendo* on the accused. It is a defence of justification, or, to put it in

I terms of pleading, a confession and avoidance. In civil cases this plea is always to be proved by the party setting it up; and it is, perhaps, not altogether easy to see why it should not be so in a criminal case, more especially as when self-defence is set up the facts must often be known only to the defendant who relies on it. But, in the opinion of the court, *Woolmington v. Public Prosecutions Director* (2) ([1935] A.C. 462) and *Mancini v. Public Prosecutions Director* (3)

* ARCHBOLD'S CRIMINAL PLEADING EVIDENCE & PRACTICE (33rd Edn.), pp. 941-942, para. 1649; but see *ibid.*, 10th Cumulative Supplement.

([1941] 3 All E.R. 272) establish that in murder or manslaughter the rule that the onus is on the prosecution permits of no exception except as to proof of insanity. In the recent case of *Chan Kau alias Chan Kai v. R.* (4) ([1955] 1 All E.R. 266), this was stated in terms by LORD TUCKER, who referred (*ibid.*, at p. 267) to *R. v. Smith* (1) and said that the passage from the summing-up quoted in ARCHBOLD clearly needed some modification in the light of modern decisions. It must, however, be understood that maintaining the rule that the onus always remains on the prosecution does not mean that the Crown must give evidence-in-chief to rebut a suggestion of self-defence before that issue is raised, or, indeed, need give any evidence on the subject at all. If an issue relating to self-defence is to be left to the jury there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily, no doubt, such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus on him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If, on a consideration of all the evidence, the jury are left in doubt whether the killing or wounding may not have been in self-defence the proper verdict would be not guilty. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may, and sometimes does, strengthen the case for the prosecution. It is, perhaps, a fine distinction to say that before a jury can find a particular issue in favour of an accused person he must give some evidence on which it can be found but, none the less, the onus remains on the prosecution. What it really amounts to is that if, in the result, the jury are left in doubt where the truth lies the verdict should be not guilty, and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence. Had the learned judge in the present case gone on to say that it was not for the appellant to establish his plea with the same degree of certainty as is necessary to establish a case for the prosecution it might have been that we should have had to consider whether this was a case for the application of the proviso*. There was certainly here material on which a jury might have found self-defence. But that it was the duty of the appellant to satisfy them on this point was on several occasions stressed in the summing-up, and we do not feel by any means satisfied that, if what we now hold to be the correct direction had been given, the jury would be sure to have convicted. For these reasons, we quashed the conviction at the close of the argument.

Appeal allowed.

Solicitors: *A. E. M. West*, Manchester (for the appellant); *Sharpe, Pritchard & Co.*, agents for *P. B. Dingle*, Manchester (for the Crown).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

* To the Criminal Appeal Act, 1907, s. 4; 5 HALSBURY'S STATUTES (2nd Edn.) 929.

A

Re R. W. SHARMAN, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), February 25, 1957.]

Company—Winding-up—Petition by judgment creditor—Majority of creditors opposing—Petition dismissed—Costs—Whether petition should be dismissed with costs or without order as to costs.

B

A judgment creditor of a company for £167 5s. 11d. and costs of £8 10s. petitioned for an order that the company be compulsorily wound-up. The petition was opposed by other creditors to whom the company owed in all £33,202 19s. 3d., and who constituted a majority of the creditors, and it was also opposed by the company. In the circumstances, the petitioning creditor recognised that the petition must be dismissed, but asked that he should not be ordered to pay the costs.

C

Held: in dismissing the petition no order would be made as to costs since it was only by the opposition of the majority of the creditors that the petitioning creditor was deprived of what would otherwise have been his right as a judgment creditor, viz., to have the company wound-up.

D

Re British Electric Street Tramways ([1903] 1 Ch. 725) distinguished.

[As to costs in the case of a winding-up by the court, see 6 HALSBURY'S LAWS (3rd Edn.) 554, para. 1066; and for cases on the subject, see 10 DIGEST (Repl.) 896-898, 6040-6068.]

Cases referred to:

E

(1) *Re Home Remedies, Ltd.*, [1942] 2 All E.R. 552; [1943] Ch. 1; 112 L.J.Ch. 36; 167 L.T. 362; 10 Digest (Repl.) 1107, 7660.

(2) *Re Great Northern Copper Mining Co., Ltd.*, (1866), 14 W.R. 705; *subsequent proceedings*, sub nom. *Re Great Northern Copper Mining Co. of South Australia, Ltd., Ex p. The Co.*, (1869), 20 L.T. 347; 10 Digest (Repl.) 880, 5822.

F

(3) *Re British Electric Street Tramways*, [1903] 1 Ch. 725; 72 L.J.Ch. 386; 10 Digest (Repl.) 900, 6103.

(4) *Re Flagstaff Silver Mining Co. of Utah*, (1875), L.R. 20 Eq. 268; 45 L.J.Ch. 136; 10 Digest (Repl.) 855, 5633.

Petition for compulsory winding-up order.

G

R. W. Sharman, Ltd. (hereinafter called "the company"), was incorporated in October, 1946, under the Companies Act, 1929, as a company limited by shares. The nominal capital of the company was £10,000 divided into ten thousand ordinary shares of £1 each. The amount of the capital paid up or credited as paid up was £4,267. In January, 1957, the petitioner, Regent Oil Co., Ltd., commenced an action against the company in the High Court for recovery of £167 5s. 11d., the price of petroleum products sold and delivered by the petitioner to the company and on Feb. 4, 1957, judgment was obtained, in default of the company's appearance, for £167 5s. 11d. and £8 10s. costs. The company had not paid or satisfied any part of the judgment debt.

H

On Jan. 7, 1957, a notice convening a meeting which was held on Jan. 11, 1957, was sent to the larger creditors of the company but not to the petitioner. The petitioner was not present at the meeting. On Jan. 15, 1957, a receiver of the company was appointed in exercise of a power contained in a debenture created on Nov. 11, 1946, by the company in favour of Barclays Bank, Ltd.

I

The petitioner alleged that the company was insolvent and unable to pay its debts and petitioned that the company be wound-up by the court. The petition was opposed by creditors to whom the company owed £33,202 19s. 3d. and who constituted a majority of the creditors. In these circumstances, the petitioner recognised that the court must accede to the wishes of the majority of the creditors and dismiss the petition. The only question for consideration, therefore, was that of costs.

R. B. S. Instone for the petitioning creditor.

E. F. R. Whitehead for the respondent company and opposing creditors.

WYNN-PARRY, J.: This is a petition for the winding-up of a company by Regent Oil Co., Ltd., who are judgment creditors for £167 5s. 11d. and £8 10s. costs. The matter coming before the court, it is shown that creditors amounting in value to £33,202 19s. 3d. oppose the making of an order. There appears to have been an informal meeting of some larger creditors to which the petitioning creditor, being a comparatively small creditor, was not invited. The petition discloses that

“on Jan. 15, 1957, a receiver of the company was appointed in exercise of a power contained in a debenture created by the company in favour of Barclays Bank, Ltd., on Nov. 11, 1946.”

I assume that that paragraph was introduced into the petition in order to support the allegation in the next paragraph that “the company is insolvent and unable to pay its debts”.

Counsel for the petitioning creditor recognises that in view of the weight of the opposition to the petition he could not properly press for an order and it is obvious that the petition will have to be dismissed; but he asks that no order should be made as to costs. It appears that the present practice in such a case as this is to order the petitioning creditor to pay the costs. Investigation has failed to establish, with any clarity, the origin of this practice or the length of time during which it has obtained although counsel suggests that it may well have grown up since the decision of SIMONDS, J., in *Re Home Remedies, Ltd.* (1) ([1942] 2 All E.R. 552). It is to be noticed that in the case of contributories the rule is different as appears from *Re Great Northern Copper Mining Co., Ltd.* (2) ((1866), 14 W.R. 705). The headnote of that report is as follows:

“If, on a petition for winding-up a company, the court is of opinion that the circumstances are such that the opinion of the shareholders ought to be obtained, and such opinion, when obtained, is to the effect that there should be no winding-up, the court, if satisfied that such is the bona fide opinion of the shareholders, will consider itself bound thereby. Therefore, such a petition having been ordered to stand over for the wish of the shareholders to be ascertained, and the shareholders expressing a bona fide desire to continue their concern, the court dismissed the petition; but, being of opinion that the petitioner had a bona fide case at the time of presenting the petition, dismissed it without costs.”

LORD ROMILLY, M.R., in a short judgment, referred to the fact that the petition had been stood over to ascertain the wishes of the shareholders and took the view that he ought to give effect to the wishes of the majority. He ends his judgment saying (*ibid.*, at p. 706):

“The petition is dismissed; it appears, however, on the evidence that at the time the petition was presented there was a proper case for a petition, and it will therefore be dismissed without costs”.

In a later case *Re British Electric Street Tramways* (3) ([1903] 1 Ch. 725), BUCKLEY, J., laid it down that when a petitioner for a winding-up order elects at the hearing to withdraw his petition he will be ordered to pay the costs of those who have given notice within the specified time of their intention to appear—one set of costs to those supporting and another set to those opposing. The basis of this decision was, as appears clearly from the judgment, that where a petitioner at the hearing refuses or elects not to open the petition and asks for it to be dismissed the court has no opportunity of looking at the matter on the merits and, therefore, has no material on which to exercise its discretion in making an order as to costs. To quote his words (*ibid.*, at p. 727):

“If the petition is withdrawn, the court cannot say whether any and

A which of these parties would have got their costs if the petition had been heard."

The present case, as is pointed out in argument, is somewhat different because it appears on the face of the petition and cannot be disputed that the petitioning company is a judgment creditor and, therefore, entitled, as between it and the company, *ex debito justitiae* to an order. The only reason which supervenes to prevent that order being made is the intervention of a body of creditors to whose wishes, under the law as it now stands, the court is bound to have regard.

B Is it, the question arises, a fair and reasonable practice that in these circumstances the position of such a petitioner entitled *ex debito justitiae* against a company to an order should be so much changed for the worse on the intervention of a body of a majority of creditors opposing the petition? No doubt, if the company itself alone opposes and desires to get rid of the petition it must pay the costs and that appears from *Re Flagstaff Silver Mining Co. of Utah* (4) ((1875), L.R. 20 Eq. 268).

C The court usually hesitates very much to interfere with an existing practice, but I feel that I am at liberty here at any rate to consider the existing practice because history does not report, as I have said, how it came into existence or how long it has continued, and there is no authority which stands in the way of any such review. It appears to me that at any rate in the case of a judgment creditor the practice ought to be varied. It is perfectly true, as is pointed out in the judgment of BUCKLEY, J., in *Re British Electric Street Tramways* (3) that the petitioner who issues a petition invites creditors to attend and it may be that the present practice is perfectly fair in the case of a creditor who is not a judgment creditor, as to whose position I say no more, but where a judgment creditor presents a petition and is only deprived of what otherwise would be his right by the circumstance that an overwhelming majority of the creditors or a majority of the creditors oppose the petition, I find it difficult to see how, as a matter of principle, the practice is justified in not merely depriving the petitioner of his costs but ordering him to pay costs himself. I agree with counsel D for the petitioning creditor that it is too late to review the practice with a view to seeing whether or not the petitioner should have his costs but I have come to the conclusion that at any rate as regards a judgment creditor in the position of the petitioning creditor in this case the fair practice would be that in dismissing the petition the court should make no order as to costs.

E F

Petition dismissed.

Solicitors: *Clifford Symons* (for the petitioning creditor); *Reginald Johnson & Co.*, Hayes, Middlesex (for the respondent company and opposing creditors).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

LEWIS v. HIGH DUTY ALLOYS, LTD.

[MONMOUTH ASSIZES (Ashworth, J.), June 12, 14, 1956.]

Factory—Dangerous machinery—Duty to fence—Part of machinery not dangerous by itself—Danger caused by conjunction of part of machine with part of materials used on it—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 14 (1). Master and Servant—Duty of master—Reasonable precautions not to expose employee to unnecessary risk—Factory containing many machines of which a few were dangerous to oil when in motion—Whether employers owed duty to give instructions not to oil dangerous machines when in motion.

The plaintiff had been employed since 1942 by the defendants in their factory to oil and grease their machines. There were some five hundred machines in the factory, of which about twelve were dangerous to oil when in motion. The plaintiff had never been given specific instructions not to oil those machines when in motion, nor were there any notices on the dangerous machines forbidding their being oiled when in motion. Prior to the accident to the plaintiff, no accident was shown to have happened to any employee oiling machines during the twelve years of the plaintiff's employment at that work.

In November, 1954, the plaintiff slipped while oiling an automatic planing machine when it was in motion, and his left arm was crushed between a metal block which was being planed and a V-shaped slide which was part of the machine. The V-shaped slide was not dangerous by itself. On a claim by the plaintiff against the defendants for damages for breach of their statutory duty under the Factories Act, 1937, s. 14 (1), to fence every dangerous part of any machinery, viz., the V-shaped slide, and for breach of duty at common law,

Held: (i) there was no breach of s. 14 (1) of the Factories Act, 1937, since the danger was constituted by the conjunction of the V-shaped slide and the metal block and the obligation to fence dangerous parts of machinery imposed by s. 14 (1) did not apply where the danger arose indirectly through the conjunction of part of the machine with some part of the materials used on it.

Observations of LORD SIMONDS and of LORD UTHWATT in *Nicholls v. Austin (Leyton) Ltd.* ([1946] 2 All E.R. at pp. 92, 99) applied.

Lenthall v. Gimson & Co. (Leicester), Ltd. ((May 24, 1956) unreported) not followed.

(ii) the defendants were liable in damages for breach of the duty at common law to take reasonable care not to expose the plaintiff to unnecessary risks, since they had not issued proper instructions to him not to oil any of the twelve dangerous machines when in motion and had taken no effective step to ensure that the machines were not oiled when in motion.

[**Editorial Note.** This case should be compared with the decision in *Hoare v. M. & W. Grazebrook, Ltd.* (ante, p. 470), where a different view of the effect of s. 14 of the Factories Act, 1937, was taken.

As to the statutory duty to fence dangerous machinery, see 17 HALSBURY'S LAWS (3rd Edn.) 74, para. 126; and for cases on the subject, see 24 DIGEST 908-910, 65-76.

For the Factories Act, 1937, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

- (1) *Lenthall v. Gimson & Co. (Leicester), Ltd.*, (May 24, 1956), unreported.
- (2) *Nicholls v. Austin (Leyton), Ltd.*, [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.
- (3) *Kilgollan v. William Cooke & Co., Ltd.*, [1956] 2 All E.R. 294.
- (4) *Bullock v. G. John Power (Agencies), Ltd.*, [1956] 1 All E.R. 498.

A Action.

The plaintiff claimed against the defendants damages for personal injuries arising out of breaches by the defendants of their statutory duty under the Factories Act, 1937, s. 14 (1), alternatively damages for negligence.

The plaintiff, who was sixty-one years of age, had in 1915 sustained a serious wound to his right hand. In 1940 he entered the defendants' employ and since 1942 he had been employed at their factory in oiling and greasing the defendants' machines. On Nov. 15, 1954, the plaintiff's left arm was caught in a Butler automatic planing machine, as a result of which accident the present claim was brought.

Ryder Richardson, Q.C., and I. B. Fife for the plaintiff.

G. G. Baker, Q.C., and H. J. Garrard for the defendants.

C ASHWORTH, J.: In view of the fact that one basis of the claim is a contention that the defendants were in breach of s. 14 of the Factories Act, 1937, it is important that I should summarise a description of the machine. On the machine is a table at a height of three feet one inch above the floor level. On the table is a square block, which in fact is metal, and the height of the block on the day in question was fifteen inches, so that the total height of the block above floor level was fifty-two inches. At the left of the machine there is a metal apparatus, which was referred to as a bridge, and although that can be raised or lowered as occasion requires, it must be regarded as a static or permanent part of the machine. The block of metal, which throughout the case was described as the die, travels from left to right and back from right to left on the table. From the bridge there depends the plane or shaver, and, as the die travels towards the bridge, the edge of this plane shaves the die, and, in order to carry the shaving right across the block, there is a mechanism on the bridge by which the plane traverses from side to side. The rate at which the machine operates when in motion is, in my view, slow. To be precise the following figures were accepted. In the course of a minute the machine travels sixteen times, eight times forward and eight times backward, and the length of the cut or stroke was accepted as being fourteen inches. It is possible for the machine to be left in motion without an operator standing by, and at the moment of the accident the operator in question was in fact absent. He had set up the machine and had been called away to a neighbouring machine, but his conduct in leaving the Butler machine is not to be criticised as it was perfectly safe for him to leave it there in motion. It was the plaintiff's task to use an oil-can on this machine, and, indeed, on others. At the right end of the bridge there are three oiling points. To the left of those three points there is a screw mechanism, which the plaintiff also had to oil. At the left end of the bridge there are also two oiling points. He had to oil the screw mechanism immediately to the right of those two points. In the centre of the bridge and on the top of the metal part there was a nipple, and it was the plaintiff's task to oil that and another nipple. At the lower end of the bridge there is a V-shaped recess. That was described in part of the evidence as being a V-slide. Although I am anticipating the story, it is convenient to mention that the accident arose because the plaintiff's left arm was caught in that V-shaped recess by the die then moving towards the bridge.

I At the time of the accident there were something like five or six hundred machines in the defendants' factory. The question of great importance in the present case concerns the safety or danger of oiling machines when in motion. I should perhaps state now that on the evidence of Mr. St. Aubyn, who was called for the defendants, there were only about twelve machines that were dangerous to oil when in motion. Twelve out of five hundred is a very small proportion. It is surprising to note that no indication was placed on any of those twelve machines to remind workmen of the necessity for their own safety of seeing that they were stopped before any oiling was carried out. The evidence

is quite clear that the defendants' representatives relied on an oral instruction to point out this danger to their workmen. [HIS LORDSHIP then dealt with the plaintiff's evidence. The plaintiff stated in evidence that having finished oiling the topmost points on the bridge he turned to go to another machine and slipped on a smooth metal plate on which he was standing (and which was the sump cover for the machine in question), that he put out his left arm to prevent himself from falling and touched the die which was then in motion; that the die crushed his arm against the V-shaped slide causing him severe injury. HIS LORDSHIP continued:] It is evident that if that account of the accident were correct the plaintiff had finished his task of oiling when the accident happened, and it might have been open to the defendants to rest their case on the basis that no question of defect of system in regard to oiling arose. Indeed, in the statement of claim, in accordance with the plaintiff's own story, it was pleaded that the plaintiff was turning away from the machine which was in motion and which he had been oiling when he slipped and tripped and fell.

It is, in my view, greatly to the defendants' credit that they have not sought to have the present case decided on the narrow basis that the plaintiff may have failed to make out the case which he put forward in his pleading. They have been content to let this case be decided on the issue whether, assuming that the plaintiff was in fact engaged in oiling the machine when in motion, he can still put forward a claim. The defendants' point of view is that the accident could not have happened in a way which the plaintiff alleges. Although there is no eye-witness of the accident, the operator heard the cry of the plaintiff and came round and found him trapped. What the defendants put forward as the explanation of that trapping of the plaintiff's left arm is that he must have been oiling the machine when it was in motion, that somehow he slipped and his left arm went forward when the die was close to it and that in that way his left arm was crushed. [HIS LORDSHIP considered the evidence and continued:] I am not prepared to accept the plaintiff's account of the way in which this happened. I do accept the view that his arm was trapped when he was oiling this machine when running.

The claim is put forward on two distinct bases. One of them involves an allegation that there is a breach of the Factories Act, 1937, and the other is based on common law negligence. It may be convenient to deal first with the claim under the Factories Act, 1937. Section 14 (1) provides that:

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced."

At the end of s. 14 there is another paragraph which reads as follows:

"The [Minister of Labour and National Service]* may, as respects any machine or any process in which a machine is used, make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine."

The only case of which any record is at present available, in which an accident occurring in circumstances such as those involved in the present case has been considered, was a decision of FINNEMORE, J., in *Lenthall v. Gimson & Co. (Leicester), Ltd.* (1) (May 24, 1956, unreported). In that case a somewhat similar situation arose. The importance of the decision is that the learned judge took the view that there could be a breach of s. 14 if the danger in question arose by reason of a conjunction of a part of the machine itself with the material which was

* The functions of the Secretary of State under the section as originally enacted were transferred to the Minister of Labour and National Service by the Defence (Functions of Ministers) Regulations, 1941 (S.R. & O. 1941 No. 2057), reg. 2, and the Transfer of Functions (Factories, etc., Acts) Order, 1946 (S.R. & O. 1946 No. 376), art. 2.

A being worked on it. Other cases that have dealt with s. 14, and in particular with materials that were being worked on a machine, have not gone that length, and, indeed, have not been directed to that issue; but there are passages in some of the reports which seem to me to lead to the view that where a danger arises by a combination of that sort the statute has no application.

B One of the cases to which I was referred was *Nicholls v. Austin (Leyton), Ltd.* (2) ([1946] 2 All E.R. 92). LORD SIMONDS said (*ibid.*, at p. 98):

“ I find nothing in this language [of s. 14 (1)] to suggest that the section aims at protecting the worker from any indirect danger arising out of the functional operation of the machine.”

C LORD UTHWATT said (*ibid.*, at p. 99):

“ The contention of the appellant [the employee] is that the phrase ‘ every dangerous part ’ in respect of which the obligation to fence is imposed by s. 14 (1) includes parts which are indirectly dangerous in that they are liable to throw out material with such force as to be liable to cause injury to the worker. Acceptance of this contention involves the view—indeed it is in the substance of the contention—that the obligation imposed by the sub-section is to fence the machine, viewed as a single operating unit, so as to avoid the possibility of danger arising to the worker from its operation. My Lords, in my opinion the sub-section, whether it be read alone or be read in connection with the other provisions of the Act relating to machinery, negatives the contention.”

E Other cases where the same sort of issue has arisen are *Kilgollan v. William Cooke & Co., Ltd.* (3) ([1956] 2 All E.R. 294); and *Bullock v. G. John Power (Agencies), Ltd.* (4) ([1956] 1 All E.R. 498). Although I am conscious that the distinction between the present case and that decided by FINNEMORE, J., may be so fine as to be non-existent, I am of opinion that the circumstances of the present case do not disclose any breach of the Factories Act, 1937, by the defendants. The part of the machine about which complaint is made is the V-slide, and that I do not regard as a dangerous part of the machine taken by itself. What constituted the danger was the conjunction of the V-slide with a die. The die is not part of the machine; it is material which is being worked by the machine. It may be that although sub-s. (1) covers parts of the machine, and the paragraph at the end of s. 14 covers articles or materials, there is a statutory gap and that no statutory obligation is imposed on factory owners where the danger arises indirectly through the conjunction of part of the machine with some part of the materials. For the purposes of this judgment it is enough for me to say that I am not satisfied that any breach of the Factories Act, 1937, has been made out.

H That leaves the claim in common law negligence based on the facts which I have found, namely, that the plaintiff was injured when he was engaged in oiling the machine in motion. Evidence was called regarding the instructions which had been given to the plaintiff. According to him, when he was first set on the task of oiling and greasing in 1942 he was taken round the machines by a man named Tommy Atkins who showed him the machines, showed him the oiling points and the different oils, watched him while he himself was oiling, and then left him to carry on. At that time, according to the plaintiff, some of the machines were moving and some may have been stopped. Apart from that, according to the plaintiff, no further instruction was given him, and at no time was he reprimanded for oiling machines in motion, although it was his practice regularly to do so. The defendants have called two of their representatives, Mr. Daybank and Mr. St. Aubyn, who in fact gave instructions to the plaintiff. At the highest those instructions only come to this, that the plaintiff was warned not to oil machinery in motion if in the plaintiff's view it was dangerous to do so.

It was not suggested that either representative pointed out the specific machines which he should not oil when in motion. It was left to the plaintiff's discretion. I ask myself this question: Where you have in a factory twelve machines which it is dangerous to oil when in motion, is it right for employers to leave it to the workman's discretion without any further supervision or any indication on the machines themselves that they should not be oiled when in motion? It is true that in the course of twelve years during which the plaintiff was employed as an oiler he met with no accident; it is true that so far as the evidence goes no other oiler met with an accident through oiling machines in motion; it is true that according to Mr. St. Aubyn he was passing through the factory quite frequently and that no workman was ever seen to be oiling a machine in motion. In my view that does not discharge the defendants from a *prima facie* liability. I do not suggest for a moment in the present case that the evidence discloses a wholesale disregard of safety precautions by oilers or an acquiescence in such a disregard by the defendants, but in my view the defendants are at fault here for two reasons: (i) they failed to issue proper instructions to the plaintiff to ensure that he did not oil any of these twelve dangerous machines when in motion; and (ii) they took no effective step to ensure that instructions not to oil such machines when in motion were carried out. Some of the evidence called for the plaintiff was not very attractive or reliable. I need not mention the name of one particular witness, but it was quite obvious he was not telling the truth. None the less, the impression created on me by the evidence is that there was quite a widespread practice of oiling machines in motion if the circumstances of the work rendered it inconvenient to wait for a stoppage, and the defendants must accept in my view the position that they had not taken sufficient or proper steps to ensure that oiling of dangerous parts was only carried out when the machines were at rest. It is on those two grounds that I find that they are guilty of a breach of the duty which employers owe to their employees.

[HIS LORDSHIP found that the plaintiff was guilty of contributory negligence and assessed his liability at one third. HIS LORDSHIP then stated that on the basis that the defendants were to bear full responsibility for the accident he would have awarded £1,800 to the plaintiff, and in the circumstances, therefore, he would award the plaintiff £1,200.]

Order accordingly.

Solicitors: *W. H. Thompson* (for the plaintiff); *T. Haynes Duffell & Son*, Birmingham (for the defendants).

[*Reported by GWYNEDD LEWIS, Barrister-at-Law.*]

Re SHAW (deceased).
PUBLIC TRUSTEE v. DAY AND OTHERS.

[CHANCERY DIVISION (Harman, J.), January 16, 17, 18, 22, 23, 24, February 20, 1957.]

Charity—Education—Alphabet—Research into and propaganda on advantages of reform of alphabet—Whether for advancement of education—Whether beneficial to the community.

Charity—Trust—Invalid trust—Impersonal trust—Whether effect would be given to testator's directions as a power on which trustees might act.

By his will a testator directed his trustee to hold his residuary trust funds, and the annual income thereof for a period of twenty-one years from his death, on trust (i) to ascertain by inquiry how much time could be saved by persons who speak and write the English language, by the substitution for the present English alphabet of a proposed British alphabet containing at least forty letters; to show the extent of the time and labour wasted by the use of the present alphabet; and, if possible, to show the loss of time in terms of loss of money; (ii) to transliterate one of the testator's plays into the proposed British alphabet; to advertise and publish the transliteration with the original lettering opposite the transliteration, page by page; and to present copies thereof to public libraries, so as to persuade the government or the public to adopt the proposed alphabet. Subject to these trusts, or if and so far as the trusts should fail (and subject also to the payment of certain annuities given by the will), the residuary trust funds and the income thereof were given, in equal shares, to three institutions. On the question whether the trusts in connection with the proposed alphabet were valid,

Held: the trusts in connection with the proposed new alphabet were void for the following reasons:—

(i) the trusts were for purposes that in law were not charitable because

(a) increase of knowledge is not a charitable purpose unless combined with an element of teaching or education, and, although the research and propaganda enjoined by the testator might tend to increase public knowledge in a certain respect, viz., the saving of time and money by the use of the proposed alphabet, yet they were not for the advancement of education (dictum of RIGBY, L.J., in *Re Macduff*, [1896] 2 Ch. at p. 472, applied; *Crystal Palace Trustees v. Minister of Town & Country Planning*, [1950] 2 All E.R. 857, n., distinguished); and

(b) the trusts were not within the category of charitable trusts for other purposes beneficial to the community, because the object of the research and propaganda enjoined by the testator was to convince the public that the new alphabet would be beneficial and, analogously to the cases of trusts for political purposes advocating a change in the law of the land, the court was not in a position to judge whether the adoption of the new alphabet in fact would be beneficial (*Trustees of the Sir G. B. Hunter (1922) "C" Trust v. Inland Revenue Comrs.* (1929), 14 Tax. Cas. 427, applied; reasoning of LORD PARKER OF WADDINGTON in *Bowman v. Secular Society, Ltd.*, [1917] A.C. at p. 442, applied); and

(ii) the court was not at liberty to give validity to the trusts by treating them as conferring on the trustees a power to carry out the testator's directions regarding the new alphabet, since the trusts were not in favour of an ascertainable beneficiary but were impersonal trusts for a non-charitable purpose.

Dicta of SIR WILFRID GREENE, M.R., in *Re Diplock* ([1941] 1 All E.R. at p. 198) and of JENKINS, L.J., in *Inland Revenue Comrs. v. Broadway Cottages Trust* ([1954] 3 All E.R. at p. 128) applied.

[As to educational purposes being charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 218, para. 496; and as to non-charitable purposes such as political purposes, and bequests without beneficiaries, see *ibid.*, pp. 242, 243.

For cases on educational purposes as charitable purposes, see 8 DIGEST (Repl.) 327, 107, and 328-330, 108-118; for cases on gifts without beneficiaries (in relation to animals), see *ibid.*, 348, 285 et seq., and for cases on charitable purposes beneficial to the community, see *ibid.*, 350, 351, 297-311.]

Cases referred to:

- (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest (Repl.) 312, 1.
- (2) *Morice v. Durham (Bp.)*, (1805), 10 Ves. 522; 32 E.R. 947; 8 Digest (Repl.) 390, 836.
- (3) *Crystal Palace Trustees v. Minister of Town & Country Planning*, [1950] 2 All E.R. 857, n.; [1951] Ch. 132; 114 J.P. 553; 2nd Digest Supp.
- (4) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest (Repl.) 395, 879.
- (5) *Whicker v. Hume*, (1858), 7 H.L. Cas. 124; 28 L.J.Ch. 396; 31 L.T.O.S. 319; 22 J.P. 591; 11 E.R. 50; 8 Digest (Repl.) 330, 121.
- (6) *United States President v. Drummond*, (1838), cited in 7 H.L. Cas. 155; 11 E.R. 62; 8 Digest (Repl.) 346, 267.
- (7) *Re Strakosch, Temperley v. A.-G.*, [1949] 2 All E.R. 6; [1949] Ch. 529; [1949] L.J.R. 1477; 8 Digest (Repl.) 387, 807.
- (8) *Williams' Trustees v. Inland Revenue Comrs.*, [1947] 1 All E.R. 513; [1947] A.C. 447; [1948] L.J.R. 644; 176 L.T. 462; 27 Tax Cas. 409; 2nd Digest Supp.
- (9) *Hunter (Sir G. B.) (1922) "C" Trust, Trustees v. Inland Revenue Comrs.*, (1929), 14 Tax Cas. 427; Digest Supp.
- (10) *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 8 Digest (Repl.) 359, 378.
- (11) *Re Gott, Glazebrook v. Leeds University*, [1944] 1 All E.R. 293; [1944] Ch. 193; 113 L.J.Ch. 124; 170 L.T. 210; 8 Digest (Repl.) 388, 815.
- (12) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 8 Digest (Repl.) 396, 889.
- (13) *Re Astor's Settlement Trusts, Astor v. Scholfield*, [1952] 1 All E.R. 1067; [1952] Ch. 534; 8 Digest (Repl.) 315, 7.
- (14) *Re Diplock, Wintle v. Diplock*, [1941] 1 All E.R. 193; [1941] Ch. 253; 110 L.J.Ch. 55; 164 L.T. 339; *affd.* H.L., sub nom. *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 8 Digest (Repl.) 395, 875.
- (15) *Inland Revenue Comrs. v. Broadway Cottages Trust, Inland Revenue Comrs. v. Sunnylands Trust*, [1954] 3 All E.R. 120; [1955] Ch. 20; 35 Tax Cas. 577, 585; 3rd Digest Supp.

Adjourned Summons.

By originating summons, dated May 17, 1955, the plaintiff, the Public Trustee, as the executor and trustee of the will, dated June 12, 1950, of George Bernard Shaw, deceased, applied for the determination of the following questions, among

A others: (i) whether certain trusts (being the trusts summarised in the headnote*) were valid and effectual in whole or to some and what extent or whether they were invalid or failed on the ground of uncertainty, perpetuity, impracticability, public policy or any other ground; and (ii) whether the plaintiff ought to take any and, if any, what steps towards carrying out these trusts or ascertaining whether they were impracticable. The first two defendants were annuitants
 B under the testator's will and were not concerned with the questions stated above; the other defendants were the three residuary legatees under cl. 40 of the will and the Attorney-General. The facts and the terms of the testator's will are set out in the judgment.

Robert S. Lazarus for the Public Trustee, the plaintiff.

C *Charles Russell, Q.C.*, and *P. W. E. Taylor* for the British Museum and the Royal Academy of Dramatic Art, the third and fifth defendants, residuary legatees.

K. J. T. Elphinstone for the National Gallery of Ireland, the fourth defendant, a residuary legatee.

Milner Holland, Q.C., and *Denys B. Buckley* for the Attorney-General.

D *Cur. adv. vult.*

Feb. 20. **HARMAN, J.**, read the following judgment: All his life long Bernard Shaw was an indefatigable reformer. He was already well-known when the present century dawned, as novelist, critic, pamphleteer, playwright; and during the ensuing half century he continued to act as a kind of itching
 E powder to the British public, to the English-speaking peoples, and indeed to an even wider audience, castigating their follies, their foibles and their fallacies and bombarding them with a combination of paradox and wit that earned him in the course of years the status of an oracle: the Shavian oracle; and the rare distinction of adding a word to the English language. Many of his projects he lived to see gain acceptance and carried into effect and become normal.
 F It was natural that he should be interested in English orthography and pronunciation. These are obvious targets for the reformer. It is as difficult for the native to defend the one as it is for the foreigner to compass the other. The evidence shows that Shaw had for many years been interested in the subject. Perhaps his best known excursion in this field is "Pygmalion" in
 G which the protagonist is a professor of phonetics: this was produced as a play in 1914 and has held the stage ever since and invaded the world of the film. It is indeed a curious reflexion that this same work, tagged with versicles which I suppose Shaw would have detested, and tricked out with music which he would have eschewed (see the preface to "The Admirable Bashville"), is now charming huge audiences on the other side of the Atlantic and has given birth to the present proceedings. I am told that the receipts from this source have enabled the
 H executor to get on terms with the crushing death duties payable on the estate, thus bringing the interpretation of the will into the realm of practical politics.

The testator, whatever his other qualifications, was the master of a pellucid style, and the reader embarks on his will confident of finding no difficulty in understanding the objects which the testator had in mind. This document,
 I moreover, was evidently originally the work of a skilled equity draftsman. As such, I doubt not, it was easily to be understood, if not of the vulgar, at any rate by the initiate. Unfortunately the will bears ample internal evidence of being in part the testator's own work. The two styles, as ever, make an unfortunate mixture. It is always a marriage of incompatibles: the delicate testamentary machinery devised by the conveyancer can but suffer when

* The trusts were those declared in heads (1) (2) (3) and (4) of cl. 35 and heads A., B., C. of cl. 38 of the testator's will; these are printed at p. 757, letter E, to p. 758, letter A, and p. 758, letter F, post.

subjected to the *cacoethes scribendi* of the author, even though the latter's language, if it stood alone, might be a literary masterpiece.

This will is a long and complicated document made on June 12, 1950, when the testator was already ninety-four years old, though it is fair to say that it is rather youthful exuberance than the circumspection of old age that mars its symmetry. By cl. 2 the plaintiff is appointed sole executor and trustee. Clause 5 is in these terms:

"I bequeath my copyrights performing rights filming rights television rights and all cognate rights now in existence or hereafter to be created with the manuscripts typescripts and other documents in which I have such rights to my trustee upon trust to apply the proceeds resulting from the exploitation of such rights or the sale or other lucrative use of such documents as income of my estate."

Clause 7 begins as follows:

"I declare that my trustee shall manage and deal with my author's rights with all the powers in that behalf of an absolute owner (subject as hereinafter provided) for so long as may prove necessary or expedient during a period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of His late Majesty King George the Fifth who shall be living at the time of my death (hereinafter called 'the special period')."

A proviso is added forbidding the trustee to sell or assign the literary rights or to alienate them for more than a limited period. There follow clauses giving specific bequests and various directions, including cl. 16 in these words:

"I empower my trustee to procure all necessary assistance and expert advice legal artistic literary or other for the discharge of his relevant functions and to pay its cost out of my estate."

Next come legacies and annuities to servants, relations and others, the trustee being empowered to provide the annuities out of the income of "my residuary trust funds hereinafter defined", and it is declared that

"every annuity unless previously appropriated shall until the expiration of twenty-one years from my death or the previous cesser whether partial or complete of the trust of the balance of the income of my residuary trust funds hereinafter contained be payable only out of the income of my residuary trust funds in each year from my death available for the payment thereof and if the income of my residuary trust funds shall be insufficient to pay the said annuities in full the annuitant shall not be entitled to be paid any capital sum in satisfaction of his or her annuity as a legacy, but the said annuity shall abate pro rata for such period and to such extent as shall be necessary having regard to the insufficiency of such income as aforesaid but if at the end of any year from my death there should be income available (after paying the full amount of the said annuities for the time being payable for that year) to pay the amounts or part of the amounts by which the annuities then still payable had previously abated my trustee shall out of such income pay the said amounts or such parts of the said amounts and rateably in proportion to such last mentioned annuities as such income shall be sufficient to satisfy. Upon the expiration of twenty-one years from my death or the cesser whether partial or complete of the said trust of the balance of the said income the annuities then subsisting if not then provided for under sub-cl. (4) hereof and any amounts by which such annuities

A had previously abated if not made good shall be a charge on the capital of my residuary trust funds."

The trustee is also given a discretion to increase annuities in certain events. Clause 35 and its sequents I must read in full.

B " 35. I devise and bequeath all my real and personal estate not otherwise specifically disposed of by this my will or any codicil hereto and all property over which I have general power of appointment unto my trustee upon trust that my trustee shall (subject to the power of postponing the sale and conversion thereof hereinafter contained) sell my real estate and sell call in or otherwise convert into money as much as may be needed of my personal estate (other than any copyrights which as provided by cl. 7 of this my will are not to be sold) to increase the ready moneys of which I may be possessed at my death to an amount sufficient to pay my funeral and testamentary expenses and debts, estate duty, legacy duty and all the duties payable on my death in respect of my estate or the bequests hereby made free of duty (other than testamentary expenses) and the legacies bequeathed by this my will or any codicil hereto or to make such other payments or investments or change of investments as in his opinion shall be advisable in the interest of my estate and shall invest the residue of such moneys in manner hereinafter authorised And shall stand possessed of the said residuary trust moneys and the investments for the time being representing the same and all other investments for the time being forming part of my residuary estate (herein called my residuary trust funds) and the annual income thereof upon the trusts hereby declared of and concerning the same. (1) To institute and finance a series of inquiries to ascertain or estimate as far as possible the following statistics (a) the number of extant persons who speak the English language and write it by the established and official alphabet of twenty-six letters (hereinafter called Dr. Johnson's alphabet); (b) how much time could be saved per individual scribe by the substitution for the said alphabet of an alphabet containing at least forty letters (hereinafter called the proposed British alphabet) enabling the said language to be written without indicating single sounds by groups of letters or by diacritical marks, instead of by one symbol for each sound; (c) how many of these persons are engaged in writing or printing English at any and every moment in the world; (d) on these factors to estimate the time and labour wasted by our lack of at least fourteen unequivocal single symbols; (e) to add where possible to the estimates of time lost or saved by the difference between Dr. Johnson's alphabet and the proposed British alphabet estimates of the loss of income in British and American currency. The inquiry must be confined strictly to the statistical and mathematical problems to be solved without regard to the views of professional and amateur phoneticians, etymologists, spelling reformers, patentees of universal languages, inventors of shorthand codes for verbatim reporting or rival alphabets, teachers of the established orthography, disputants about pronunciation, or any of the irreconcilables whose wranglings have overlooked and confused the single issue of labour saving and made change impossible during the last hundred years. The inquiry must not imply any approval of or disapproval of the proposed British alphabet by the inquirers or by my trustee. (2) To employ a phonetic expert to transliterate my play entitled " Androcles and the Lion " into the proposed British alphabet assuming the pronunciation to resemble that recorded of His Majesty our late King George V, and sometimes described as Northern English. (3) To employ an artist-calligrapher to fair-copy the transliteration for reproduction by lithography photography or any other method that may serve in the absence of printers' types. (4) To advertise and publish the transliteration with the original Dr. Johnson's

lettering opposite the transliteration page by page and a glossary of the two alphabets at the end and to present copies to public libraries in the British Isles, the British Commonwealth, the American States North and South and to national libraries everywhere in that order."

Clause 36:

"I desire my trustee to bear in mind that the proposed British alphabet does not pretend to be exhaustive as it contains only sixteen vowels whereas by infinitesimal movements of the tongue countless different vowels can be produced all of them in use among speakers of English who utter the same vowel no oftener than they make the same finger prints. Nevertheless they can understand one another's speech and writing sufficiently to converse and correspond . . ."

Clause 37:

"It is possible that the Ministry of Education may institute the inquiry and adopt the proposed British alphabet to be taught in the schools it controls in which event cl. 35 (1) foregoing and its relevant sequels will be contra-indicated as superfluous and cl. 40 come into operation accordingly but the adoption must be exact and no account taken of the numerous alternative spelling reforms now advocated or hereafter proposed."

Clause 38:

"I hereby devise and bequeath the balance of the income of my residuary trust funds not required during the period of twenty-one years after my death to pay the annuities hereby or by any codicil hereto bequeathed or for any other purpose upon which income of my residuary trust funds may under the trusts hereinbefore contained be applicable upon trust during the special period but subject to cesser as hereinafter provided to apply the same as follows:—A. To remunerate the services and defray the expenses incidental to these proceedings and generally to the launching advertising and propaganda of the said British alphabet. B. To acquire by employment purchase or otherwise the copyrights and patents (if any) created by or involved in the designing and manufacture of the said alphabet or the publication of the works printed in it without exploiting the said rights or for commercial profit. C. To wind up the enterprise when the aforesaid steps have been taken or if and when its official adoption or general vogue shall make further recourse to my estate and action on the part of my trustee in respect of this charitable trust superfluous."

Clause 39:

"Pending the operation of the foregoing clause I direct that my trustee shall for the said period of twenty-one years from my death accumulate the said balance of the income of my residuary trust funds in the way of compound interest by investing the same and the resulting income thereof from time to time in any investment in which my residuary trust funds are authorised to be invested."

Clause 40:

"Subject to the trusts hereinbefore declared of my residuary trust funds and the income thereof or if and so far as such trusts shall fail through judicial decision or any other cause beyond my trustee's control my trustee shall stand possessed of my residuary trust funds and the income thereof but subject to a charge on the capital as well as the income thereof for payment of such of the annuities hereby bequeathed as shall be subsisting

A upon trust as to one third thereof for the trustees of the British Museum in acknowledgment of the incalculable value to me of my daily resort to the reading room of that institution at the beginning of my career as to one third of the same upon trust for the National Gallery of Ireland and as to the remaining one third of the same upon trust for the Royal Academy of Dramatic Art at 61 Gower Street in the county of London and should any
B of these three institutions be permanently closed at the date when the trust to accumulate the said balance of income of my residuary trust funds shall cease the others or other shall succeed to its share and if more than one equally."

Finally, cl. 47 reads thus:

C "Having been born a British subject in Ireland in 1856, subsequently registered as a citizen of Eire, and finally privileged to remain a British subject by the Home Secretary's letter dated June 27, 1949, I declare that my domicile of choice is English and desire that my will be construed and take effect according to English law."

D Apart from a minor question about certain annuities which I have already decided, the difficulties begin with cl. 35 which is, in form, a normal residuary clause directing conversion of the estate, other than copyrights, and the payment of funeral and testamentary expenses and debts out of the proceeds and the ready money. These resources have proved inadequate and it has been necessary to defray the death duties largely out of royalties accruing since the death,
E which, it will be remembered, are directed by cl. 5 to be treated as income. The definition of "my residuary trust funds" appears at first sight to exclude the copyrights and the proceeds of their exploitation, but no one suggested that the testator died intestate in this respect, and I am content to assume that these, directed as they are to be applied "as income of my estate", form part of the residuary income. The trustee is by cl. 7 directed to manage and deal
F with them as absolute owner for so long as may be necessary during the defined "special period".

The directions in cl. 35 connected with what the testator calls "the proposed British alphabet" prescribe no limit of time, but cl. 38 shows that not more than the income of the first twenty-one years after the death is to be devoted to these purposes. So much of this income as is not devoted to these purposes or the
G subsidiary purposes mentioned in cl. 38 (which are, in my view, mere machinery incidental to the purposes stated in cl. 35) is to be accumulated, and is to continue to be used during the special period unless the trusts "shall fail through judicial decision or any other cause beyond my trustee's control", or unless the enterprise shall have been wound up on its successful achievement.

It appears that the residuary estate is likely to consist of nothing but copy-
H rights and royalties arising out of them. These are to devolve at the end of the twenty-one-year period on the ultimate residuary legatees, the British Museum, the Royal Academy of Dramatic Art, and the Irish National Gallery in equal shares. The first two of these now claim that what I may call the alphabet trusts are entirely void and that the claimants are entitled, therefore, to come into their inheritance at once and to stop the accumulation of income. The grounds
I of this claim are two: first, that the trusts, being for an object and not for a person, are void trusts; secondly, that they are void for uncertainty.

The Attorney-General appears as *parens patriae* to uphold the trusts as being charitable trusts, and counsel for the Attorney-General at my request also supported the proposition of the executor that, even if not charitable, these trusts, not being tainted with the vice of perpetuity (as it is called), are a valid exercise by a man of his power of disposing of his own money as he thinks fit. The claimants retort that these trusts are not charitable trusts, and it seems to

me that I should address myself first to that question. It is notorious that the word "charitable", when used by a lawyer, covers many objects which a layman would not consider to be included under that word, but excludes benevolent or philanthropic activities which the layman would consider charitable. In construing a will the lawyer's sense must prevail in the absence of some special context. The four heads of charity are set out by LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* (1) ([1891] A.C. 531 at p. 583). His words, as has often been pointed out, are not original, being drawn from the argument of SIR SAMUEL ROMILLY in his reply in *Morice v. Bishop of Durham* (2) ((1805), 10 Ves. 522 at p. 532). They are almost too familiar to need repetition. Shortly stated the four heads are (i) religion, (ii) poverty, (iii) education, and (iv) "other purposes beneficial to the community". SIR SAMUEL ROMILLY describes the last head as being "the most difficult", and the phrase he uses is "the advancement of objects of general public utility". Here, again, it is trite law that not every object coming within one or other of these categories is charitable—a college for pickpockets is no charity—but that every object which is to rank as charitable must either fit into one or more of the first three categories, or, if not, may still be held charitable because of general public utility.

The first object of the alphabet trusts is to find out by inquiry how much time could be saved by persons who speak the English language and write it, by the use of the proposed British alphabet and so to show the extent of the time and labour wasted by the use of our present alphabet, and, if possible, further to state this waste of time in terms of loss of money. The second is to transliterate one of the testator's plays, "Androcles and the Lion", into the proposed British alphabet, assuming a given pronunciation of English, and to advertise and publish the transliteration in a page by page version in the proposed alphabet on one side and the existing alphabet on the other, and, by the dissemination of copies and, in addition, by advertisement and propaganda, to persuade the government or the public or the English speaking world to adopt it. This was described by the Attorney-General as a useful piece of research beneficial to the public, because it would facilitate the education of the young and the teaching of the language and show a way to save time and, therefore, money. It was suggested that the objects could thus be brought within the third category and that a parallel could be found in the decision of DANCKWERTS, J., in *Crystal Palace Trustees v. Minister of Town & Country Planning* (3) ([1950] 2 All E.R. 857, n.), where trusts "for the promotion of industry, commerce and art" were held charitable. So they were, but only in the context provided by the instrument (an Act of Parliament) in which they appeared. In my opinion, if the object be merely the increase of knowledge, that is not in itself a charitable object unless it be combined with teaching or education (see the speech of RIGBY, L.J., in *Re Macduff, Macduff v. Macduff* (4), [1896] 2 Ch. 451 at p. 472). The facts of that case bear no resemblance to the present, but the lord justice said:

"There is one other case to which I will refer—*Whicker v. Hume* (5) ((1858), 7 H.L. Cas. 124)—and in doing so I will refer also to the unreported case of *United States President v. Drummond* (6) ((1838), cited in 7 H.L. Cas. 155), which is mentioned in *Whicker v. Hume* (5). I say nothing about the wide extent of the gift in *Whicker v. Hume* (5), because there is no doubt now that the extensive nature of the gift as regards the range of the objects is no objection to it; but the gift was for advancement of education and learning, and the objection was taken by counsel who were impeaching the validity of the gift that education is no doubt a charitable purpose within the Statute of Elizabeth, but learning is not—that is to say, that the promotion of abstract learning would not be a charitable purpose. That was dealt with by LORD CHELMSFORD and LORD CRANWORTH, and both of them

A point out that, reading the word 'learning' as you find it in that will in connection with education, it must be taken as equivalent to teaching, and, therefore, as a certain branch of education; and I rather gather from their judgments, and from the pains which they take to draw out and to elucidate the meaning of the word 'learning' in that will, that if they could not have put that interpretation upon it they would have doubted, at any rate, as to whether the advancement of learning as an abstract matter would be a charity at all. The Lord Chancellor, LORD CHELMSFORD, goes with great pains into the matter, and deals with the word 'learning'; and he says (7 H.L. Cas. at p. 155) that the word in that will was used in the sense of teaching and instruction, 'and, in that sense, it appears to me', he says, 'that the case which was cited by the respondents, and which is printed in the respondent's case of the *United States President v. Drummond* (6), may be applicable, where LORD LANGDALE decided, that a gift to the United States of America, to found, at Washington, under the name of the "Smithsonian Institution, an establishment for the increase of knowledge among men", was a valid charity'. The Lords evidently doubted whether a gift for the increase of knowledge would be a good charitable gift, unless it was understood to mean a gift for teaching and education. Yet the increase of knowledge would unquestionably in these days be taken to be a purpose of general utility, and the doubt of the noble Lords appears to me to be strongly in favour of the view taken by LORD LANGDALE that 'purposes of general utility' will not make a good charitable gift."

E The research and propaganda enjoined by the testator seem to me merely to tend to the increase of public knowledge in a certain respect, namely, the saving of time and money by the use of the proposed alphabet. There is no element of teaching or education combined with this, nor does the propaganda element in the trusts tend to more than to persuade the public that the adoption of the new script would be "a good thing", and that, in my view, is not education. Therefore I reject this element.

F There remains the fourth category. As I have already said, this does not embrace all objects of public utility, as appears clearly in *Re Strakosch, Temperley v. A.-G.* (7) ([1949] 2 All E.R. 6), and perhaps even better in *Williams' Trustees v. Inland Revenue Comrs.* (8) ([1947] 1 All E.R. 513). The headnote ([1947] A.C. 447) reads:

G "Every object of public general utility is not necessarily a charity, for in order to be charitable a trust must be within the spirit and intendment of the statute 43 Eliz. c. 4. Accordingly, no trust can be charitable unless it is beneficial to the community in a way which the law regards as charitable. A trust was established with the objects of promoting Welsh interests in London by social intercourse; discussing all questions affecting Welsh interests; fostering the study of the Welsh language by lectures on Welsh history, literature, music and art; maintaining a library of literature in the Welsh language or relating to Wales. The trustees were empowered (inter alia) to maintain an institute and meeting place for the benefit of Welsh people in London with a view to creating a centre to promote 'the moral, social, spiritual and educational welfare of Welsh people'. Held, that the trust was not exempt from income tax under s. 37 (1) of the Income Tax Act, 1918, since the ground on which a charitable character was sought to be attributed to it was not that it was beneficial in a way which the law regards as charitable."

In his speech LORD SIMONDS says ([1947] 1 All E.R. at p. 518):

"My Lords, the claim of the appellants that the property is vested in them for charitable purposes is based on these contentions, (a) that the dominant

purpose of the trust is the fostering of Welsh culture which is a purpose beneficial to the community composed of the people of the United Kingdom, (b) that the purpose aforesaid is beneficial to the community composed of the people of the Principality of Wales and the county of Monmouth which is an integral part of the United Kingdom and in itself constitutes a political body settled in a particular territorial area, and (c) because the maintenance of the institute (the expressed method of effectuating the purpose aforesaid) is itself a purpose beneficial to a section of the British community which is determined by reference to impersonal qualifications (namely, persons with Welsh connections who are resident in or near or visiting London) and is not a selection of private individuals chosen on account of personal qualifications. I have taken this statement of the appellants' contentions from the formal reasons in their written Case, because in them so clearly appears the fallacious argument on which in this and other cases, which it has been my fortune to hear, an attempt has been made to establish the charitable character of a trust. My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers unless it is within the spirit and intendment of the preamble to 43 Eliz. c. 4, which is expressly preserved by s. 13 (2) of the Mortmain and Charitable Uses Act, 1888. The second is that the classification of charity in its legal sense into four principal divisions by LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* (1) must always be read subject to the qualification appearing in the judgment of LINDLEY, L.J., in *Re Macduff* (4) . . ."

LORD SIMONDS then cites from that case as I have done. Then he goes on ([1947] 1 All E.R. at p. 519):

"But it is just because the purpose of the trust deed in this case is said to be beneficial to the community or a section of the community and for no other reason that its charitable character is asserted. It is not alleged that the trust is (a) for the benefit of the community and (b) beneficial in a way which the law regards as charitable. Therefore, as it seems to me, in its mere statement the claim is imperfect and must fail."

It is hard to ascertain what are the limits of purposes held to be beneficial to the community "in a way which the law regards as charitable". LORD SIMONDS in the case last cited grapples with this difficulty, and is fair to admit that it is very difficult to reconcile all the cases. His Lordship opines (*ibid.*, at p. 520) that "Each case must be judged on its own facts and the dividing line is not easily drawn . . ." It seems to me, however, that in the present case I am stopped on the threshold by the word "beneficial". Who is to say whether this project is beneficial? That, on the face of it, is a most controversial question, and I do not think that the fact that the testator and a number of other people are of opinion that the step would be a benefit proves the case, for undoubtedly there are a great many more people, at present at any rate, who think the exact contrary. That is why the testator directs the steps which he recommends to be taken. They are intended to overcome the opposition and sloth of the great majority who prefer to stick to what they know and to use that to which they are accustomed. I do not see how mere advertisement and propaganda can be postulated as being beneficial. Mr. Isaac Pitman is the author of a singularly able piece of pleading on the subject in his affidavit, but, even if I were persuaded of the merits of the scheme, I cannot think that my opinion on that subject is relevant or can be the deciding factor.

I feel unable to pronounce that the research to be done is a task of general utility. In order to be persuaded of that, I should have to hold it to be generally

A accepted that benefit would be conferred on the public by the end proposed. That, however, is the very conviction which the propaganda based on the research is designed to instil. The testator is convinced, and sets out to convince the world, but the fact that he considers the proposed reform to be beneficial does not make it so any more than the fact that he describes the trust as charitable constrains the court to hold that it is.

B A case on a parallel subject, spelling reform, came before ROWLATT, J., on an income tax point. That is *Trustees of the Sir G. B. Hunter (1922) "C" Trust v. Inland Revenue Comrs.* (9) ((1929), 14 Tax Cas. 427). The headnote reads:

C "The appellants claimed that the income of a trust of which they were trustees was exempt from income tax under s. 37 (1) (b), Income Tax Act, 1918, on the ground that the trust was established for charitable purposes only, and that the trust income was applied to such purposes only. The trust deed provided that the net income and, after a period of years, the capital, of the trust should be paid or applied to the benefit of the Simplified Spelling Society or in certain circumstances, as to which the trustees had wide discretionary powers, to the benefit of or to promote the formation of D wide discretionary powers, to the benefit of or to promote the formation of the society were to recommend and to further the general use of simpler spellings of English words than those now in use. It engaged in propaganda to influence public opinion in favour of its objects and to gain for them the approval of education authorities. The appellants claimed that the purposes for which the society was established were charitable either as being educational or as being beneficial to the community. Held, that the trust was not E established for charitable purposes."

In the Case Stated (*ibid.*, at p. 430) I find that it was contended for the society that its proposal had two practical advantages:

F " (i) By the adoption of the system, spelling would be more quickly learned by a child, and the time so saved could be utilised in training the child's mind in other directions. The system would thus benefit education indirectly. (ii) The system was of general advantage, because by making the sound of words correspond with their written representation, it would lead to better speech, and by facilitating the learning of English by non-English G speaking people, whether British subjects or foreigners, would help the adoption of English as an instrument of international communication."

The society contended:

" (1) That the society was established for educational purposes only:
H (2) That alternatively the society was established for purposes beneficial to the community only . . ."

The Crown claimed:

" (1) That the trust was not established for educational purposes only or for purposes beneficial to the community but for the advancement of an idea or theory . . ."

I With that view the Special Commissioners agreed, and there was an appeal which came before ROWLATT, J., who said (*ibid.*, at p. 432):

"I think that the commissioners were clearly right here. It must be distinctly understood that what the court has to decide in cases of this kind is not whether it appears that the society is pursuing a beneficial object or not, in the opinion of the court; I think that the court has nothing to do with that at all. But what the court has to decide is whether the object of

the society is one that is charitable within the meaning of the rule governing courts of equity and the Income Tax Acts. The objects of this society or any other society which would benefit under this trust is simply to make spelling more simple. Everyone would agree up to a point that it is probably advantageous. Probably as you go on you will get differences of opinion; but, right or wrong, the question is whether that is a charitable object. You have people trying to promote the simplification of spelling, or the simplification of grammar, or the uniformity of pronouncing, or the simplification of dress, or the simplification or reform of any of the conveniences of life. But in my judgment they are nowhere near either of the express categories mentioned by LORD MACNAGHTEN in the well-known judgment, *Income Tax Special Purposes Comrs. v. Pemsel* (1), or within the classes of cases which come within the general classes in the Act. I think that this case is hardly arguable."

Such words of such a judge must have great weight with me.

It seems to me that the objects of the alphabet trusts are analogous to trusts for political purposes, which advocate a change in the law. Such objects have never been considered charitable. In his celebrated speech in *Bowman v. Secular Society, Ltd.* (10) ([1917] A.C. 406) LORD PARKER OF WADDINGTON said (*ibid.*, at p. 442):

"Now if your Lordships will refer for a moment to the society's memorandum of association you will find that none of its objects, except, possibly, the first, are charitable. The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the Sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or, if the association be incorporated, as an absolute gift to the corporate body; but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."

I, therefore, do not reach the further inquiry whether the benefit is one within the spirit or intendment (as it is called) of the Statute of Elizabeth (43 Eliz. c. 4), but, if I had to decide that point, I should hold that it was not.

It was argued for the ultimate legatees that, apart from any other consideration, the vice of uncertainty is fatal. It has been often said that the vagueness with which a charitable bequest is stated will never be the cause of its failure. A modern instance is *Re Gott, Glazebrook v. Leeds University* (11) ([1944] 1 All E.R. 293). I read from the headnote ([1944] Ch. 193):

"A charitable trust cannot fail for uncertainty whether the charitable intention be general or only specific. There is no practical reason why certainty of the exact ambit of a charitable purpose should be required, as the court can settle a scheme for its administration."

UTHWATT, J., said ([1944] 1 All E.R. at p. 294):

"The argument is that, where there is shown an intention to devote property to a particular charitable purpose only but it is impossible to ascertain that purpose with certainty, the trust intended is not known and there is, therefore, no trust to be enforced. The well-known statement: 'A charitable trust does not fail for uncertainty', is said to be a slogan

A which does not apply save where there is an intent in favour of charity generally. No doubt, when a purpose is stated, no charitable trust is created unless the purpose is certainly charitable, but given that certainty, uncertainty as to the particular charitable purpose intended is, in my opinion, immaterial. No authority was cited to me which supports the proposition that certainty in the definition of an intended specific charitable purpose is necessary and the proposition appears to be wrong in principle and never to have been accepted in practice. If a gift to charity generally does not fail for uncertainty—and that is a proposition which is not open to dispute—it appears to me to be a natural consequence, though it may not be a necessary consequence, that a specific charitable purpose may be vaguely set out. There is no practical reason why certainty of the exact ambit of a particular charitable purpose should be required, for the court has as regards all charitable trusts jurisdiction to settle a scheme for their administration—I am not referring to *cy-près* schemes—and it is settled practice that these schemes may deal not only with methods of administration but also with the substance of the trust and define it. The court, as LORD ELDON pointed out in *Morice v. Bishop of Durham* (2), has taken strong liberties upon the subject of charities.”

Once decided that the object is charitable and the law will provide the means of carrying it into effect by a scheme, and it seems to me that the fact that the testator has not selected any particular form of alphabet for his experiment would not be fatal if the experiment itself constituted a charitable object.

E The question of certainty becomes far more difficult if there be no charitable intent. The objection here is that the Public Trustee would not know how to set about his task because he would not know the corpus on which to direct his appointed statistical and phonetic experts to work. No particular alphabet has been indicated by the testator, although there are indications of the kind of alphabet required. It is to have not less than forty letters of which at least fourteen are to be symbols for vowel sounds. The evidence before me showed that a great deal of work has been and is being done on these lines, and that among those skilled in the knowledge of phonetics a fit person could be selected who would be competent to advise the Public Trustee either to adopt one of the already existing scripts, or, if necessary, to procure the invention of a new one. I should not have considered the testator's omission or failure to choose an alphabet fatal. Once that is decided, I see no uncertainty. The statistical calculations could on the evidence be done, and the remaining directions are quite categorical.

G Can, then, this project be upheld apart from charity? I feel bound to say at once that, as the authorities stand, I do not think I am at liberty to hold that it can. In *Houston v. Burns* (12) ([1918] A.C. 337) VISCOUNT HALDANE begins his speech in these terms (*ibid.*, at p. 342):

H “My Lords, by the law of Scotland, as by that of England, a testator can defeat the claim of those entitled by law in the absence of a valid will to succeed to the beneficial interest in his estate only if he has made a complete disposition of that beneficial interest. He cannot leave it to another person to make such a disposition for him unless he has passed the beneficial interest to that person to dispose of as his own. He may, indeed, provide that a special class of persons, or of institutions invested by law with the capacity of persons to hold property, are to take in such shares as a third person may determine, but that is only because he has disposed of the beneficial interest in favour of that class as his beneficiaries. There is, however, an apparent exception to the principle. The testator may indicate his intention that his estate is to go for charitable purposes. If these purposes are of the kinds which the law recognises in somewhat different ways in the

two countries as charitable, the courts will disregard a merely subordinate deficiency in particular expression of intention to dispose of the entire beneficial interest to a class, and will even themselves, by making a scheme of some kind, give effect to the general intention that the estate should be disposed of for charitable purposes."

LORD PARKER OF WADDINGTON in *Bowman v. Secular Society, Ltd.* (10), categorically states ([1917] A.C. at p. 441):

"A trust to be valid must be for the benefit of individuals . . . or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable . . ."

In other words, one cannot have a trust, other than a charitable trust, for the benefit, not of individuals, but of objects. The reason has been often stated, that the court cannot control the trust. The principle has been recently restated by ROXBURGH, J., in *Re Astor's Settlement Trusts, Astor v. Scholfield* (13) ([1952] 1 All E.R. 1067), where the authorities are copiously reviewed. An object cannot complain to the court, which, therefore, cannot control the trust, and, therefore, will not allow it to continue. I must confess that I feel some reluctance to come to this conclusion. I agree at once that, if the persons to take in remainder are unascertainable, the court is deprived of any means of controlling such a trust, but if, as here, the persons taking the ultimate residue are ascertained, I do not feel the force of this objection. They are entitled to the estate except in so far as it has been devoted to the indicated purposes, and in so far as it is not devoted to those purposes, the money being spent is the money of the residuary legatees, or the ultimate remaindermen, and they can come to the court and sue the executor for a devastavit, or the trustee for a breach of trust, and thus, though not themselves interested in the purposes, enable the court indirectly to control them. This line of reasoning is not, I think, open to me. See, for instance, the statement by SIR WILFRID GREENE, M.R., in *Re Diplock, Wintle v. Diplock* (14) ([1941] 1 All E.R. 193 at p. 198):

"Those principles [dealing with uncertainty], I apprehend, are really nothing more than the application of a fundamental principle of the law relating to trusts. In order that a trust may be properly constituted, there must be a beneficiary. The beneficiary must be ascertained or must be ascertainable. In the case of what I may call impersonal trusts, such as a gift for charitable purposes or benevolent purposes, there is no class of beneficiary which can be defined in the same sense as a class of beneficiaries such as a class of relatives. In the latter case, although no particular person in the class may be able to say that at any given moment he is entitled to anything out of the trust, the class as a whole can enforce the trust. In the case of charitable trusts in which no defined class is specified, nevertheless, owing to the particular principles which have come to be applied to charitable gifts, the courts have not treated the trust as failing for that reason. There is a very good ground for that—namely, that the Crown, as *parens patriae*, taking all charities under its protection, is in a position to enforce the trust, and, therefore, although there may be no specified charitable beneficiary who can come to the court and insist on having the trust performed, nevertheless the Attorney-General can appear and is entitled to insist on the trust being carried out, if necessary, by a *scheme cy-près*. However, that exception to the general rule that there must be beneficiaries ascertained or ascertainable—if I may call it an exception—does not extend beyond what falls within the legal class of charity. It does not extend to other public-spirited purposes."

The same view is taken in the judgment of the Court of Appeal, delivered by JENKINS, L.J., in *Inland Revenue Comrs. v. Broadway Cottages Trust*, *Inland Revenue Comrs. v. Sunnyslads Trust* (15) ([1954] 3 All E.R. 120).

I should have wished to regard this bequest as a gift to the ultimate residuary legatees subject to a condition by which they cannot complain of income during the first twenty-one years after the testator's death being devoted to the alphabet project. This apparently might be the way in which the matter would be viewed in the United States, for I find in MORRIS & LEACH on the RULE AGAINST PERPETUITIES (1956), at p. 308, the following passage quoted from the American Law Institute's RESTATEMENT OF TRUSTS:

"Where the owner of property transfers it upon an intended trust for a specific non-charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no trust is created; but the transferee has power to apply the property to the designated purpose, unless he is authorised so to apply the property beyond the period of the rule against perpetuities, or the purpose is capricious."

As the authors point out, this is to treat a trust of this sort as a power, for clearly there is no one who can directly enforce the trust, and if the trustees choose to pay the whole moneys to the remaindermen, no one can complain. All that can be done is to control the trustees indirectly in the exercise of their power. In my judgment, I am not at liberty to validate this trust by treating it as a power. See per JENKINS, L.J., in *Inland Revenue Comrs. v. Broadway Cottages Trust* (15) ([1954] 3 All E.R. at p. 128): "We do not think a valid power is to be spelt out of an invalid trust". This also was the view of the learned author of GRAY ON PERPETUITIES (4th Edn.), the leading work on the subject (see Appendix H), and I feel bound to accept it.

The result is that the alphabet trusts are, in my judgment, invalid, and must fail. It seems that their begetter suspected as much, hence his jibe about failure by judicial decision. I answer that it is not the fault of the law, but of the testator, who failed almost for the first time in his life to grasp the problem or to make up his mind what he wanted.

Declaration accordingly.

Solicitors: *J. N. Mason & Co.* (for the Public Trustee); *Charles Russell & Co.* (for the British Museum and the Royal Academy of Dramatic Art); *Benileys, Stokes & Lowless* (for the National Gallery of Ireland); *Treasury Solicitor*.

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

QUINN v. CAMERON AND ROBERTON, LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Oaksey, Lord Morton of Henryton, Lord Cohen and Lord Keith of Avonholm), January 31, February 4, 5, 6, March 14, 1957.]

Factory—Removal of dust—Metal grinding—Plough buff—Failure to provide appliances for the interception of dust—Whether operation of plough buff was dry grinding—Definitions of grinding, cleaning of castings, and abrasive wheel—Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O. 1925 No. 904), Definitions, reg. 1.

The appellant was employed from 1942 to 1951 in an iron foundry owned by the respondents, where iron castings were cast in sand in moulding boxes. The iron castings were then knocked out and most of the sand removed in the moulding shop. In order to remove the remaining sand and superfluous metal, consisting largely of excrescences known as "risers" or "fins", the castings were taken to the dressing shop where the appellant worked as a grinder operating, inter alia, a plough buff which consisted of a frame suspended from a radial arm hinged at one end to a vertical girder. The suspended frame contained a carborundum grinding wheel driven by an electric motor. In the process of grinding a quantity of dust was thrown off partly from the carborundum wheel, partly from the metal casting and partly from the sand still adhering to the casting. The dust caused by the disintegration of the sand contained fine siliceous particles. The appellant was found to be suffering from pneumoconiosis and he claimed that he contracted the disease or that it was aggravated in the course of his employment by the respondents owing to their breach of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, reg. 1*, which provided that no dry grinding which ordinarily caused the evolution of dust into the air of a room in such a manner as to be inhaled by any person employed should be performed without the use of adequate appliances for the interception of the dust and for its removal. The plough buff was not equipped with any appliance for the interception of dust. By definition in the regulations an abrasive wheel meant "a wheel manufactured of bonded emery or similar abrasive"; "grinding" meant "the abrasion, by aid of mechanical power, of metal, article of metal, or part of any article of metal by means of a grindstone or abrasive wheel"; and "cleaning of castings" (which was not within the prohibition of reg. 1) meant "the freeing of castings from adherent sand or other substance . . ." The chemical constitution of carborundum was not similar to that of bonded emery.

Held: the respondents were liable for breach of statutory duty in failing to comply with reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, since—

(i) the definitions of "grinding" and "cleaning of castings" in the regulations were not mutually exclusive (*Wardlaw v. Bonnington Castings, Ltd.*, 1955 S.C. 320, approved) and (LORD MORTON OF HENRYTON dissenting) the carborundum wheel of the plough buff was a wheel manufactured of a "similar abrasive" within the definition of "abrasive wheel" in the regulations because it had an abrasive function, and, therefore, the operation of the plough buff was "dry grinding" within reg. 1, and

(ii) on the evidence the dust thrown off by the plough buff had materially contributed to the atmospheric condition to which the appellant's disease was due or by which it was aggravated.

Appeal allowed.

* The terms of reg. 1 are set out at p. 767, letters C to F, post.

A [As to the removal of dust or fumes in a factory, see 17 HALSBURY'S LAWS (3rd Edn.) 120, 121, para. 201.]

For the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, Definitions, reg. 1, see 8 HALSBURY'S STATUTORY INSTRUMENTS 122, 124.]

Cases referred to:

- B (1) *Morton v. William Dixon, Ltd.*, 1909 S.C. 807.
 (2) *Wardlaw v. Bonnington Castings, Ltd.*, 1955 S.C. 320; *affd.* H.L. sub nom. *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613.
 (3) *Vitruvia S.S. Co. v. Ropner Shipping Co.*, 1923 S.C. 574; 41 Digest 803, l.

Appeal.

C Appeal by Daniel Quinn from an interlocutor of the First Division of the Court of Session (the Lord President (LORD CLYDE), LORD CARMONT and LORD RUSSELL), dated Mar. 16, 1956, affirming an interlocutor of the Lord Ordinary (LORD GUTHRIE), dated Mar. 24, 1955, pronounced in an action for damages brought by the appellant, a grinder, against the respondents, Cameron and Robertson, Ltd., averring that he had contracted pneumoconiosis while in their employment.

D The facts appear in the opinion of LORD MORTON OF HENRYTON, p. 765, letter I, to p. 767, letter C, post.

Gordon Stott, Q.C., and *Alastair M. Johnston* (both of the Scottish Bar) for the appellant.

E *Ian H. Shearer, Q.C.*, and *G. C. Emslie* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

Mar. 14. The following opinions were read.

F VISCOUNT SIMONDS: My Lords, this appeal has raised questions which to me at least have appeared to be of peculiar difficulty. It concerns the obligations of ironfounders to their workmen both at common law and under the regulations made under the Factories Act, 1937. The present appellant is a victim of that fell disease, pneumoconiosis, and he claims that he has contracted it, or that at least it has been aggravated, by reason of the respondents' disregard of their obligations at their iron foundry at Kirkintilloch where he was employed by them from 1942 to 1951.

G I will very briefly describe the process in the course of which the events happened that give rise to the appellant's claim. At the respondents' foundry iron castings are cast in sand in moulding boxes. They are then knocked out and most of the sand removed in the moulding shop. They are next taken to the dressing shop where the appellant worked, and there the superfluous metal consisting largely of excrescences known as "risers" or "fins" and any still adherent sand are removed. This operation is carried out in a number of ways, but here we are concerned only with the removal by means of a grinding machine called a "plough buff". It consists of a frame suspended from a radial arm hinged at one end to a vertical girder. The outer end of the radial arm is supported by a triangular frame running on wheels in the arc of a circle formed by the movement of the radial arm. The suspended frame contains a carborundum grinding wheel driven by an electric motor. The casting having been brought to the plough buff, the workman adjusts the wheel over the stub of the riser or fin which is to be removed and presses down on handles so as to bring it to bear on the casting. In the ensuing process of grinding, a quantity of dust is thrown off partly from the carborundum wheel, partly from the metal casting and partly from the sand which still adheres to the casting. It is with dust caused by the disintegration of the sand that this case is concerned; for it is

common ground that it is by the fine and invisible particles of siliceous sand that pneumoconiosis is caused. A

The appellant's ground of complaint at common law is that the respondents were negligent in that (a) they did not equip their plough buffs with exhaust appliances to remove the dust, and (b) that they did not supply their workmen operating the plough buffs with respirators, and that, by their negligence, they caused, or at least contributed to, the appellant's disease. It was proved or admitted at the hearing that the respondents did not supply either exhaust appliances or respirators, and it was also, as it appears to me, proved that, in the process of grinding by the plough buffs, a quantity of dust was thrown up into the air in the immediate neighbourhood of the workmen, and that this dust consisted of, or contained, the dangerous siliceous particles. The question, then, is whether the respondents have been guilty of neglect at common law in that they have (to adopt the test laid down by LORD DUNEDIN in *Morton v. William Dixon, Ltd.* (1), 1909 S.C. 807 at p. 809) failed to do something which was commonly done by other persons in like circumstances or ignored a precaution so obviously required that it would be folly in anyone to neglect it. B C

My Lords, on this question the Lord Ordinary, LORD GUTHRIE, and the Lord President (LORD CLYDE), LORD CARMONT and LORD RUSSELL on appeal from him, were unanimously of opinion that, on the facts of the case, negligence at common law had not been proved, and I am not prepared to differ from them. I do not think it necessary to rehearse the evidence which was carefully examined by them. D

The second and more difficult question arises on the regulations. They are the Grinding of Metals (Miscellaneous Industries) Regulations, 1925. First I refer to the relevant definitions, which are as follows: E

"*Grindstone* means a grindstone composed of natural or manufactured sandstone, but does not include a metal wheel or cylinder into which blocks of natural or manufactured sandstone are fitted.

"*Abrasive wheel* means a wheel manufactured of bonded emery or similar abrasive. F

"*Grinding* means the abrasion, by aid of mechanical power, of metal, article of metal, or part of any article of metal by means of a *grindstone* or *abrasive wheel*.

"*Cleaning of castings* means the freeing of castings from adherent sand or other substance, and includes the withdrawal or knocking out of cores, core rods and lifters, the removal of ingates, risers or other projections or excrescences, and the general smoothing of the castings." G

Of the regulations themselves I need refer only to the first, which is as follows:

"No *racine*, dry *grinding*, or *glazing* ordinarily causing the evolution of dust into the air of the room in such a manner as to be inhaled by any person employed shall be performed without the use of adequate appliances for the interception of the dust as near as possible to the point of origin thereof, and for its removal and disposal so that it shall not enter any occupied room, and for the purpose of this regulation the appliances shall not be deemed adequate unless they either include—(a) a hood or other appliance, so constructed, arranged, and placed as substantially to intercept the dust thrown off; and (b) a duct of adequate size, air tight and so arranged as to be capable of carrying away the dust . . . ; and (c) a fan or other efficient means of producing a draught sufficient to extract the dust; or are such as, in the case of the particular factory or part thereof, or of the particular manufacture, process or operation in or for which they are used, shall be proved to be at least as effectual for such interception, removal and disposal as such hood, duct and fan would be." H I

A On this regulation a number of questions arise, the respondents contending in the first place that it is not applicable to their operations at all, and in the second place that, even if it is, they have not committed a breach of it, and in the third place that, in any event, the appellant has not proved that he suffered any damage by reason of the breach.

B Under the first head two points are taken. It is said, and it was held by LORD GUTHRIE, that the operation came within the description of "cleaning of castings" as defined in the regulations, and that the requirements of "grinding" and "cleaning" of castings were mutually exclusive and that, therefore, reg. 1 did not apply. After LORD GUTHRIE had so decided, the First Division of the Court decided in another case (*Wardlaw v. Bonnington Castings, Ltd.* (2) (1955 S.C. 320)) that this was wrong and that the two definitions were not mutually exclusive. This decision was given before the instant case reached the Inner House. The respondents, therefore, were content to reserve the point for argument in this House. They have argued it accordingly, but, for my part, I am content to say that the First Division were clearly right in *Wardlaw's* case (2) and to accept their reasoning and conclusion.

D The second point under the first head was this. The respondents contended that the operation in question did not fall within reg. 1 on the ground that the abrading wheel, which, as already stated, was made of carborundum, was neither a "grindstone" nor an "abrasive wheel" within the meaning of the regulation. This point has a curious history. I will say no more than that it was not taken in the pleadings, and that it would require a very astute mind to discover that it was implicit in the respondents' general denial. It was not taken at the hearing before the Lord Ordinary, which proceeded throughout on the footing that the process was "grinding" within the regulation, counsel and witnesses on both sides referring to it as grinding and to the machine as a grindstone. It may, nevertheless, be that it was open to the respondents to take the point for the first time on appeal. But I have come to the conclusion that the point is not a sound one, and I have come to this conclusion without any further evidence though, if it were necessary, I should not, in the circumstances, have hesitated to remit the case in order that further evidence might be obtained.

E "Dry grinding" being the "abrasion . . . of metal . . . by means of a grindstone or abrasive wheel", the appellant must show that the abrading wheel falls within the definition of "grindstone" or of "abrasive wheel" in the regulations. Clearly it is not within the definition of "grindstone", for it is composed neither of natural nor of artificial sandstone. Is it then "a wheel manufactured of bonded emery or similar abrasive"? I cannot agree with the learned judges of the First Division that it is not. It is true that nothing more was proved or admitted than that the wheel is made of carborundum—a silicon carbide—which is in some way bonded and that it has an abrasive function, but it appears to me that no more is necessary to show that it is an abrasive similar to bonded emery. It is, as has been said, a narrow point. But, although it was conceded that for some little time the carborundum has been in common and, indeed, almost universal use, it never appears to have been doubted that it fell within the regulation.

H Having formed the opinion that the operation of grinding by a machine which I will continue to call a "plough buff" is within the regulation, I turn to the question whether the respondents have been guilty of a breach of it. It must first be observed that the regulation is in its terms absolute. No suggestion was made in this case that the machine was of a type for which exemption had been given. The respondents were, therefore, absolutely prohibited from working the machine so as to cause

I "the evolution of dust into the air of the room in such a manner as to be inhaled by any person employed . . . without the use of adequate

appliances for the interception of the dust as near as possible to the point of origin thereof, and for its removal",

and so on. But the prohibition, though so far absolute, is modified by the following provision which must, I think, have a positive as well as a negative effect. It is that, for the purpose of the regulation, the appliances shall not be deemed "adequate" unless they include (a) a hood or other appliance so constructed, arranged and placed as substantially to intercept the dust thrown off, and (b) a duct, and (c) a fan as therein respectively described, or are such as to satisfy the other conditions therein mentioned. It is clear, as I say, that there would be no breach of the regulation if the respondents had, in connection with their plough buffs, used such appliances as complied with the provision that I have just stated. And I conceive that, in regard to this provision, there might be some controversy as to what in a quantitative sense was meant by the words "substantially to intercept". But, in fact, no such question can arise in the present case, for not only was no effective intercepting appliance used by the respondents, no such appliance was used at all. It was established that the heavy particles of dust were flung off horizontally to the back of the frame of the buff, but that the lighter particles, including the dangerous and invisible particles, of silica dust get carried round with the action of the wheel and rise vertically into the air. This is the dust which is evolved into the air and is liable to be inhaled by a person employed in the shop. It is the dust to which, as was proved by ample evidence, the appellant was continuously in greater or less degree exposed, and it is the dust against which the respondents did not provide any safeguards whatever.

In these circumstances I cannot doubt that the respondents have been guilty of a breach of the regulation. It is irrelevant whether they knew, or ought to have known, of the danger to which the workman was exposed, and equally irrelevant whether there was any effective and practical remedy and, if so, whether the respondents knew, or ought to have known, of it. These were questions of vital import in determining whether there was negligence at common law, but they are not relevant to the question whether or not there has been a breach of the regulation.

The final question is whether the appellant has established a causal connection between the breach and the damage suffered by him. As was held in this House in *Wardlaw's* case (2) ([1956] 1 All E.R. 615), that is what he must show. "Post hoc, ergo propter hoc" is a fallacy in respect of a breach of a statutory regulation as it is in respect of any other event in life. The question is whether the evidence shows that the breach caused or made a material contribution to the atmospheric conditions to which the appellant's illness was due or by which it was aggravated. For the purpose of deciding this question, it was determined in the same case that a contribution is material unless the maxim "de minimis non curat lex" can be applied to it.

My Lords, on this question there has been a difference of opinion in the courts below. I quote LORD RUSSELL as expressing in clearest terms the view that the appellant had not proved his case:

"On the weight of the relevant evidence I am accordingly satisfied that no substantial quantity of dangerous sand is proved to have been emitted into the air of the dressing shop from the plough buffs; and that any such dust as was incidentally emitted neither caused, nor contributed to the aggravation of, the disease by which the [appellant] became incapacitated."

The Lord President had expressed himself in similar terms and LORD CARMONT had agreed. On the other hand, the Lord Ordinary, after a careful review of the evidence, sums the matter up in a passage which I must quote at some length.

"In the course of the removing of fins and risers a certain amount of siliceous dust is thrown off into the atmosphere . . . Although the wheel

A of a plough buff grinds on the underside of its rim, and the particles of metal and carborundum thrown off in the process are projected away from the operator towards the steel screen, siliceous dust is released into the atmosphere about the operator. The effect of the heat applied to the castings in the process of moulding is to render the sand brittle. As a little of the sand is still adherent to the castings about the risers when the casting is brought to the plough buff, during the process of removing the risers, this brittle sand is ground down to small particles of dust. Some of the particles of dust are visible in the atmosphere especially when rays of sunlight fall on them. Other particles are dangerous to the health of the operator, since, if they are inhaled over a prolonged period, they cause irritation in the lungs, which produces the condition called pneumoconiosis. The [appellant's] working day was from 7.15 a.m. until 5 p.m. with a break of one hour. His work involved his exposure to the danger of pneumoconiosis, since he had throughout his working day, and especially when working at a plough buff, to breathe an atmosphere which contained these invisible particles of siliceous dust."

D I have cited this passage, though many of the facts stated in it have already appeared in the course of this opinion, because it appears that every word of it is amply justified by the evidence. I regret that I must come to a conclusion of fact different from that of the learned judges of the First Division, but, having read and re-read the evidence, I prefer the view of it which was taken by the Lord Ordinary. He had at least some advantage in seeing and hearing the witnesses, though their candour and credibility may not have been in issue, and his evaluation of their testimony agrees with my own on a consideration only of the written word. This leads to the inevitable conclusion that the appellant proved the last thing he had to prove, a relevant causal connection between the respondents' breach of the regulation and his own disease. In my opinion, therefore, this appeal should be allowed. The Lord Ordinary indicated that, had he taken a different view on the merits, he would have awarded £4,000 to the appellant. This was not challenged before the First Division. The appellant is, therefore, entitled to judgment for £4,000. The respondents must pay the appellant's costs of this appeal and in the courts below.

LORD OAKSEY: My Lords, I have had the advantage of reading the speech of my noble and learned friend on the Woolsack and I agree with it.

G LORD MORTON OF HENRYTON: My Lords, this appeal arises out of an action for damages which was brought by the appellant against the respondents. The respondents have an iron foundry at Kirkintilloch called the "Star Foundry", and the appellant was employed there from 1942 to February, 1951. In February, 1951, he was found to be suffering from pneumoconiosis. H As is now well known, the development of this disease is slow and gradual and results from the inhalation of minute invisible particles of silica dust. The appellant gave up his employment on Feb. 24, 1951, and has not since been employed. The appellant claims that this disease was contracted or aggravated in the course of his employment by the respondents, owing to their negligence and to their breach of reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925.

I The appellant was fifty-nine years of age when he brought this action. As a youth he was employed in the respondents' iron works for a short period. He became a pit-head worker and later an oncost worker in a mine for about three years. Next he worked in a sand quarry, and then served in the army during the first world war. After his demobilisation he was a casual labourer for about four years. From about 1926 to 1931 he was employed by the Forth and Clyde Foundry in Kirkintilloch. During that period his work consisted of buffing steel castings with a machine and dressing castings with a hammer and chisel.

Between 1931 and 1942 he was for a time unemployed during the industrial depression, and at other times worked in employments which are immaterial for the purposes of this action. On his return to the Star Foundry in 1942, he worked in the dressing shop and he continued the same work till February, 1951. The findings of the Lord Ordinary (LORD GUTHRIE) as to the work on which the appellant was engaged during this period, and the extent to which it exposed him to the risk of inhaling dust, were as follows:

"In the shop castings which have come from the furnace in the moulding shop are dressed. In the process of casting the metal is cast in sand in a moulding box, and great heat is then applied. When the moulding box is removed from the furnace, the casting is turned out of the moulding box, and most of the sand comes away from the casting when the box is emptied or 'knocked out'. Thereafter a lighter casting will be placed in a container called a rumbler so that adhering sand may be removed by revolving the rumbler. A heavier casting will be taken to a brushing-off table so that adhering sand can be brushed off with steel brushes. After a casting has been made and has been taken from the moulding box, rough pieces of metal project from it. The projections on some castings are known as 'fins', and on others as 'risers'. Even after rumbling or brushing a little sand may still adhere to the casting at these fins, or risers. The fin and risers are removed by grinding machines called buffs. In the dressing shop there are four double-wheel grinding machines or high speed buffs, which were on fixed foundations, and which had double wheels of carborundum. The casting was held against these high speed buffs, and the grinding wheels abraded the fins. To the high speed buff were attached a hood, a duct, and a fan for the purpose of carrying away the particles of metal and sand removed by the process from the casting. There were also three 'plough buffs' or swing-frame grinding machines. A plough buff was suspended by chains from a horizontal overhead girder. One end of this girder was hinged to a fixed vertical girder. The other end rested upon a triangular support at the base of which were two wheels. The wheels enabled the overhead horizontal girder and with it the plough buffs to move laterally in an arc. The plough buff could also be moved backwards and forwards by its attachment to the horizontal girder. The plough buff consisted of a horizontal steel arm or frame with a casing containing a carborundum wheel at the end nearest the triangular support. At the other end of the frame was an electric motor, which drove the wheel by means of a belt. The plough buff was used to remove 'risers', projections above the rim of circular castings. The casting was placed upon a table, and the buff, suspended by its chains, was brought to the required position above the casting, so that the rim of the carborundum wheel was above the riser which had to be abraded. The operator, standing near the wheel, held two handles which enabled him to apply the wheel to the riser. Behind the machine was placed a steel partition to catch particles of metal removed from the casting and particles of carborundum worn away in the operation of the wheel. No dust extraction plant was attached to the plough buff.

"The [appellant's] work was to operate the high speed buffs and plough buffs, and his time was, roughly, evenly divided between the two types of machine. In the course of the removing of fins and risers a certain amount of siliceous dust is thrown off into the atmosphere. Even in the operation of high speed buffs this dust is created, and it is not all removed by the hood, duct and fan with which a high speed buff is equipped. Although the wheel of a plough buff grinds on the underside of its rim, and the particles of metal and carborundum thrown off in the process are projected away from the operator towards the steel screen, siliceous dust is released into the atmosphere about the operator. The effect of the heat applied to

A the castings in the process of moulding is to render the sand brittle. As a little of the sand is still adherent to the casting about the risers when the casting is brought to the plough buff, during the process of removing the risers, this brittle sand is ground down to small particles of dust. Some of the particles of dust are visible in the atmosphere especially when rays of sunlight fall on them. Other particles are dangerous to the health of the operator, since, if they are inhaled over a prolonged period, they cause irritation in the lungs, which produces the condition called pneumoconiosis. The [appellant's] working day was from 7.15 a.m. until 5 p.m., with a break of one hour. His work involved his exposure to the danger of pneumoconiosis, since he had throughout his working day, and especially when working at a plough buff, to breathe an atmosphere which contained these invisible particles of siliceous dust."

C It is convenient at this point to set out reg. 1 of the Regulations of 1925 already mentioned:

D "No *racing*, *dry grinding*, or *glazing* ordinarily causing the evolution of dust into the air of the room in such a manner as to be inhaled by any person employed shall be performed without the use of adequate appliances for the interception of the dust as near as possible to the point of origin thereof, and for its removal and disposal so that it shall not enter any occupied room, and for the purpose of this regulation the appliances shall not be deemed adequate unless they either include—(a) a hood or other appliance, so constructed, arranged, and placed as substantially to intercept the dust thrown off; and (b) a duct of adequate size, air tight and so arranged as to be capable of carrying away the dust, . . . access for inspection and cleaning, and, where practicable, with a connection at the end remote from the fan to enable H.M. Inspector of Factories to attach thereto any instrument . . . ; and (c) a fan or other efficient means of producing a draught sufficient to extract the dust; or are such as, in the case of the particular factory or part thereof, or of the particular manufacture, process or operation in or for which they are used, shall be proved to be at least as effectual for such interception, removal and disposal as such hood, duct and fan would be."

F The Lord Ordinary held that "the seeds of the trouble were sown" far back in the appellant's industrial career, but that his exposure to dust in the employment of the respondents aggravated his condition and was a cause of his incapacity. G The Lord Ordinary held, however, that the appellant had failed to prove negligence on the part of the respondents and that reg. 1 of the Regulations of 1925 did not apply to the present case. He expressed his reasons as follows:

H "According to all the evidence in the case, the work upon which the [appellant] was engaged was the removal of risers by means of the plough buff. It was therefore one of the processes specifically included within the scope of the definition of 'cleaning of castings'. The terms of the regulations, and in particular reg. 7 and reg. 10, making different provision for the cleaning of rooms in which grinding is carried on from the requirement for cleaning of rooms in which cleaning of castings is done show that 'grinding' and 'cleaning of castings' are mutually exclusive. For these reasons I hold I that reg. 1 does not apply, and, therefore, that the [appellant's] case of breach of statutory duty by the [respondents] has failed."

The Lord Ordinary, therefore, assoilzied the respondents, but intimated that, if he had decided in favour of the appellant, he would have granted a decree for £4,000 damages.

On appeal to the First Division, the appellant's counsel did not seek to support the Lord Ordinary's decision on the ground which had found favour with him, for immediately after that decision was given the First Division, in *Wardlaw*

v. *Bonnington Castings, Ltd.* (2) (1955 S.C. 320), had held that work of this kind was both "grinding" and "cleaning of castings" and that the two operations were not mutually exclusive. This case came to your Lordships' House and is reported in [1956] 1 All E.R. 615. The point now under discussion was not, however, raised in your Lordships' House; thus it remained open to the respondents in the present case, and was relied on by their counsel in argument before this House.

In the present case, the learned judges of the First Division agreed with the view of the Lord Ordinary that the appellant's disease had been aggravated to the point of incapacity by his work with the respondents, and counsel for the respondents did not seek to contend to the contrary in this House. The First Division also agreed with the Lord Ordinary that the appellant had failed to prove negligence at common law on the part of the respondents. They were prepared to assume, without so deciding, that reg. 1 of the Regulations of 1925 did apply to the present case and they did not doubt that the respondents had failed to comply with it, but they held that the appellant had failed to prove that the respondents' failure to comply with the regulation had materially contributed to the appellant's incapacity. The appeal was, therefore, dismissed.

The result is, my Lords, that the questions now arising for decision are: (i) Were the respondents guilty of negligence at common law? (ii) Did reg. 1 of the Regulations of 1925 apply to the present case? If so, counsel for the respondents did not seek to contend that they had complied with it. (iii) Did the appellant prove that the respondents' failure to comply with the regulation had materially contributed to his incapacity? I turn now to the first of these questions.

In the present case the faults alleged against the respondents are that they did not equip their plough buffs with exhaust appliances to remove the dust and they did not provide the operators of the buffs, and in particular the plough buffs, with respirators. These are faults of omission, and I quote again the oft-quoted words of Lord President DUNEDIN in *Morton v. William Dixon, Ltd.* (1) (1909 S.C. 807 at p. 809):

"I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

Counsel for the appellant rightly conceded that there is no evidence of a general practice in the industry to provide either of these safeguards, but he submitted that the provision of one or other of them was a precaution so obviously required that it was folly on the part of the respondents to omit it.

My Lords, on this first question the respondents have concurrent decisions of the Lord Ordinary and the First Division in their favour. The evidence has again been carefully scrutinised in this House and the question has been fully and ably argued. I do not think it necessary to detain your Lordships with a review of the evidence and arguments, as I am satisfied that there is no good reason for reversing the decision of the courts in Scotland on this point.

Before dealing with the second question I must set out the relevant definitions in the Regulations of 1925. They are as follows:

"*Grindstone* means a *grindstone* composed of natural or manufactured sandstone, but does not include a metal wheel or cylinder into which blocks of natural or manufactured sandstone are fitted.

"*Abrasive wheel* means a wheel manufactured of bonded emery or similar abrasive.

"*Grinding* means the abrasion, by aid of mechanical power, of metal, article of metal, or part of any article of metal by means of a *grindstone* or *abrasive wheel*,

A “*Cleaning of castings* means the freeing of castings from adherent sand or other substance, and includes the withdrawal or knocking out of cores, core rods and lifters, the removal of ingates, risers or other projections or excrescences, and the general smoothing of the castings.”

B Relying on these definitions, counsel for the respondents submitted (a) that the appellant had failed to prove that the work on which he was engaged was “grinding” within the meaning of reg. 1; (b) that the work on which the appellant was engaged was “cleaning of castings” within the meaning of the definition already quoted; that the processes of “grinding” and “cleaning of castings” are mutually exclusive; and, therefore, reg. 1, which relates only to grinding, does not apply to the present case.

C Counsel’s argument in support of his first submission on this question may be summarised as follows. He concedes that the operation carried on at the plough buffs might well be “grinding” in the ordinary sense of that word; but he pointed out that the burden is on the appellant to prove that it is “grinding” within the meaning of reg. 1, and no operation is “grinding” within that regulation unless it is carried out “by means of a grindstone or abrasive wheel”. See the definition of grinding already quoted. Moreover, the words “grindstone” and “abrasive wheel” are given a strictly limited meaning by the further definitions already quoted. It is common ground in this case that the wheel employed in the respondents’ plough buffs is made of carborundum and not of “natural or manufactured sandstone”. Therefore, says counsel, it is not a “grindstone” within the definition. Counsel for the appellant agrees. Further, says counsel for the respondents, “abrasive wheel” is defined as “a wheel manufactured of bonded emery or similar abrasive”, and it has not been proved by any evidence that carborundum is an abrasive “similar to” bonded emery.

E My Lords, there is no hint of this particular argument in the pleadings, but in his condescendence 4 the appellant avers that the work done by him at the plough buffs was dry grinding within the meaning of the Regulations of 1925, and this averment is met by a denial and a reference to the regulations for their terms. Thus the burden was placed on the appellant to prove his averment. F It is quite clear, however, that the argument now under consideration was never put to the Lord Ordinary. In fact, both counsel for the respondents frankly stated that the point had not at that time occurred to them. Indeed, it does not appear to have occurred to the parties concerned in any case since the Regulations of 1925 came into force, although carborundum wheels have commonly G been employed for many years past. In these circumstances no evidence was directed to this issue before the Lord Ordinary.

The argument was, however, put to the First Division and all the learned judges of that Division found it an argument of weight. The Lord President (LORD CLYDE) said:

H “The [appellant’s] counsel while unable to state whether he regarded carborundum as falling within the definition of ‘grindstone’ or ‘abrasive wheel’ appeared to resent this point being taken without the [respondents] having specifically averred in their defences that carborundum fell within neither of the definitions. It was however in my view a matter for him to prove, and not for the [respondents] to disprove. He was afforded an opportunity of amending in order to make a proper averment of what carborundum was. This he refused to do. The matter therefore must rest on the evidence as it stands. Had it been necessary to determine the point I should have felt I unable to hold that merely to prove that the wheel was made of carborundum meant that it was either a grindstone or an abrasive wheel, as defined in the regulations. For these definitions are narrowly drawn and subject to qualifications which may well exclude carborundum. It would however be unfortunate to decide this case on such an issue, and it is not in my view I necessary to do so. I shall assume that the carborundum wheel is for the

purposes of the regulation a grindstone or an abrasive wheel. For in my view there is another consideration which entitles the [respondents] to absolver on this question in regard to reg. 1."

LORD CARMONT agreed and LORD RUSSELL, after referring to the evidence, said:

"There is thus nothing to show that carborundum is either sandstone or emery or similar abrasive. In that situation it is apparent that the [appellant] has failed to prove affirmatively—as he was, in the absence of admission, bound to do—that his work at the plough buff was 'dry grinding' as defined by the regulations, and that the [respondents] were bound to provide the exhaust appliance thereat whose absence is founded on as a statutory breach of duty."

My Lords, I, too, am much impressed by the argument, and the question is, of course, a vital one in this case. For if the appellant cannot satisfy your Lordships that a wheel manufactured of carborundum is "a wheel manufactured of bonded emery or similar abrasive" he has failed to prove that reg. 1 applies in the present case. It is plain that the only grinding which comes within reg. 1 is grinding by means of a wheel manufactured of certain specified materials. The obvious inference is that the framers of the regulation attached great importance to the material whereof the wheel was composed, and thought that the workmen needed protection against dust only if the wheel were composed of (i) natural or manufactured sandstone, or (ii) bonded emery, or (iii) abrasive material similar to bonded emery. Not, be it observed, "similar to sandstone or bonded emery"; the abrasive must be similar to bonded emery, or reg. 1 does not apply. What, my Lords, is the meaning of the word "similar" in this context? It cannot mean "similar in function", for the function of every abrasive is to abrade, whether it be bonded emery or any other abrasive, and the words used are "or similar abrasive" not "or other abrasive". "Similar" must, therefore, mean that an abrasive, to come within the definition, must have some quality or qualities as a material which it possesses in common with bonded emery. In the absence of expert evidence directed to this particular point, I am unable to say whether carborundum possesses any such qualities, and counsel for the appellant conceded that the chemical composition of the two materials is different.

It follows that, on the evidence as it stands, the appellant has, in my opinion, failed to prove that reg. 1 applies in the present case; but if further evidence were called, new light might be thrown on the matter, and your Lordships would then have to consider whether, in the light of any similarities in the two materials revealed by such evidence, carborundum was or was not a "similar abrasive" to bonded emery, within the meaning of the definition.

I should be very reluctant to dismiss this appeal on the ground that the appellant has failed to prove this similarity, since this point was not specifically raised in the pleadings and no one of the counsel appearing before the Lord Ordinary had it in his mind.

Counsel for the appellant asked your Lordships, if you were not satisfied on this point, to remit the cause to the Court of Session with a direction to allow the parties to call further evidence, to make findings thereon, and to report these findings to this House. He explained that he did not accept the First Division's offer of an opportunity to amend because he did not desire to amend his pleadings, but to call fresh evidence to prove his allegation in condescendence 4, which I have already quoted.

My Lords, if the matter rested with me I would accede to counsel's application. A similar remit has been made in other cases, for instance on Dec. 6, 1923, in *Vitruvia S.S. Co. v. Ropner Shipping Co.* (3) (1923 S.C. 574). However, I understand that your Lordships are all satisfied, without further evidence, that carborundum is a "similar abrasive" to bonded emery. In these circumstances there will be no remit, and I shall express my opinion briefly on the other

A issues arising in the case, on the assumption that carborundum is a similar abrasive to bonded emery.

I turn first to counsel for the respondents' second ground for submitting that reg. 1 does not apply to this case. I have already stated this ground, which was rejected by the First Division (affirming LORD WHEATLEY) in *Wardlaw v. Bonnington Castings, Ltd.* (2), to which I have already referred. In my opinion, it was rightly rejected. I agree with the reasoning of the First Division and the Lord Ordinary in *Wardlaw's* case (2), and I see no reason why a particular operation should not be both "grinding" and "cleaning of castings" within the respective definitions. If so, the persons carrying out that operation must comply both with the requirements of the regulation in regard to grinding and with the requirements in regard to cleaning of castings.

C My Lords, I now come to the last of the three questions arising for decision. If reg. 1 applies in the present case, it is clear that the respondents did not comply with its terms, since they supplied no appliances at all for the interception of the dust from the plough buffs during the years 1942 to 1951. Thus there arises the question, has the appellant proved that this breach of the regulation has materially contributed to his incapacity?

D In approaching this question I accept the Lord Ordinary's description of the results, as regards dust, of the operation carried out by the appellant at the plough buffs.

It is to be observed that reg. 1 begins with an absolute prohibition, but the latter part of it, though it is framed in negative terms, does, I think, import a positive provision that appliances which "substantially . . . intercept the dust thrown off" are to be deemed adequate. Thus the question for decision may be stated as follows:—Has the appellant proved, on a balance of probabilities, that the dust which would have been intercepted if the respondents had supplied such appliances "materially contributed to the disease?" I quote these words from the opinion of LORD REID in *Wardlaw's* case (2) ([1956] 1 All E.R. at p. 618).

F My Lords, I would answer this question in the affirmative. The words "the dust thrown off" surely mean the whole of the inhalable dust thrown off, whether it be dangerous or harmless, and to my mind the words "substantially to intercept" mean that this dust must be intercepted, not wholly but in substance, that is, disregarding any non-substantial quantity of dust which the "hood or other appliance" may fail to intercept. If this had been done, I cannot doubt that it would have had a most significant effect on the amount of harmful dust inhaled by the appellant.

H It may well be that the appliances known during the period 1942 to February, 1951, were not such as "substantially to intercept the dust thrown off", but this cannot affect the duty to intercept the dust which is thrown on the respondents by reg. 1. If they could not carry out that duty, they were in breach of reg. 1 in continuing to grind in the manner therein described.

For these reasons, I would decide the question of causation in favour of the appellant, and, but for the difficulty which I feel in deciding, on the evidence before this House, that carborundum is a "similar abrasive" to bonded emery, I should have been in favour of allowing the appeal.

I LORD COHEN: My Lords, I agree with the speech of my noble and learned friend on the Woolsack.

LORD KEITH OF AVONHOLM: My Lords, on the common law aspect of this case reliance was placed by counsel for the appellant on the second limb of LORD DUNEDIN's dictum in *Morton v. William Dixon, Ltd.* (1) (1909 S.C. 807 at p. 809). But the whole tenor of the evidence is opposed to the idea that it was folly not to introduce a dust extractor in the operation of metal grinding in an iron foundry or to provide respirators for the workers. There was no

general appreciation among iron foundries, as distinguished from steel foundries, of any danger to workmen of pneumoconiosis from the grinding of iron castings during the period of the appellant's employment 1942 to 1951. I would refer in this matter to two short passages in the evidence. The first is in the evidence of Doctor Baxter, a witness for the appellant:

"Q.—Are you aware of the state of informed knowledge in relation to the danger of disease in these two types of foundry over the past years?
A.—Yes.

"Q.—Is it not correct to say that it is only comparatively recently that the dangers of siliceous dust in iron foundries were fully understood or known?
A.—Yes, that is quite correct, fully known.

"Q.—I think I am right in saying it was recognised for some considerable time back that there was danger of this nature present in steel foundries?
A.—Yes.

"Q.—Is not that correct? A.—Yes."

And in the evidence of Mr. Whiteside, a retired factory inspector, and a witness for the respondents, there appears this passage:

"In the year 1950, I would expect a steel founder employer to be well informed of the potential danger of the siliceous particles in his dressing shop. In 1950, I would not expect a good iron founder employer to be aware of the risks of silica to anything like the same extent as the steel founder."

In the face of this and other evidence to which it is unnecessary to refer, it is impossible to invoke *Morton v. William Dixon, Ltd.* (1). This is sufficient, in my opinion, to dispose of the appellant's case at common law.

Turning to the case on the statutory regulations, I would deal at the outset with the point taken by the respondents for the first time in the Inner House and considered by the judges of the First Division, though not made a ground of their judgment, viz., that a carborundum wheel is not shown to be an abrasive wheel within the meaning of the regulations. No indication of this point is taken by the respondents in their pleadings, though the fact that a carborundum wheel was in use was disclosed by the appellant in his condescendence. I do not propose, however, to enlarge on a matter of pleading beyond saying that, if necessary, I should have been prepared to allow the appellant to lead additional evidence without any conditions, to establish the nature of the carborundum wheel with which the plough buffs were fitted, with a view to showing, among other things, what carborundum is, its history, and its similarity to, or dissimilarity from, an emery wheel in its nature and functions.

I find myself able, however, to deal with the matter without further evidence, on a consideration of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O. 1925 No. 904). "Grinding", and so "dry grinding", is related to the definition of "grindstone" and "abrasive wheel". We are not concerned here with a "grindstone" in the sense of the regulations, though in the evidence the appliance in question was referred to by both sides as a "grindstone" as a matter of ordinary parlance. We are concerned with an "abrasive wheel", which is defined as "a wheel manufactured of bonded emery or similar abrasive".

"Similar abrasive" is a somewhat ambiguous term. There is no catalogue of abrasives from which any genus can be inferred. The question turns solely on the effect of the word "similar". Is the similarity to be found in the chemical composition of the other abrasive or in its functional efficiency? Is it enough to have a substitute for "bonded emery" to perform the same kind of work in the same kind of way as bonded emery is intended to do? The type of evidence that would be required to establish similarity must depend on what meaning is to be given to the term "similar abrasive". The most natural

A meaning, in my opinion, is something which abrades metal in the same way as emery, because the regulations are dealing, inter alia, with the grinding of metals. There is nothing to indicate that, in dry grinding, the regulation is concerned with the chemical composition of the grinding material. If it were, little content could be given to the word "abrasive". It was suggested that the similarity is in respect of the dangers emanating from the material of which the wheel is composed. But that is difficult to reconcile with the fact that the definition has remained unchanged for over thirty years, and for a large part of that period it was recognised, at least in the steel industry, that the main danger was from silica burnt into the steel castings in the processes before grinding. When I consider also some other paragraphs of the regulations I think that they support the view that it is the function and not the composition of the wheel that should be looked to with reference to the words "similar abrasive".

"Glazing" is defined as the abrading, polishing or finishing, by aid of mechanical power, of metal, article of metal, or part of any article of metal by means of any wheel, buff, mop, bob, dolly, or band to which any abrading or polishing substance is attached or applied, with a certain exception which it is not material to notice. Here there clearly is no limit to the type of "any abrading or polishing substance", and it is difficult to understand why, in the case of an abrasive wheel, the abrasive should be confined to some material of the same chemical family as emery.

"Sand blasting" is defined as the cleaning or smoothing of castings by a jet of sand, metal shot or grit or other abrasive, propelled by a blast of compressed air or steam. Under the ejusdem generis rule, it would not seem possible to limit the abrasive except to exclude an abrasive which was not a solid. Sand and metal shot do not come within the same genus of substances chemically, and any solid material which could function equally well as an abrasive would seem to fit the definition.

Regulation 3 provides that not more than one person shall at any time be allowed to perform the actual process of grinding or glazing on any grindstone, abrasive wheel, or glazing appliance; and reg. 9 prescribes that in every room in which grinding is carried on there shall be kept permanently affixed a notice specifying the safe working peripheral speed of every class of grindstone and abrasive wheel in use in such room. It is difficult to understand why these regulations should not apply just as much to an abrasive wheel of carborundum as to an abrasive wheel of bonded emery.

Lastly, amending regulations were made in 1950 (the Grinding of Metals (Miscellaneous Industries) (Amendment) Special Regulations, 1950 (S.I. 1950 No. 688)). By this date the dangers from the grinding of castings impregnated with sand were fully realised, yet no change was made in the definition of "abrasive wheel".

On all these considerations, accordingly, I have come to the opinion that "similar abrasive" in the definition of "abrasive wheel" refers to the function performed by the abrasive, and not to the chemical family to which the abrasive belongs.

On the footing that the appellant was engaged in dry grinding within the meaning of the regulation, there clearly was a breach of the regulation in failing to provide a dust interceptor or in continuing to employ workmen at the plough buffs without one.

The judges of the First Division have, however, found that the appellant has failed to prove that his illness was due to breach of the regulation. In my opinion they have erred in two respects. They regard the regulation, as the Lord President (LORD CLYDE) put it, as "dealing with dust in general and not the dangerous particles in particular". He includes among the dust particles of metal thrown off from the castings and carborundum from the wheel. On the assumption that these are "dust", the evidence is that they are thrown away

from the operator of the wheel against a steel plate at the back of the machine and fall to the floor, where they cake into a hard mass. The particles of metal, at least, could hardly float in the air, and what the regulation is dealing with is inhalable dust. It is, therefore, no answer to say that, if an exhaust apparatus had been provided which carried away these particles of metal and carborundum, there would have been substantial compliance with the regulation, which, to quote the Lord President, "would leave unaffected practically all the dangerous dust". This was one ground on which the Lord President proceeded, and LORD RUSSELL followed a similar line of reasoning. The other ground was that, on the evidence, there was very little sand on the castings when they came to the plough buffs, and that no attempt was made in the appellant's evidence to quantify the amount of dangerous dust. There might be some force in this point if the other ground was a valid one. The invisible particles of silica thrown off from the sand might possibly be held to be a negligible proportion of the total quantity of the material thrown off in the grinding, though in themselves they might not be so negligible that they could not be a contributory cause of the appellant's illness. But it is the inhalable dust with which we are concerned, and it cannot, I think, be held on the evidence that the invisible particles were a negligible or unsubstantial part of the total inhalable dust.

There is evidence from workmen of sand adhering to the castings and of fine dust being thrown off in the process of grinding. The witness, Stabler, says:

"I have had a good deal of experience in measuring dust clouds by instruments, and I have never come across a case of a visible cloud of dust which didn't include a heavy concentration of the finer particles which do attack, and I have come to the conclusion if ever in visiting foundries I see a cloud of dust I know that the finer particles are there. That is as a result of my experience in measuring such clouds."

There was enough of the dangerous dust to incapacitate the appellant, as the Lord Ordinary (LORD GUTHRIE) has held, and this I apprehend was not disputed by the respondents. If an adequate appliance had been fitted as near as possible to the point of origin of the inhalable dust, I think it is a reasonable inference that the dangerous particles would have been removed to as great an extent as the inhalable visible particles, if not to a greater extent, and, if the appliance was inadequate to intercept, or at least substantially to intercept, the visible inhalable particles, and ex hypothesi the invisible inhalable particles, it would not comply with the regulation.

I refer again to the witness Stabler, who says it was quite practicable to fit an appliance for the interception of dust to the plough grinders. His evidence proceeds:

"It is quite practicable, in my experience, to fit such grinders with ducts and fans, for instance.

"Q.—And if such an appliance is fitted, what is the effect as regards the dispersal of such particles into the atmosphere of the factory? A.—It would have a similar effect as on the other grinders in this shop, to which it was applied. It wouldn't entirely do away with the dust, but it would take away the major portion of it. It would prevent, quite definitely, the visible cloud that I saw.

"Q.—As regards the smaller invisible particles, would they be affected by that also? A.—Yes, that is the main object of getting a draught sufficient at the grinding wheel or buff, and in a way so as to take it away from the operator, and greatly reducing, at all events, the concentration of the particles."

Mr. Whiteside, a witness for the respondents, asked about an exhaust appliance in the shape of a flexible pipe which he had seen for many years attached to

swing grinders in similar factories, said, in cross-examination, that it was reasonably efficient but did not collect all the airborne dust. His evidence then continues:

“Q.—Where exhaust appliances are used on swing frame grinders, the silica particles will be likeliest to be drawn into the suction system? A.—Yes, it probably will be. It is very, very light and being deflected from the draught is the most likely to be drawn into the suction.

“Q.—So that if exhaust appliances were fitted, it is the silica part which is likeliest to be removed? A.—Yes.”

The witness, Arnott, another witness for the respondents, gives such an appliance a thirty per cent. efficiency.

LORD RUSSELL seems to have gone further than the Lord President in this matter. On the weight of the relevant evidence he says:

“I am accordingly satisfied that no substantial quantity of dangerous sand is proved to have been emitted into the air of the dressing shop from the plough buffs; and that any such dust as was incidentally emitted neither caused nor contributed to the aggravation of the pneumoconiosis by which the [appellant] became incapacitated.”

This does not seem entirely consistent with a previous passage in his opinion, where he says:

“The Lord Ordinary has found . . . that during his time in the [respondents'] service the progress of the disease has been aggravated to the point of incapacitating him. I am satisfied that the weight of the relevant evidence reasonably supports that conclusion.”

But, for the reasons I have already stated, I think LORD RUSSELL in the later passage of his opinion reached a wrong conclusion.

On the further point taken by the respondents that the appellant was engaged not in “dry grinding” but in the “cleaning of castings” within the meaning of the regulations I have nothing to add to what has been said. In my opinion, the court below reached a correct conclusion in holding that the two processes are not mutually exclusive under the regulations. I would, accordingly, allow the appeal and remit to the Court of Session to give decree for £4,000 damages.

Appeal allowed.

Solicitors: *W. H. Thompson*, agent for *Donald Shaw & Co.*, Edinburgh (for the appellant); *Beveridge & Co.*, agents for *Biggart, Lumsden & Co.*, Glasgow, and *Campbell, Smith, Mathison & Oliphant*, Edinburgh (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

NICHOLSON AND OTHERS v. ATLAS STEEL FOUNDRY AND ENGINEERING CO., LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Oaksey, Lord Morton of Henryton, Lord Cohen and Lord Keith of Avonholm), February 6, 7, 11, March 14, 1957.]

Factory—Ventilation—Failure to ventilate—Increase of risk of injury from noxious dust—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 4 (1).

Factory—Grinding machines—Swing frame grinder—Whether portable grinding machine within exemption certificate—Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O. 1925 No. 904), reg. 1.

N. was employed by the respondents in the dressing shop of their steel foundry from 1934 to 1940, from 1942 to 1943 and from 1947 to June, 1949. He worked at dressing metal castings by the use of a pneumatic hammer. The operation unavoidably caused a cloud of dust containing siliceous particles from the sand that adhered to the castings. Near him were two swing frame grinders, each consisting of a grinding mechanism, weighing between five and ten hundredweights, hung from a radial beam attached to a post sunk into concrete foundations. No dust extraction appliances were fitted to these machines, but for the purposes of the appeal it was unnecessary to determine the issue whether these grinders had or had not given off siliceous dust when in use. The part of the dressing shop where N. worked had no roof ventilation, the only means of ventilation being the doors provided for the exit and entry of vehicles. It was admitted that the respondents were in breach of duty under s. 4 (1) of the Factories Act, 1937*, by failing to provide adequate ventilation. N. contracted pneumoconiosis, which was a progressive disease, and died as a result of the disease. The appellants, N.'s widow and children, sued the respondents alleging, among other grounds, breach of statutory duty under s. 4 (1) and breach of statutory duty under reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, by failing to provide dust extraction appliances for the swing frame grinders. The respondents disputed there being any causal connection between their breach of duty under s. 4 (1) and N.'s disease, since the emission of particles of dust by the use of the pneumatic hammer was unavoidable and not due to their fault; and they also contended that the swing frame grinders were within a certificate of exemption from reg. 1 granted for portable grinding machines and portable buffing machines.

Held: (i) the respondents were liable in damages for breach of statutory duty under s. 4 (1) of the Factories Act, 1937, because their failure to provide adequate ventilation had exposed N. to a greater degree of risk than otherwise would have been his and, pneumoconiosis being a progressive disease, contributed to his illness to an extent which was material and not negligible.

Bonnington Castings, Ltd. v. Wardlaw ([1956] 1 All E.R. 615) followed.

(ii) the swing frame grinders were not portable machines within the exemption certificate (see particularly p. 785, letter G, to p. 786, letter A, post).

Appeal allowed.

[As to the duty to provide adequate ventilation in factories, see 17 HALSBURY'S LAWS (3rd Edn.) 102, para. 169.

As to the removal of dust or fumes in a factory, see 17 HALSBURY'S LAWS (3rd Edn.) 120, 121, para. 201.

* Section 4 (1) of the Factories Act, 1937, provides: "Effective and suitable provision shall be made for securing and maintaining by the circulation of fresh air in each workroom adequate ventilation of the room, and for rendering harmless, so far as practicable, all fumes, dust and other impurities that may be injurious to health generated in the course of any process or work carried on in the factory."

For the Factories Act, 1937, s. 4 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1004.

For the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, reg. 1, see 8 HALSBURY'S STATUTORY INSTRUMENTS 124.]

Case referred to:

(1) *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613.

Appeal.

Appeal by the widow and children of Alexander Watson Nicholson (hereinafter called "the deceased") against an interlocutor of the First Division of the Court of Session (the Lord President (LORD CLYDE), LORD CARMONT and LORD RUSSELL), dated June 22, 1956, reversing an interlocutor of the Lord Ordinary (LORD BLADES), dated Apr. 19, 1955, in an action raised by the appellants against the respondents, Atlas Steel Foundry and Engineering Co., Ltd., the employers of the deceased, averring that the deceased died of pneumoconiosis which he contracted while he was employed by the respondents in the dressing shop of their steel foundry and that his contraction of the disease was caused by the fault of the respondents.

The facts are stated in the opinion of LORD COHEN, p. 781, letters D to H, and a description of the swing frame grinders is given in the opinion of LORD KEITH OF AVONHOLM at p. 785, letter C, to p. 786, letter A, post.

Gordon Stott, Q.C., and *Alastair M. Johnston* (both of the Scottish Bar) for the appellants.

W. I. R. Fraser, Q.C., and *D. C. Anderson* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

Mar. 14. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the appellants are the widow and minor children of Alexander Watson Nicholson, who died on June 14, 1951, as the result of pneumoconiosis which he contracted while in the employment of the respondents at their Atlas Steel Foundry, Armadale. They claim that he contracted this disease owing to the fault of the respondents, resting their case, first, on neglect at common law in that they did not provide adequate ventilation of their dressing shop by means of roof ventilation along its whole length and suitable openings in the walls; secondly, on the allegation that they failed to observe the obligation imposed by s. 4 (1) of the Factories Act, 1937, in that they did not make effective and suitable provision for securing and maintaining by the circulation of fresh air the adequate ventilation of their dressing shop and for rendering harmless, so far as practicable, all fumes, dust and other impurities that might be injurious to health generated in the course of any process or work carried on there; and thirdly, on the allegation that they were in breach of the provisions of reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, in that they failed to provide dust extraction plants to the swing frame grinders which they installed in 1938 and 1939.

Pneumoconiosis is an industrial disease of gradual onset, which is caused by the inhalation over a long period of dust containing minute siliceous particles. It is admitted by the respondents that the deceased inhaled, while in their employment, the particles which caused his illness and ultimately his death, but they contend that it was not proved that particles which were wrongfully emitted, or which, having been innocently emitted, were allowed through inadequate ventilation to remain within his breathing zone, made a material contribution to his illness. I am constrained to state the contention in this

somewhat awkward way because it is common ground that the nature of the deceased's work was such that he must inevitably have inhaled a quantity, even a large quantity, of noxious particles about which he could have no cause of complaint, and the only question is whether, in addition to these particles, he was, owing to the fault of the respondents, bound to inhale a number of other particles which made a material contribution to his illness. In determining whether a material contribution was made, I must apply the test recently laid down in this House in *Bonnington Castings, Ltd. v. Wardlaw* (1) ([1956] 1 All E.R. 615) and say that a contribution is material unless the maxim "deminimis" can be applied to it. It is right that this should be so, for if, as the law now stands, the workman is in certain circumstances forced to inhale noxious particles of dust without having any legal ground of complaint, it must be doubly incumbent on the employer to safeguard him against any additional risk.

The deceased, during his periods of employment by the respondents, which were from 1934 to 1940, from 1942 to 1943, and again from 1947 to June, 1949, worked exclusively in the respondents' dressing shop dressing steel castings by the use of a pneumatic hammer. In the course of that operation, quantities of adhering moulding sand, when pulverised by the action of the hammer, were emitted in the form of dust, which included a proportion of invisible siliceous particles to the inhalation of which he was exposed. So far he had no ground of complaint, though it may be a matter of wonder that such an operation should be permitted. In addition to the dressing of the steel castings by means of the pneumatic hammer, an operation carried on by others besides himself, there were in his close neighbourhood in the same shop two so-called swing frame grinders. It was in regard to those that the respondents were alleged to have been in breach of the regulation to which I have referred. Here two points of controversy arose. The respondents admitted that no dust-extracting appliances were fitted to these machines at the relevant dates, but they contended that it had not been proved that there was any adherent sand or, at any rate, any but a negligible amount of such sand on the castings when they were brought to the machines. Therefore, they said, there could have been no material contribution to the noxious particles inhaled by the deceased through this default. And, secondly, they said that, in any case, there had been no breach because, under a power accorded to him by the Act, the Chief Inspector of Factories had granted a certificate of exemption from the regulation to portable grinding machines or portable buffing machines as defined in the certificate, and the machines in question came within the certificate. I propose to say only a very few words on either of these points. On the latter of them, on which the Lord Ordinary (LORD BLADES) was in favour of the appellants and their Lordships of the First Division unanimously against them, I will only say that I wholly agree with the reasoning and conclusion of my noble and learned friend, LORD KEITH OF AVONHOLM. It appears to me an artificial, even an extravagant, view to call these machines portable grinding machines, and there is nothing in the definition to drive me to it.

On the first point also there was a difference of opinion between the Lord Ordinary and the First Division. A pure question of fact is involved. The Lord Ordinary concluded that it could not be doubted that siliceous dust was given off by the swing frame grinders in use during the deceased's period of employment in the dressing shop. The Lord President (LORD CLYDE) held that the evidence negated any appreciable quantity of silica dust ever having emanated from the operation of the swing frame grinders in this factory. In this conflict of opinion I do not find it necessary to come to a conclusion and I do not regret it, for I must admit that I find that the evidence is particularly confusing and indecisive. Perhaps for that reason I should not be right to differ from the judgment under appeal, but, as I am in favour of the appellants

on the larger question of inadequate ventilation, they stand to gain or lose nothing by any opinion I might form on this question.

The same difference of opinion has arisen concerning the inadequacy of the ventilation of the shop. Here I can ignore the common law aspect of the case. The argument has revolved round the statutory duty imposed by s. 4 (1) of the Factories Act, 1937, and it is clear that, if the appellants do not succeed on this question, they cannot succeed at common law. On the other hand, if they do succeed, that is all they want.

The Lord Ordinary found as a fact that the ventilation of the dressing shop was not effective, and that the respondents had failed in their duty both at common law and under statute. He held, further, that it was practicable for them to have made the ventilation at any rate more effective than it was. It is, however, a fair criticism of his judgment that he did not, before making his award of damages in favour of the appellants, consider whether there was a relevant causal connection between the respondents' default and the illness of the deceased. *Wardlaw's* case (1) had not yet been decided in this House. On appeal to the Inner House, it was appreciated that it was necessary to establish a causal link between the default in providing proper ventilation and the onset or aggravation of pneumoconiosis. As the Lord President said:

"As the Lord Ordinary held, albeit with some hesitation, that the eastern part was not ventilated as required by the statute, I do not feel entitled to interfere with his conclusion on this question. The important matter is, however, how far it takes the [appellants]."

The relevant facts about the ventilation of the shop were these. The deceased worked in the eastern half of the shop which had no roof ventilation at all, unlike the western half which had had ridge ventilation in the roof from a date before the eastern half was built. The only means of ventilation in the eastern half consisted of doors which had not been provided for ventilation purposes but for the exit and entry of men and vehicles. Their effectiveness for ventilation could only be fortuitous and occasional. It is clear that there was no adequate ventilation. But, as the Lord President says, how far does this take the appellants? My Lords, I do not think that it can be wrong to approach this question from the angle that, if the statute prescribes a proper system of ventilation by the circulation of fresh air so as to render harmless so far as practicable all fumes, dust and other impurities that may be injurious to health generated in the course of work carried on in the factory, and if it is proved that there is no system, or only an inadequate system, of ventilation, it requires little further to establish a causal link between that default and the illness due to noxious dust of a person employed in the shop. Something is required as was held in *Wardlaw's* case (1). I was a party to that decision and would not in any way resile from it. But it must not be pressed too far. In the present case there was, in my opinion, ample evidence to support the appellants' case. The appellants rightly or wrongly by their pleadings assumed the burden not only of proving that there was a causal link between default and disease but also of proving that it was practicable for the respondents to have reduced the risk by the provision of additional roof ventilators and openings in the walls for the admission of fresh air.

It was common ground, as I have said, that the deceased could not avoid inhaling noxious particles of silica as he worked with his pneumatic hammer, but it must be obvious that the sooner the dust—a cloud of dust as it was called—was dispersed the fewer the particles he would inhale, and equally obvious that, if there is no ventilation and no circulation of air, the dispersal of the cloud will be delayed and the workman will remain in the concentration of particles which is of all things most dangerous. The question then is whether the respondents could have improved the ventilation by the method suggested by the appellants. In spite of some evidence to the contrary, I do not hesitate

to accept the evidence given by the appellants' expert witness, Mr. George Victor Stabler. He had a wide experience of iron and steel foundries and their ventilation. He visited this foundry. Having indicated that he did not regard the ventilation as up to standard, he was asked:

"Q.—What is your view as regards the necessity of proper ventilation in such a shop as this? A.—It should be more than in this particular case in the sense that it should be plain that there should be a higher rate of change of atmosphere produced by some such things as continuous roofs and ventilators, or the usual type of cyclic ventilation which many modern dressing shops are fitted with and which change the atmosphere six times an hour and that kind of thing."

He was then asked:

"Q.—If some such form of ventilation had been present, would that have minimised the danger of the dust being unhealthy to the workers? A.—It would have reduced the concentration."

The evidence of Mr. Stabler was in some degree confirmed by another expert, Mr. Whiteside, but he spoke only from a plan, and the appellants' counsel was prepared to make his stand on Mr. Stabler's evidence. Against this evidence must be set that of the respondents' experts. A Mr. John William Gardom, whose qualifications were unimpeachable, in his evidence in chief on this point said no more than that the general ventilation of the building was quite adequate. But his answers in cross-examination were such as might well justify the trial judge in preferring the evidence of Mr. Stabler. I must quote a few questions and answers.

"Q.—Why didn't you apply your mind to the question of the means of providing ventilation? A.—The means of ventilation were quite satisfactory and could not be otherwise. What is more important to my own view is the extraction of any fumes or dust at any given point.

"Q.—What were the methods for extracting fumes from the dressing shop where the men worked? A.—Where the men worked none at all.

"Q.—Do you regard that as satisfactory? A.—I don't know how it could be improved at the present time.

"Q.—I suggest a simple method of improving it would be to extend the louvres to the position in the roof above where the men were working? A.—Yes.

"Q.—So that the dust went up in the air? A.—I would agree.

"Q.—Do you think that the roof ventilators are valueless as ventilators? A.—No, but I do as fume extractors."

Then he was asked by the court:

"Q.—And also as far as dust extraction goes? A.—Yes."

I must admit that from these answers and from his further cross-examination I get little assistance and, even if they do not support the appellants' case, which they might well be thought to do, at least they do not appear to me to outweigh the clear and unequivocal testimony of Mr. Stabler. A second expert witness, Mr. A. W. Mason, was called by the respondents. I do not wish to underestimate his qualifications, but as the last question and answer of his cross-examination were as follows:

"Q.—You are really not in a position to say whether or not improved ventilation would render this dangerous dust harmless? A.—No, I am not",

I am not disposed to give much weight to his evidence.

I need not refer to the rest of the evidence, for it appears to me that it clearly established that dust containing dangerous particles of silica was emitted into the air by the operation of pneumatic hammers on the castings, that this dust hung about in concentrated form longer than it would have if there had been better ventilation, and that improved roof ventilators were practicable and would have effectively improved the conditions. It follows that, owing to the default of the respondents, the deceased was exposed to a greater degree of risk than he should have been, and, though it is impossible even approximately to quantify the particles which he must in any event have inhaled and those which he inhaled but need not have, I cannot regard the excess as something so negligible that the maxim "de minimis" is applicable. Accordingly, following the decision in *Wardlaw's* case (1), I must hold the respondents liable. The interlocutor of the First Division should, in my opinion, be recalled and that of the Lord Ordinary restored. The respondents must pay the costs of the appellants here and below.

My noble and learned friend, **LORD OAKSEY**, who is unable to be here, asks me to say that he has read, and concurs in, my opinion.

LORD MORTON OF HENRYTON: My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack.

LORD COHEN: My Lords, the appellants are the widow and children of the deceased, Alexander Watson Nicholson, who died of pneumoconiosis on June 14, 1951. He had, for periods aggregating over nine years, been in the employ of the respondents, the last of such periods terminating in June, 1949, when, owing to the state of his health, he had to stop working. From the date of his retirement until his death he was mostly confined to bed. Throughout his employment with the respondents he was employed in the dressing shop, his work consisting in operating a pneumatic hammer. Other tools to be found in the dressing shop were swing frame grinders and double-headed grinders. It is common ground that until changes effected recently, the castings reached the dressing shop in a dirty condition (i.e., with a lot of sand on them) and that the operation of the pneumatic hammers necessarily created a cloud of dust which must have included some of the siliceous particles which are the cause of pneumoconiosis. It was admitted that the creation of this cloud was inevitable, but the appellants contended that, had the respondents provided proper ventilation in the dressing shop in accordance with their obligations under s. 4 (1) of the Factories Act, 1937, the cloud would have been more rapidly dispersed and rendered harmless so far as practicable. They also alleged that siliceous dust was generated in the operation of the swing frame grinders, which mingled with the general atmosphere of the rooms because, in breach of their obligations under reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, the respondents had failed to provide suitable appliances for the interception and removal and dispersal of the said dust. The appellants also alleged fault at common law in respect of the respondents' alleged failure to provide safe plant and appliances and adequate ventilation, but I need not pursue the common law aspect of the matter, since the appellants admitted before your Lordships that they could not succeed at common law if they failed to establish the above-mentioned breaches of statutory duty.

The Lord Ordinary (**LORD BLADES**) found that the alleged breaches of statutory duty had been proved. He gave his judgment before the decision of your Lordships' House in *Bonnington Castings, Ltd. v. Wardlaw* (1) ([1956] 1 All E.R. 615), and approached the case on the basis that, once the breaches of statutory duty were established, the onus of proving that they had not contributed to the disease was on the respondents. He held that this onus had not been discharged and awarded the appellants damages totalling £3,300. When the matter came before the First Division of the Inner House the Lord

President (LORD CLYDE) and LORD CARMONT agreed, or assumed in favour of the appellants, that the breaches of duty were established, and LORD RUSSELL did not differ from the Lord Ordinary's finding on that point but, approaching the matter in the light of the decision of this House in *Wardlaw's* case (1) that the onus of establishing causation lay on the appellants, the First Division held unanimously that the appellants had failed to discharge that onus.

In relation to the claim in respect of breach of reg. 1, the respondents had raised a preliminary point that the regulation had no application owing to a certificate of exemption granted by the Chief Inspector of Factories in exercise of his powers under the regulations. In October, 1926, he had exempted from reg. 1

“Portable grinding machines, portable glazing machines and portable buffing machines (i.e. grinding, glazing and buffing machines without fixed foundations or suspensions, which are carried or propelled to the work).”

The Lord Ordinary had rejected this argument, but their Lordships of the First Division accepted it, LORD CARMONT making his acceptance the principal ground of his decision on the claim under reg. 1.

My Lords, I will deal first with the claim in respect of alleged faulty ventilation. The breach of s. 4 (1) is now admitted, and I am unable to agree with their Lordships of the First Division that the appellants had failed to discharge the onus which admittedly rests on them of establishing that this breach caused, or contributed to, the disease from which the deceased died. The particular defect in ventilation which the appellants pleaded in their condescendence was the failure to provide roof ventilators in the eastern half of the bay in which the deceased worked and also openings in the walls for the admission of fresh air. In the course of the argument, some discussion ensued whether it was open to the appellants to rely on anything in the evidence which went beyond this allegation. Counsel for the appellants admitted that he could not lead evidence directed to something he had not pleaded, but claimed that he was entitled to rely on anything extracted from his witnesses in cross-examination or deposed to by the respondents' witnesses. This was disputed by counsel for the respondents. I do not find it necessary to decide the point for, accepting the Lord President's view that the appellants must be closely confined within their pleading, I am unable to agree with the Lord President that the addition of the additional roof ventilators would not on the evidence have mitigated the onset or development of the disease from which the deceased died.

Pneumoconiosis is a progressive disease. The longer a workman is exposed to an intense cloud the graver must be the risk of infection. In the present case, it is clearly established by the evidence that, at any rate down to 1949, the tool with which the deceased was working on dirty castings created a thick cloud of dust which must have necessarily included siliceous particles to an extent which cannot be classed as “*de minimis*”. The respondents are, admittedly, not to blame for the generation of this cloud, but any failure to provide proper ventilation must, I think, lengthen the period during which the cloud remains intense. It seems to me to follow that the respondents' failure to provide adequate ventilation must increase the risk to which the workmen are exposed. Reading the evidence as a whole, I think it establishes that (to use the language of LORD REID in *Wardlaw's* case (1) ([1956] 1 All E.R. at p. 618)) “on a balance of probabilities, the breach of duty caused, or materially contributed to”, the injury.

Before considering the expert evidence, it should be mentioned that in the western half of the dressing shop there were four roof ventilators, but in the eastern half in which the deceased worked there were none. The only other form of ventilation were doors which were opened from time to time. The

expert evidence called on behalf of the appellants was that of Mr. Stabler. The Lord Ordinary summarised his evidence as follows:

"Mr. Stabler, [appellants'] expert, expressed the opinion that the ventilation in the dressing shop was inadequate for the type of work being carried on, and below the standard usual in such works in the Scottish area. He drew attention to the absence of roof ventilation in that part of the dressing shop in which steel dressing was done. As for the doors in the shop, he conceded that they might have some small effect on the circulation of air in their immediate vicinity but said that the doors had been positioned for access and not for ventilation. When visiting the dressing shop he had observed what he described as dust clouds and noted that there was no material general horizontal movement of the dust, which indicated to him that there was no marked draught at the working place. He tested the dust with a konometer and found that it contained a heavy concentration of fine siliceous particles, invisible to the eye, and dangerous if inhaled. It was, he said, those invisible particles that caused lung damage. In his view, the ventilation of the dressing shop was definitely sub-standard. There should have been provision made for a higher rate of change of atmosphere such as is produced by such devices as continuous roofs and ventilators . . ."

The expert witnesses called on behalf of the respondents were Mr. Gardom and Mr. Mason. The effect of their evidence on this point is summarised by the Lord Ordinary as follows:

"Mr. Gardom, [respondents'] expert, considered that the ventilation of the dressing shop generally was satisfactory. While he agreed that ventilators should have been installed in the roof of the eastern half, in his opinion roof ventilation did not assist greatly in freeing the air inside the dressing shop of dust. Mr. Mason, also a [respondents'] expert, and skilled in factory design and layout, did not consider the atmospheric conditions unusual for a dressing shop. They were, he said, reasonably acceptable. They could have been better, but they could also have been very much worse."

The Lord Ordinary preferred the evidence of Mr. Stabler, but the Inner House held that the appellants had not discharged the onus which rested on them. The Lord President cited further extracts from the evidence of Mr. Gardom and Mr. Mason as follows:

"Mr. Gardom, an expert of considerable experience who was called for the [respondents], stated (at p. 205-6) that roof ventilators were useless to extract the dangerous dust and that the proper method was to extract the dust downwards. He would not like to increase the roof ventilation for the purpose of lifting this dust up. Mr. Mason, another expert for the [respondents], also stated (at p. 226) that ventilation was not the proper way to remove this dust and at p. 230, in dealing with the dangerous dust in steel factories, he says: 'As I see it the ventilation system would not cater for the dust removal . . . I cannot see the ventilation system providing for dust removal.' When asked as to whether, assuming there were some very fine particles of dust, it was at all practicable to provide for the removal of this type of dust by a system of ventilation, he replied: 'On the basis of the assumption it is very difficult to say, but I feel that even a forced system or mechanical system to remove the dust might be such as it would be uncomfortable.' This indeed seems highly likely, as even in the absence of such a system there is evidence that employees in the dressing shop complained to the shop stewards about the draughts in the shop. Finally, he says at p. 233: 'I do not think any general form of ventilation would

remove the dust.' The highest he puts it for the [appellants] is at p. 229 where he says: 'I can only say that a really efficient ventilation system against a less efficient one would remove the dust quicker, but I cannot see that the risk of the dust being breathed by the men would be more than slightly removed. It still means it will pass between them and the general ventilation system.' "

My Lords, like the Lord Ordinary, I prefer the evidence of Mr. Stabler. Bearing in mind that pneumoconiosis is a progressive disease, that continued exposure to the dangerous dust increases the risk of infection, and that the most dangerous particles are the light particles which tend to rise, it seems to me that additional roof ventilators would, as Mr. Stabler said, have reduced the concentration and, therefore, mitigated the onset or aggravation of the disease. I am fortified in this view by some evidence given by the respondents' manager, Mr. Walker:

" Q.—What form of ventilation is there in the eastern half? A.—There is not really any planned ventilation, but according to tests there is sufficient ventilation.

" Q.—The answer is that there is no form of roof ventilation in the eastern half at all? A.—I agree there is no form of roof ventilation.

" Q.—You depend entirely on the doors? A.—More or less.

" Q.—And you agree with me that doors are not as satisfactory as roof ventilators? A.—I would say from recent knowledge.

" Q.—Isn't it obvious that ventilation by the doors will not carry the dust up in the same way as roof ventilation? A.—Well, that could be assumed.

" Q.—Isn't it perfectly obvious to anybody with a grain of common sense? A.—That is the usual form of ventilation."

It is also worth noting that Mr. Mason, when talking of the existing roof ventilators, said that the existing roof ventilators in the western half of the shop are a cumulative aid to the air extraction generally. I cannot resist the conclusion that the provision of more ventilators in the eastern half would have had a more direct effect on the air in that half.

For these reasons I think that, on the balance of probabilities, the appellants are entitled to succeed. I would respectfully adopt some observations made by my noble and learned friend, LORD KEITH OF AVONHOLM in *Wardlaw's* case (1) where he said ([1956] 1 All E.R. at p. 622):

" The respondent has, however, in my opinion, proved enough to support the inference that the fault of the appellants has materially contributed to his illness. During the whole period of his employment he has been exposed to a polluted atmosphere for which the appellants are in part to blame. The disease is a disease of gradual incidence. Small though the contribution of pollution may be for which the appellants are to blame, it was continuous over a long period. In cumulo it must have been substantial, though it might remain small in proportion."

Having reached this conclusion, it is not strictly necessary to deal with the question of the swing frame grinders, but, as your Lordships were informed that the decision of the First Division on the preliminary point as to the effect of the certificate of exemption granted by the Chief Inspector of Factories in October, 1926, has been followed in other cases, and this point was fully argued before your Lordships, it would, I think, be desirable that your Lordships should express your opinions thereon. It is enough for me to say that, for the reasons given by the Lord Ordinary and by your Lordships, I am satisfied that the swing frame grinders in the respondents' dressing shop do not fall within the exemption granted by the Chief Inspector of Factories of portable grinding machines.

A In the result I would allow the appeal and restore the interlocutor made by the Lord Ordinary on Apr. 19, 1955.

LORD KEITH OF AVONHOLM: My Lords, I agree that this appeal can be disposed of in favour of the appellants on the question of ventilation alone, in which case some of the other points canvassed in the course of the argument need not be considered. But, as all of the judges of the First Division expressed the view that swing frame grinders were portable grinding machines and, therefore, were exempted from the application of reg. 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, by virtue of the Chief Inspector of Factories' certificate of exemption, I would deal shortly with this matter. The views of their Lordships of the First Division, if passed over in silence by this House, might well be treated as binding in other cases raising the same point.

First of all, I observe that there are grinding machines which are clearly portable and about which no question can arise, grinders which can be carried or moved about at will within the shop and fitted to various air points for purposes of buffing or grinding. The swing frame grinder in this case, in my view, consists of various parts. There is a fixed upright post attached to foundation plates in a concrete foundation sunk into the floor of the shop. Attached to the upper part of this post is a horizontal beam so adjusted as to swing in a complete circle round the post. This radial beam carries a pulley block, and round the pulley runs a metal chain with a hook at one end. The grinding portion of the mechanism is attached to this hook, and so can be raised or lowered to a suitable level and swung by means of the radial beam round the post so as to be brought above any casting waiting to be ground within the limits of the circle to which the mechanism can extend. The grinding part of the mechanism which can be unhooked was said to weigh five to ten hundredweights. Broadly speaking, the work can be said to be taken to this machine. In the case of the clearly portable grinders the machine is taken to the work. I cannot regard the mechanism described above as a portable grinding machine. The machine, in my opinion, must be looked at as a whole from the standpoint of the manner in which it is used. It is not legitimate to take it to pieces and treat the grinding part of the mechanism as the grinding machine. This is a swing frame grinder and it ceases to be a swing frame grinder if the grinding end is detached from the rest. The certificate of exemption does not purport to deal specifically with swing frame grinders. It is said, and as I understand it this was the ground of the views expressed by the judges of the First Division, that the grinding unit was without fixed foundations or suspension, and could be carried or propelled to the work. But this, at best, could only be so on the view, which I have already rejected, that the machine is to be dealt with in parts. In any event, I should doubt whether the grinding unit when at work can be regarded as being without a fixed suspension. It is suspended to a chain which must be fixed even if its position may be adjustable. It was said that it might be attached to a crane and was at one time so used. Even so, I think it could be said to have a fixed suspension in comparison with portable machines carried about and plugged into air points. Nor do I think the machine can be said to be carried or propelled to the work by virtue of being rotated within a limited radius so as to be brought over castings brought within its reach. I think also that the reason stated for making the exemption, viz., that, owing to the special conditions under which the machines were used, compliance with reg. 1 and reg. 17 was at present impracticable, lends support to the view that it was not intended to apply to swing frame grinders. The application of exhaust apparatus to a clearly portable grinder is quite a different problem from such application to a relatively fixed apparatus like a swing frame grinder. For these various reasons, I am of

opinion that the swing frame grinder here in question was not a portable grinder, and that it did not come under the certificate of exemption.

Coming to the question of ventilation, I agree that the respondents here were in breach of s. 4 (1) of the Factories Act, 1937. The judges of the court below have assumed this to be so, but have held it not proved that this caused or contributed to the disease from which the deceased died. I have difficulty in seeing how this conclusion can be supported on the evidence. There is ample evidence that the atmosphere at the deceased's end of the dressing shop was often very bad, and that dust from the operations carried on there hung about owing to inadequate ventilation. There was no roof ventilation at that end of the shop. The only ventilation was through two doors which were closed in winter, except when it was necessary to let in or let out men and material. This dust was due to the cleansing and grinding of steel castings that took place in the shop, and the dust necessarily included large quantities of the invisible and dangerous silica particles given off in these processes from the sand with which the castings were impregnated. It is an easy and natural inference, and in accordance with the medical evidence, to hold that the pneumoconiosis from which the deceased suffered was due to the dangerous dust to which he was exposed in the course of his work with the respondents over a prolonged period of time. The view taken by the court below seems to be that the real cause of his disease was the noxious dust given off in the course of the deceased's working on castings with a pneumatic hammer, for which no fault could be attached to the respondents, and that it is not proved that roof ventilation would have materially helped to lessen the deceased's exposure to this dust. Indeed, one view was that ordinary ventilation might merely disturb the noxious dust and bring it within the range of a workman who would otherwise escape. I am unable to accept these views. It would seem common sense that, with a system of ventilators in the roof and louvres in the walls, the current of air would draw the dust upwards and allow substantial quantities to escape. It would necessarily reduce the density of the dust which is proved in the evidence to have hung about, and which was produced not only by the deceased's pneumatic hammer but from the other buffing and cleansing operations going on around him. It would also have reduced the amount that was allowed to settle on the floor and equipment which could be stirred up again by any draught or other disturbance. Thus, the cumulative amount of dust inhaled by the deceased would have been appreciably diminished, and for the reasons given in *Bonnington Castings, Ltd v. Wardlaw* (1) ([1956] 1 All E.R. 615), the appellants here should be entitled to succeed. Some evidence given by the respondents' witnesses was referred to by the Lord President (LORD CLYDE), but it does not modify the views I have expressed. The witness, Mr. Gardom, to whom he refers, thought roof ventilators useless. He amplifies this in the following passage:

"Q.—Do you say that the roof ventilation doesn't assist at all in freeing the air of dust? A.—Yes, it may take some of it up in the air, but I don't think it is a good method and I would not like to increase the roof ventilation for the purpose of lifting the air up.

"Q.—It would leave the dust floating in the air? A.—Yes."

Roof ventilators would, no doubt, take the dust up in the air, but I do not understand why they should not carry much of it into the open air. Passages from the evidence of the witness, Mr. Mason, are also quoted by the Lord President, but they do not seem to indicate appreciation of the problem of reducing the concentration of dust hanging about. The witness, Mr. Stabler, a witness for the appellants, had this matter clearly in view in the following passage of his evidence:

"Q.—What is your view as regard the necessity of proper ventilation

A in such a shop as this? A.—It should be more than in this particular case in the sense that it should be plain that there should be a higher rate of change of atmosphere produced by some such things as continuous roofs and ventilators, or the usual type of cyclic ventilation which many modern dressing shops are fitted with and which change the atmosphere six times an hour and that kind of thing.

B “Q.—If some such form of ventilation had been present, would that have minimised the danger of the dust being unhealthy to the workers?

A.—It would have reduced the concentration.”

No doubt some modern form of air conditioning might have improved the atmosphere of the shop more, or more quickly, though this is not pleaded by the appellants. But the witness clearly regards roof ventilation as achieving the same result, even if less efficiently, and he is corroborated to some extent by Mr. Whiteside, another witness for the appellants. When referring to methods of dealing with dust in steel foundries discussed in 1944 in a report made by a committee of which he was a member, Mr. Whiteside is asked:

D “Were there as at that date other practicable means of preventing the inhalation of dust? A.—I think what was intended there was the method of suction or exhaust ventilation, that is the first line of defence. That is to remove the dust from the atmosphere so that nobody can breathe it in. General ventilation helps too.”

E In these circumstances, I consider that, in consequence of the respondents' breach of s. 4 (1) of the Factories Act, 1937, an excessive amount of dangerous dust was allowed to accumulate in the dressing shop, to which the deceased was exposed over a prolonged period, and that his death from pneumoconiosis must be ascribed at least partially to this fault of the respondents.

F It is unnecessary to consider whether the deceased was exposed to a further quantity of dangerous dust from the working of swing grinders in his vicinity without the provision of any dust extraction appliance. I am not satisfied that this may not have had some further cumulative effect in bringing about the deceased's illness. But I need not enter into this matter as it is enough that the appellants are entitled to succeed on the ground of inadequate ventilation.

I would allow the appeal.

Appeal allowed.

Solicitors: *W. H. Thompson*, agent for *Digby Brown & Co.*, Glasgow, and *D. G. McGregor*, Edinburgh (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Hamilton, Kinnear & Beatson*, Edinburgh (for the respondents).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

BEAUCHAMP'S EXECUTORS *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Wynn-Parry, J.), February 6, 7, 1957.]

Special Contribution—Additional assessment—Limitation on time for making—Assessment on executors of taxpayer—Finance Act, 1948 (11 & 12 Geo. 6 c. 49), s. 55 (1), (6)—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), s. 67 (2), s. 125 (2)—Finance Act, 1923 (13 & 14 Geo. 5 c. 14), s. 29 (1), (3)—Special Contribution Regulations, 1948 (S.I. 1948 No. 2029), regs. 4, 5, and Schedule.

An assessment of an individual to special contribution need not be made within six years of the end of the basic year 1947-48 (i.e., before Apr. 6, 1954) nor, if the assessment was made on his personal representatives, need it be made before the end of the third year next following the year of assessment in which he died.

Appeal dismissed.

[For the Finance Act, 1948, s. 55 (1), (6), see 12 HALSBURY'S STATUTES (2nd Edn.) 847, 848; for the Income Tax Act, 1918, s. 67 (2), s. 125 (2), see *ibid.*, 46, 70; and for the Finance Act, 1923, s. 29 (1), (3), see *ibid.*, 254.]

Case Stated.

The taxpayers, the executors of Sir Frank Beauchamp, appealed against an additional assessment to the special contribution in the sum of £11,211 made on them in their representative capacities. Sir Frank Beauchamp, Bart., died on June 17, 1950, in the year of assessment 1950-51. The additional assessment to the special contribution was made on the taxpayers on Apr. 30, 1954. The taxpayers contended that by virtue of s. 55 (1), (6) of the Finance Act, 1948, of the Special Contribution Regulations, 1948 (S.I. 1948 No. 2029), reg. 5, and reg. 4, and Schedule, applying s. 67 (2) and other provisions of the Income Tax Act, 1918, of the Finance Act, 1923, s. 29 (1), read with s. 67 (2) of the Income Tax Act, 1918, and of s. 29 (3) of the Finance Act, 1923: (i) an assessment to the special contribution must be made not later than six years after the end of the year of assessment, 1947-48, i.e., not later than Apr. 5, 1954; and (ii) it must be made on executors not later than the end of the third year next following the year of assessment in which the deceased person died, i.e., not later than Apr. 5, 1954. The Crown contended that the Finance Act, 1948, imposed on the Special Commissioners a duty to assess the special contribution without limitation as to time, that the Special Contribution Regulations, 1948, ought not to be read as limiting that duty and did not do so and that there could be no limitation of three or six years from the end of a year of assessment because there was no year of assessment for the special contribution. The commissioners dismissed the appeal. The taxpayers appealed.

Roy Borneman, Q.C., and C. N. Beattie for the taxpayers.

John Senter, Q.C., and Sir Reginald Hills for the Crown.

WYNN-PARRY, J.: The Special Commissioners stated the two questions before them for decision in these words:

"(a) whether an assessment to the special contribution must be made not later than six years after the end of the year of assessment 1947-48—i.e., not later than Apr. 5, 1954; (b) whether an assessment to the special contribution must be made on executors not later than the end of the third year next following the year of assessment in which the deceased person died—i.e., on the facts of this case, again not later than Apr. 5, 1954."

A I accept that as correctly stating the questions before me in this appeal. To arrive at a solution certain sections forming Part 5 of the Finance Act, 1948, must be considered. The first proposition of counsel for the taxpayers is that, on an examination of the language of Part 5, provision will be found which has the result that a time limit is imposed on the Special Commissioners, and for that purpose he bases himself on the definition in s. 68 (1) of the expression "assessment"

B "as including "additional assessment", pointing out that "additional assessment" has a technical meaning in the Income Tax Acts which can only be ascertained by reference thereto, and that, on an analysis of the relevant provisions of the Income Tax Act, 1918, s. 125 must apply*. Even assuming that that is right it means that a period of limitation is introduced in Part 5, so to speak, by a side-wind, because it is clear that there is no express provision in

C Part 5 that there shall be a particular period after which no assessment can be made. Section 47 (1) of the Finance Act, 1948, the charging section, provides:

"In the case of individuals whose total income for the year 1947-48 exceeded £2,000 and whose aggregate investment income for that year exceeded £250, there shall subject to the provisions of this Part of this Act be charged a special contribution (in this Part of this Act referred to as 'contribution') of an amount determined in accordance with the following table."

D The commissioners in the course of their reasons have said:

"Furthermore, we accept the Crown's contention that in spite of the many references to the year 1947-48 the special contribution was not a tax imposed for the year of assessment 1947-48",

E and I agree with them. The year 1947-48 is introduced simply as a basic year on which the necessary calculation is to be made, and in that regard the scheme of Part 5 clearly differs very materially from the schemes which are to be found in the other Acts dealing with the levying and payment of tax. The rest of s. 47, sub-ss. (2) to (7), appear to me to be supplementary to the charge contained

F in sub-s. (1). Section 48 provides:

"Subject to the provisions of this Part of this Act, income from any source and total income shall be ascertained for the purposes of this Part of this Act as they are ascertained for the purposes of surtax; and subject as aforesaid income shall be treated for the purposes of this Part of this Act as income of an individual if it would be so treated for the purposes of surtax."

G Counsel for the taxpayers relied strongly on that section, as well as other parts of Part 5, as indicating that special contribution was tied to surtax for all purposes. I myself do not read the section in that sense. I think it was more accurately described by counsel for the Crown as a measuring section, because its sole object is to provide a means for ascertaining the amount which is to be paid

H by the taxpayer by way of contribution.

Section 65 is an ad hoc provision dealing with relief in respect of error or mistake in express terms. By way of contrast, no such express provision deals with the limitation of the period in respect of which an assessment may be made. That is a matter of considerable importance. If the legislature had decided to provide that in respect of this special tax there should be such a limited period within which an assessment could be made, nothing would have been easier than to have incorporated such a provision in this Part of the Finance Act, 1948, so that it could stand alongside, and be, as it were, a corollary to, this express provision as to relief in respect of error or mistake. One is therefore thrown again to the provision in the definition section on which counsel for the taxpayers has to rely, that the expression "assessment" includes "additional assessment". I find for myself great difficulty, having examined Part 5 even to the limited extent

* The terms of the Income Tax Act, 1918, s. 125 (2), are set out at p. 790, letter I, post.

to which I have examined it, in coming to the conclusion in this judgment that the legislature has by this definition introduced a period of limitation. I think the proper conclusion on this first point is that I must apply the doctrine *expressio unius est exclusio alterius*. Therefore, I am against counsel for the taxpayers on his first and main point.

Section 55 (1) reads:

“Contribution shall be a debt due to the Crown, and shall be assessed and charged by the Special Commissioners.”

What follows, including sub-s. (6), is to my mind subsidiary to that, and sub-s. (6) is the sub-section on which counsel for the taxpayers founds the second part of his argument. That sub-section reads:

“The Commissioners of Inland Revenue may by statutory instrument make regulations with respect to the assessment and collection, and the repayment, of contribution and interest thereon, and subject to the foregoing provisions of this section may by those regulations apply and adapt the provisions of the Income Tax Acts relating to returns and the giving of information and to the assessment and collection of income tax and interest thereon.”

Counsel for the taxpayers has submitted that the Commissioners of Inland Revenue have the widest possible powers. He says that they might have done nothing and made no statutory regulations at all, that they might have made an express provision introducing the period of limitation, or that they might have introduced an express regulation saying that there should be no period of limitation. In my view, I am concerned only with considering the position as it has in fact evolved, and as the commissioners have made regulations in my view this part of the case has got to be determined on a consideration of those regulations.

The regulations are contained in the Special Contribution Regulations, 1948 (S.I. 1948 No. 2029), and the two relevant regulations are regs. 4 and 5. Regulation 4 reads:

“Subject to the express provisions of the Act and these regulations the provisions of the Income Tax Act, 1918, enumerated in the schedule to these regulations shall, with any necessary modifications, apply to the assessment and collection of contribution, and to appeals under s. 60.”

The argument of counsel for the taxpayers is that, when one looks at the Schedule, it emerges that the Commissioners of Inland Revenue, in exercise of their power under s. 55 (6) of the Finance Act, 1948, have brought it about that there is a limited period within which the assessment may be made, because it is provided in the Schedule that one of the provisions of the Income Tax Act, 1918, which is to apply is s. 67 (2) which reads:

“In cases in which the Special Commissioners have authority to make, sign or allow assessments, or to hear appeals, they shall possess and exercise all the powers of the Additional Commissioners and General Commissioners with respect to assessments, appeals, and the collection and recovery of tax.”

The contention of counsel is that the phrase “all the powers” includes those powers, and nothing but those powers, and must therefore make applicable such limitations as there are on those powers. Section 125 (2) provides:

“An assessment may be amended, or an additional first assessment may be made at any time not later than three years after the expiration of the year of assessment.”

A It is perfectly true that strictly speaking that sub-section has not been repealed, but s. 29 (1) of the Finance Act, 1923, provides:

B “Subject to the provisions of this section, an assessment, an additional first assessment or a surcharge in respect of income tax chargeable for the year 1920-21 or any subsequent year of assessment may be amended or made, as the case may be, under s. 125 of the Income Tax Act, 1918, or s. 126 of that Act, at any time not later than six years after the end of the year to which the assessment relates or the year for which the person liable to income tax ought to have been charged.”

Section 29 (3) reads:

C “For the purposes of the charge of income tax or super-tax on the executors or administrators of a deceased person in respect of the profits or gains or income which arose or accrued to him before his death, the time allowed by the foregoing provisions of this section shall not extend beyond the end of the third year next following the year of assessment in which the deceased person died.”

D Those provisions in s. 29 are substantive provisions, and in effect they take the place of s. 125 (2). In his reply, counsel for the taxpayers suggested that the fact that s. 125 (2) had not been repealed was a point in his favour, because once, so to speak, he got into s. 125—if he did—he need not go any further because there was a provision still on the statute book containing the period of limitation. I take just the opposite view. I think that the circumstance that the legislature has thought fit in s. 29 of the Finance Act, 1923, to introduce substantive provisions dealing with the period within which an assessment can be made is a very strong pointer to the conclusion that, assuming the commissioners had had power under the regulations to introduce a period of limitation, they would have done so, and they ought to have done so, by an express reference to s. 29 of the Finance Act, 1923. I am not to be taken as agreeing that they could have done so, but the circumstance that the governing statutory provision as regards limiting the period within which an assessment can be made is not to be found in s. 125 appears to me to militate very strongly against the argument of counsel for the taxpayers, and I come to the conclusion that the Special Commissioners were right when they took the view that, even assuming that the Commissioners of Inland Revenue had power under reg. 4 of the Special Contribution Regulations, 1948, to introduce a period of limitation, they have not done so.

G It remains to consider reg. 5. In looking at the scheme disclosed by this statutory instrument, I think that one would find it a matter for surprise if the object had not been achieved by reg. 4 but had been achieved by reg. 5. In my view, when properly understood, reg. 5 deals only with matters of form and procedure. The verbs used are “made, signed and allowed”—

H “Assessments to contribution shall be made, signed and allowed by the Special Commissioners in the same manner as assessments to surtax are made, signed and allowed by those commissioners . . .”

I It seems to me that reg. 5 is dealing with an altogether different subject-matter from that dealt with in reg. 4, and my conclusion is that it can afford counsel for the taxpayers no help. On the reasoning of my judgment I have also to come to the conclusion that the last point of counsel for the taxpayers cannot succeed, i.e., that, even if he were wrong on the first question posed by the Special Commissioners, he would be unable to succeed on the second question because to do so he must satisfy me that s. 29 (3) of the Finance Act, 1923, applies, but, as will have been seen, I have reached the conclusion that one never gets as far as that section. Therefore, I agree with the Special Commissioners

that they were right in rejecting the argument under the second question. For those comparatively short reasons, in my view this appeal fails.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills* (for the taxpayers); *Solicitor of Inland Revenue*.

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*] B

STERNE v. STERNE.

[COURT OF APPEAL (Hodson and Ormerod, L.JJ., and Hallett, J.), March 1, 1957.] D

Divorce—Alimony—Pendente lite—Wife receiving national assistance—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 19 (1).

National assistance benefit received by a wife may be taken into account when determining what sum the husband should be ordered to pay as alimony pending suit. E

Appeal dismissed.

[As to the consideration of a wife's means on application for alimony pending suit, see 12 HALSBURY'S LAWS (3rd Edn.) 350, para. 744, note (b); and for cases on the subject, see 27 DIGEST (Repl.) 489, 4279, 4280.]

For the Matrimonial Causes Act, 1950, s. 19 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 407. F

For the National Assistance Act, 1948, s. 42 (1) (a), s. 43 (1), (2), see 16 HALSBURY'S STATUTES (2nd Edn.) 968, 969.]

Cases referred to:

- (1) *Stopher v. National Assistance Board. National Assistance Board v. Parkes*, [1955] 1 All E.R. 700; *affd.* C.A., [1955] 3 All E.R. 1; [1955] 2 Q.B. 507; 3rd Digest Supp. G
- (2) *National Assistance Board v. Prisk*, [1954] 1 All E.R. 400; 118 J.P. 194; 3rd Digest Supp.
- (3) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest (Repl.) 82, 627. H
- (4) *National Assistance Board v. Wilkinson*, [1952] 2 All E.R. 255; [1952] 2 Q.B. 648; 116 J.P. 428; 3rd Digest Supp.
- (5) *Welton v. Welton*, [1927] P. 162; 96 L.J.P. 75; 136 L.T. 675; 27 Digest (Repl.) 486, 4253.

Appeal.

This was an appeal of the petitioning wife from an order made by WALLINGTON, J., in chambers, on Feb. 5, 1957. I

The parties were married on July 4, 1953, and separated in February, 1955. In November, 1956, the wife presented a petition for divorce on the ground of the husband's adultery and applied for alimony pending suit. The Truro district registrar made no order on the wife's application and the wife appealed. On Feb. 5, 1957, WALLINGTON, J., dismissed her appeal. The wife obtained the leave of the Court of Appeal to appeal against the order of WALLINGTON, J.

The grounds of appeal by the wife were

“(i) That the learned judge erred in holding that the receipt by the [wife] of national assistance benefit was income proper to be taken into account when deciding whether, and in what amount, the [husband] should be ordered to pay alimony pendente lite.

“(ii) That the learned judge was wrong in law in failing to order the [husband] to pay alimony pendente lite to the [wife].

“(iii) That the order made by the learned judge was against the weight of the evidence.”

G. W. Willett for the wife.

Joseph Jackson for the husband.

HODSON, L.J.: The husband is a clerk in London. He earns about £700 a year gross and in addition to that he has a disability pension, not subject to tax, of £1 0s. 6d. a week; he has virtually no capital above £100. According to her affidavit sworn in January, 1957, which was the only material before both the registrar and the judge, the wife is at present unemployed and in receipt of national assistance in the sum of £2 5s. 6d. a week, which is her only income. She is living with her sister at an address in Helston, Cornwall, to whom she pays £1 10s. a week towards the cost of her food and lodging; she formerly paid her sister £2 a week. Up to Oct. 8, 1956, she was in gainful employment, said to be seasonal, at a petrol station and receiving a weekly wage of £4 4s. 9d. Just before she and her husband parted in February, 1955, she received from him £86, representing the amount due to her on the sale of some shares which stood in her name, and in addition she received about £15 from him over the following six months. There is no detail given in either of the affidavits as to the circumstances in which these people parted; whether or not the wife deserted her husband does not appear. All that does appear is that she made no claim on him for support until these proceedings were instituted and that she did earn money in what she described as a seasonal employment until Oct. 8, 1956.

The complaint of the wife is stated in the first ground of appeal:

“That the learned judge erred in holding that the receipt by the petitioner of national assistance benefit was income proper to be taken into account when deciding whether, and in what amount, the respondent should be ordered to pay alimony pendente lite.”

That is the substantial ground of appeal in the present case because counsel for the wife was not, I think, able to argue that, if the matter had been a matter of quantum only, he could have asked this court to interfere, because matters of quantum are naturally matters left to be decided in almost every case by the first tribunal, which has to exercise discretion in cases where quantum is involved. The right to alimony pendente lite is discretionary. The present position is governed by s. 19 (1) of the Matrimonial Causes Act, 1950, which reads:

“On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.”

There is no question but that in the present case the wife is a competent suitor and is entitled to apply for alimony pendente lite, although the court in the exercise of its discretion will not be guided only by the figures of income disclosed by the respective parties. In the present case there is nothing in the conduct of the parties, which, so far as I know, has been taken into account, and, indeed, the evidence on that matter is almost non-existent.

I return, therefore, to the only point which emerges in the present case, whether as a matter of law the learned judge was wrong in taking into account the receipt of public assistance by the wife in reaching the result which he did. In my judgment there is no ground for saying that the learned judge erred in that respect.

The position is now regulated by the National Assistance Act, 1948. Section 42 (1) provides:

"For the purposes of this Act—(a) a man shall be liable to maintain his wife and his children . . ."

Section 43 provides:

"(1) Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the board or the local authority concerned may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted.

"(2) On a complaint under this section the court shall have regard to all the circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly or otherwise, as the court may consider appropriate."

That matter has been considered by the Divisional Court on a number of occasions. I refer to the judgment of LORD GODDARD, C.J., in *Stopher v. National Assistance Board. National Assistance Board v. Parkes* (1) ([1955] 1 All E.R. 700), with which ORMEROD, J., agreed. It was made abundantly clear in that case that the position as it existed before the passing of the National Assistance Act, 1948, as to the husband's liability to maintain his wife had not been changed. LORD GODDARD, C.J., repeated ([1955] 1 All E.R. at p. 706) what had previously been said in *National Assistance Board v. Prisk* (2) ([1954] 1 All E.R. 400 at p. 402), in which he made it plain that the National Assistance Act, 1948, had not altered the liability as it was previously held to exist, that is to say, the liability of a husband to support his wife. In dealing with desertion, LORD GODDARD, C.J., said ([1954] 1 All E.R. at p. 402):

"In a case where the wife has deserted her husband, the law is different. It was laid down in *Jones v. Newtown & Llanidloes Guardians* (3) ([1920] 3 K.B. 381), that the right of the wife who is in desertion of her husband to maintenance is only suspended, and if she returns to her husband then she has a right to be maintained; but, as long as she is in desertion, the husband is under no obligation to support her. In *National Assistance Board v. Wilkinson* (4) ([1952] 2 All E.R. 255) there was desertion by the wife. The husband provided a perfectly proper and adequate home for the wife, but she wanted to live elsewhere and would not go and live with him. The husband was not bound to support her, so long as she lived apart from him. That is what *Wilkinson's* case (4) decided, and it decided nothing else."

I have referred to that matter not because it directly affects this case but because it may have an effect on what may happen hereafter. The authorities of the Divisional Court to which I have referred were expressly confirmed by this court in *National Assistance Board v. Parkes* (1) ([1955] 3 All E.R. 1).

The position, therefore, as I understand it, is this. It may be doubtful whether the wife is in a position in which her right to be supported by her husband persists at common law so that it may be doubtful whether the National Assistance Board will be able to recover from the husband any money which may be paid to her from time to time. However that may be, the present position with which the court is dealing is that she is in receipt of these payments. If the wife is in desertion, no doubt the National Assistance Board will not be able to recover those sums from the husband. If she is not in desertion, no doubt the National Assistance Board will be able to recover those sums from the husband. So far as the present position is concerned, it seems to me impossible to say that the court, in the exercise of its discretion, is not entitled to look at the facts as they are now. Taking those facts, she is in receipt of an income

A which the husband may in the future be compelled to reimburse because it comes from the National Assistance Board; but the court in the exercise of its discretion is entitled to say that there is not here a case in which an order should be made in favour of the wife. In my judgment, therefore, this appeal should be dismissed.

B **ORMEROD, L.J.:** I agree. Counsel for the wife in the course of his argument relied on a sentence in the judgment of SARGANT, L.J., in *Welton v. Welton* (5) ([1927] P. 162 at p. 181) where the lord justice said that the question was whether the wife had sufficient independent means to support her. If she had, then there was no ground for an order for alimony pending suit. If, on the other hand, she had not sufficient means, then there was ground for an order.
C Counsel for the wife laid emphasis on the word "independent" as meaning something in the nature of permanent private means of the wife coming from some entirely independent source. I do not think that the word "independent" was intended to have such a meaning. As a matter of fact, in an earlier passage in his judgment SARGANT, L.J., talked of sufficient means of support, without using the word "independent" at all. I think that that word can mean nothing more than means independent of those provided by the husband.

D Applying that test in the present case, the learned judge on appeal from the registrar came to the conclusion that the wife was receiving from the National Assistance Board the sum of £2 5s. 6d. a week, which was a means of support independent of her husband. It may very well be that the circumstances are such, as HODSON, L.J., has said, that any sums paid to her by the National Assistance Board may be recovered by virtue of s. 43 of the National Assistance Act, 1948, but at the moment those payments are being made for her subsistence.
E She has therefore those means of subsistence, and I cannot find that there was any error in principle on the part of the learned judge in exercising his discretion as he did. I agree that this appeal must be dismissed.

F **HALLETT, J.:** I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Balderston, Warren & Co.*, agents for *Ratcliffe, Son & Henderson*, Helston (for the wife); *Craigen, Wilders & Sorrell* (for the husband).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re GILMORE'S APPLICATION.

[COURT OF APPEAL (Denning, Romer and Parker, L.JJ.), February 12, 25, 1957.]

Certiorari—Statutory tribunal—Error of law on face of decision—Medical appeal tribunal—Incorporation of medical report which disclosed facts showing error—Decisions of tribunal to be “final”—Whether subject to certiorari—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 Geo. 6 c. 62), s. 36 (3).

In 1936 the applicant lost the sight of his right eye, and in 1955 he lost the sight of his left eye in an industrial accident and became entitled to disablement benefit under the National Insurance (Industrial Injuries) Act, 1946. Under reg. 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, his disablement was to be assessed as if the injury to his right eye was incurred as a result of losing the sight of his left eye; and, under Sch. 1 to the regulations, the disablement for blindness in one remaining eye was to be assessed in such circumstances at a hundred per cent. A medical appeal tribunal, failing to apply reg. 2 (5), assessed the applicant's disablement at twenty per cent. The facts on which the tribunal based their decision did not appear on the face of their written adjudication, but the adjudication contained an extract from the report of a specialist who had examined the applicant and had set out in his report the full facts in regard to the previous injury and to the injury in 1955. Section 36 (3) of the Act of 1946 provides that any decision of a medical appeal tribunal of a question arising under the Act “shall be final”. On an application by the applicant for an order of certiorari to remove the decision of the medical appeal tribunal into the High Court to be quashed, it was conceded that the decision was erroneous in point of law.

Held: the order of certiorari would be granted as the court had jurisdiction for the following reasons—

(i) the tribunal, by giving an extract from the specialist's report, had made the report a part of the record, and, as the tribunal came to a conclusion which could not reasonably have been entertained by them if they had had proper regard to reg. 2 (5) of the Regulations of 1948, they had fallen into error in point of law, which was thus apparent on the face of the record.

Edwards v. Bairstow ([1955] 3 All E.R. 48) applied.

(ii) the provision in s. 36 (3) of the Act of 1946 that the tribunal's decision should be “final” merely meant that the decision should be final on the facts and should not be the subject of appeal, and the sub-section did not exclude jurisdiction by certiorari.

Dictum of LORD SUMNER in *R. v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. at pp. 159, 160) applied.

Per DENNING, L.J.: “. . . on looking . . . into the old books I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word ‘final’ is not enough. That only means ‘without appeal’. It does not mean ‘without recourse to certiorari’. It makes the decision final on the facts, but not final on the law” (see p. 801, letter C, post).

[Editorial Note.] It is indicated that the position in law in regard to decisions of the National Insurance Commissioner or of the National Injuries Commissioner is similar (see p. 802, letter I, and p. 804, letter G, post). Just as the remedy by certiorari is not taken away by a statutory provision that a determination is

A to be final, so it is open to the court, it seems, to make a declaration notwithstanding such a provision (see p. 802, letter G, post).

As to error on the face of the proceedings, see 11 HALSBURY'S LAWS (3rd Edn.) 61, para. 118; and for cases on the subject, see 16 DIGEST 427-430, 2870-2908.

B For the National Insurance (Industrial Injuries) Act, 1946, s. 36 (3), see 16 HALSBURY'S STATUTES (2nd Edn.) 845.

For the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, reg. 2 (5), see 15 HALSBURY'S STATUTORY INSTRUMENTS 324.]

Cases referred to:

- C (1) *Edwards v. Bairstow*, [1955] 3 All E.R. 48; [1956] A.C. 14; 36 Tax Cas. 207; 3rd Digest Supp.
- (2) *Williams v. Bagot (Lord)*, (1824), 4 Dow. & Ry. K.B. 315; 2 L.J.O.S.K.B. 152; 16 Digest 436, 2999.
- (3) *R. v. Warnford*, (1825), 5 Dow. & Ry. K.B. 489.
- D (4) *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw*, [1951] 1 All E.R. 268; [1951] 1 K.B. 711; 115 J.P. 79; *affd.* C.A., [1952] 1 All E.R. 122; [1952] 1 K.B. 338; 116 J.P. 54; 3rd Digest Supp.
- (5) *Foster's Case*, (1614), 11 Co. Rep. 56 b; 77 E.R. 1222; sub nom. *R. v. Foster*, 1 Roll. Rep. 91; 42 Digest 772, 1993.
- E (6) *Smith's Case*, (1670), 1 Mod. Rep. 44; 1 Vent. 66; 86 E.R. 719; sub nom. *Anon.*, T. Raym. 186; sub nom. *R. v. Lluellin*, 2 Keb. 635; sub nom. *R. v. Smith*, 1 Lev. 288; 41 Digest 48, 349.
- (7) *R. v. Plowright*, (1686), 3 Mod. Rep. 94; 2 Show. 458; 87 E.R. 60; 16 Digest 437, 3018.
- (8) *Grenville v. College of Physicians*, (1700), 12 Mod. Rep. 386 (88 E.R. 1398); sub nom. *Groenvelt v. Burnell*, Carth. 491 (90 E.R. 883); Holt, K.B. 184, 536 (90 E.R. 1000, 1195); 1 Ld. Raym. 454 (91 E.R. 1202); 1 Com. 76 (92 E.R. 967); 1 Salk. 144 (91 E.R. 134); 16 Digest 400, 2440.
- F (9) *R. v. Moreley*, *R. v. Osborne*, *R. v. Reeve*, *R. v. Norris*, (1760), 2 Burr. 1040; 1 Wm. Bl. 231; 97 E.R. 696; 16 Digest 436, 3014.
- G (10) *R. v. Jukes*, (1800), 8 Term Rep. 542; 101 E.R. 1536; 16 Digest 437, 3019.
- (11) *R. v. Cashibury Hundred JJ.*, (1823), 3 Dow. & Ry. K.B. 35; 1 Dow. & Ry. M.C. 485; 16 Digest 427, 2871.
- (12) *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, 2795.
- (13) *Taylor v. National Assistance Board*, ante, p. 183.
- H (14) *R. v. National Insurance Comr., Ex p. Timmis*, *R. v. National Insurance Comr., Ex p. Cox*, *R. v. National Insurance Comr., Ex p. James*, [1954] 3 All E.R. 292; [1955] 1 Q.B. 139; 3rd Digest Supp.
- (15) *R. v. Cheltenham Comrs.*, (1841), 1 Q.B. 467; 10 L.J.M.C. 99; 113 E.R. 1211; 16 Digest 443, 3087.
- I (16) *Ex p. Bradlaugh*, (1878), 3 Q.B.D. 509; 47 L.J.M.C. 105; 38 L.T. 680; 42 J.P. 583; 16 Digest 441, 3070.
- (17) *R. v. Gillyard*, (1848), 12 Q.B. 527; 17 L.J.M.C. 153; 11 L.T.O.S. 240; 12 J.P. 456; 116 E.R. 965; 16 Digest 443, 3088.
- (18) *Walsall Overseers v. London & North Western Ry. Co.*, (1878), 4 App. Cas. 30; 48 L.J.M.C. 65; 39 L.T. 453; 43 J.P. 108; 16 Digest 476, 3578.

Motion for an order of certiorari.

The applicant, Robert Gilmore, moved for an order of certiorari to remove into

the High Court and to quash a decision of a medical appeal tribunal, dated June 13, 1956, on the applicant's claim for disablement benefit under the National Insurance (Industrial Injuries) Act, 1946.

The facts appear in the judgment of DENNING, L.J.

D. J. Turner-Samuels for the applicant.

Rodger Winn for the respondents, the Ministry of Pensions and National Insurance and the medical appeal tribunal.

Cur. adv. vult.

Feb. 25. The following judgments were read.

DENNING, L.J.: This is an application by Robert Gilmore for an order of certiorari to remove into this court a decision of a medical appeal tribunal* for the purpose of quashing it. It involves the correct application of reg. 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948 No. 1372). Regulation 2 (5) deals with an injury to one of two "paired organs", as they are called, such as eyes, legs, and so forth. If a man with two good eyes loses the sight of one of them in an industrial accident, his disablement is assessed at thirty per cent.† If, however, a one-eyed man (who lost the sight of an eye many years ago) should lose the sight of his remaining good eye in an industrial accident, then reg. 2 (5) says that his disablement must be assessed as if the blindness in his bad eye was itself the result of losing his good eye. In other words, the blindness in both eyes is deemed to be due to the accident. His disablement is, therefore, to be assessed, not at thirty per cent., but at a hundred per cent.†

Now for the facts of this case. Some twenty years ago the applicant was injured in both eyes by lime burns. It made him almost blind in his right eye, but he had sufficient sight in his left eye to enable him to continue at his work as a blacksmith. Nineteen years later, in March, 1955, whilst he was at work, some ash blew out of the fire into his eyes. This made his left eye—the one on which he relied—a good deal worse than it had been before, so that he could no longer do his work as a blacksmith. He was nearly blind in both eyes. He claimed disablement benefit under the National Insurance (Industrial Injuries) Act, 1946. The first medical board on Oct. 2, 1955, made a provisional award under which they assessed the degree of disablement at a hundred per cent. The second medical board on Jan. 17, 1956, made a similar provisional award of a hundred per cent. A third medical board, however, on Mar. 6, 1956, found that, although his sight was still very bad, it was due to a pre-existing condition and was not due to the accident in March, 1955. They, therefore, made no disablement award at all. He appealed to the medical appeal tribunal, who asked a specialist to examine him. On May 16, 1956, the specialist gave his report. It was in favour of the workman. I will give the material parts of it:

"The right eye is densely scarred from the lime burns in 1936 and has no connection with the recent injury, except that being a blind eye he had no vision in reserve and was entirely dependent on the left eye. We have the definite evidence that from 1936 till 1955 he worked as a blacksmith (pick sharpener). He tells me that he actually performed the work himself and was not supervising. He certainly could not do this now with his present sight and so I feel satisfied that his sight was further markedly

* The questions arising under the National Insurance (Industrial Injuries) Acts, 1946 to 1954, which are to be determined by a medical appeal tribunal are set out in s. 36 (1) (c) of the National Insurance (Industrial Injuries) Act, 1946, as amended by the National Insurance (Industrial Injuries) Act, 1953, s. 8, Sch. 2, para. 2 (5).

† Under Sch. 1 to the regulations.

- A impaired as a result of his accident and hypopion ulcer. I should consider that his defective sight was aggravated by the injury on [Mar. 17, 1955] and that this aggravation will be permanent. In regard to prognosis it is too early to say. The graft at present is not transparent enough to give useful sight but it may improve or alternatively it may be possible to do a further graft with better results."
- B On June 13, 1956, the medical appeal tribunal gave their decision in these words:
- C "With reference to your claim for disablement benefit, the medical appeal tribunal which considered your case on June 11, 1956, decided that a loss of faculty has resulted from the industrial accident on Mar. 17, 1955. The extent of the disablement from the loss of faculty is to be assessed at twenty per cent. for the period from Apr. 15, 1956. This is a final assessment. The findings of the tribunal are summarised as follows: Hearing commenced de novo. The specialist, Mr. Arkle, states in his report of May 16, 1956: 'I consider that the defective sight was aggravated by the injury on [Mar. 17, 1955] and that this aggravation will be permanent'. Further treatment is said to be contemplated. [The applicant] had a pre-existing condition of corneal dystrophy hypopion ulcer of which the relationship to injury is doubtful. There remains, however, a possibility of aggravation by the relevant condition and we give [the applicant] the benefit of the doubt. We assess the aggravation at twenty per cent."
- E When the applicant received that decision, his advisers took the view that the medical appeal tribunal had failed to apply reg. 2 (5). The twenty per cent. represented only the aggravation to the left eye. It ignored the bad sight in the right eye which the regulation says is to be treated as the result of the injury to the left eye. The applicant's advisers first sought to get the matter put right by applying to a medical board for a review. They relied on s. 40 (1) of the National Insurance (Industrial Injuries) Act, 1946, which provides:
- F "Any decision . . . of a medical board or a medical appeal tribunal may be reviewed at any time by a medical board if satisfied by fresh evidence that the decision was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact . . ."
- G The medical board held that the case did not come within that provision for review. The applicant appealed to the medical appeal tribunal. On Dec. 10, 1956, the tribunal rejected his appeal on the ground that his contention was
- H "not fresh evidence or the non-disclosure of a material fact, but a submission that the tribunal (in their decision of June 13, 1956) had misdirected itself in a matter of law which is not a matter upon which a medical board can be expected to pronounce."
- I The applicant had thus exhausted all the statutory ways of correcting the decision of the medical appeal tribunal. He then sought redress from the Queen's courts. On Jan. 22, 1957, he moved the Divisional Court ex parte for leave to apply for an order for certiorari to quash the decision, but the court refused his request. On Jan. 28, 1957, he moved this court ex parte and we granted his request. We thought we ought to extend the usual time limit of six months because he had not been guilty of any delay in seeking redress. We also thought that there was some ground for thinking that there was an error on the face of the record.
- On Feb. 12, 1957, the application came on for hearing in this court. After the case was opened, counsel for the respondents, the Ministry of Pensions and

National Insurance and the medical appeal tribunal, informed us that he had carefully considered the matter with the responsible officers of the Ministry and as a result he conceded that the decision of the medical appeal tribunal of June 13, 1956, was erroneous in point of law. The Ministry, he said, were in some difficulty because the chairman of the tribunal had died: but it appeared that the tribunal had either overlooked reg. 2 (5) or had thought that on the merits (presumably because they doubted whether there was any aggravation at all due to the injury) twenty per cent. was a fair award. In either case the tribunal had gone wrong in law. The regulation makes it clear that, once they accepted aggravation to the left eye, they ought to assess the disablement, not only for the left eye, but also for the right eye. They were not at liberty to reduce the award because of their doubts on aggravation any more than a judge is at liberty to reduce damages because of his doubts on liability. We might perhaps have acted on counsel's concession and quashed the decision straightaway; but in the course of the discussion some points of very considerable importance emerged on which we took time to consider our judgment.

The first point is whether the error of the tribunal appears on the face of the record. It does not appear on the face of their written adjudication of June 13, 1956. There is not a word there about the right eye, or even the left eye for that matter; but the tribunal gave an extract from the specialist's report and thereby, I think, they made that report a part of the record. Just as a pleading is taken to incorporate every document referred to in it, so also does an adjudication. Once the specialist's report is read with the record, we have before us the full facts about the previous injury to the right eye and the subsequent injury to the left. These facts are sufficient to disclose the error in law: for it is then apparent that the award of twenty per cent. must be wrong. No reasonable person, who had proper regard to reg. 2 (5), could have come to such a conclusion. It is now settled that, when a tribunal comes to a conclusion which could not reasonably be entertained by them if they properly understood the relevant enactment, then they fall into error in point of law: see *Edwards v. Bairstow* (1) ([1955] 3 All E.R. 48). When the primary facts appear on the record, an error of this kind is sufficiently apparent for it to be regarded as an error on the face of the record such as to warrant the intervention of this court by certiorari.

I may add that, even if we had not been able to have recourse to the specialist's report, we would have been able to get the facts by ordering the tribunal to complete the record by finding the facts, as the regulations require them to. By reg. 13 (1) of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1299), it is enacted that:

"A tribunal shall in each case record their decision in writing . . . and shall include in such record . . . a statement of the reasons for their decision, including their findings on all questions of fact material to the decision."

It seems to me that the tribunal cannot, by failing to find the material facts, defeat an application for certiorari. The court has always had power to order an inferior tribunal to complete the record. ABBOTT, C.J., long ago gave very good reasons in this behalf. In *Williams v. Lord Bagot* (2) ((1824), 4 Dow. & Ry. K.B. at p. 315) he said:

"If an inferior court . . . send up an incomplete record, we may order them to complete it . . . If we are not to order, or allow the officers of the court below to make a perfect record, which unquestionably they are at liberty to do, it will be in their power, by making an imperfect record, to defeat a writ of error whenever it shall be brought. The power of doing that lies in their hands, unless we prevent it."

A Likewise a tribunal could defeat certiorari unless the courts could order them to complete or correct an imperfect record. So the courts have power to give such an order: see *R. v. Warnford* (3) ((1825), 5 Dow. & Ry. K.B. 489).

B The second point is the effect of s. 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, which provides that "any decision of a claim or question . . . shall be final". Do those words preclude the Court of Queen's Bench from issuing a certiorari to bring up the decision? This is a question which we did not discuss in *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (4) ([1952] 1 All E.R. 122), because it did not there arise. It does arise here, and on looking again into the old books I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal". It does not mean "without recourse to certiorari". It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final", certiorari can still issue for excess of jurisdiction or for error of law on the face of the record.

C SIR EDWARD COKE, C.J., started this train of authority when he said, in *Foster's Case* (5) ((1614), 11 Co. Rep. 56b at p. 64b), that the words of an Act of Parliament "shall not bind the King's Bench, because the pleas there are coram ipso Rege". KELYNGE, C.J., gave the train an impetus in 1670 in *Smith's Case* (6) ((1670), 1 Mod. Rep. 44; CALLIS ON SEWERS (4th Edn.) (1824) 342), when an order of the Commissioners of Sewers was brought before him. It was pointed out that the statute 13 Eliz. c. 9 enacted that they should not be compelled to certify or return their proceedings and "that they shall not be reversed but by other commissioners". KELYNGE, C.J., disposed of the objection by saying (1 Mod. Rep. at p. 45):

F "Yet it was never doubted, but that this court might question the legality of their orders notwithstanding: and you cannot oust the jurisdiction of this court without particular words in Acts of Parliament. There is no jurisdiction that is uncontrollable by this court."

G A few years later, in 1686, the Court of King's Bench had a case *R. v. Plowright* (7) ((1686), 3 Mod. Rep. 94), where the collectors of the tax on chimneys had distrained on the landlord of a cottage. The Act, 16 Car. 2 c. 3, said that "if any question shall arise about the taking of any distress, the same shall be heard and finally determined by one or more justices . . ." The justices made a determination which was erroneous in law on its face in that it did not state sufficient grounds for making the landlord liable. The court issued a certiorari to quash their determination and said (3 Mod. Rep. at p. 95):

H "The statute doth not mention any certiorari, which shows that the intention of the law-makers was, that a certiorari might be brought, otherwise they would have enacted, as they have done by several other statutes, that no certiorari shall lie. Therefore the meaning of the Act must be, that the determination of the justices of the peace shall be final in matters of fact only . . ."

I In the famous case, *Grenville v. College of Physicians* (8) ((1700), 12 Mod. Rep. 386; 1 Ld. Raym. 454), HOLT, C.J., gave the full weight of his authority to those decisions, especially mentioning (1 Ld. Raym. at p. 469) *Smith's Case* (6). In 1760 in *R. v. Moreley*, *R. v. Osborne*, *R. v. Reeve*, *R. v. Norris* (9) ((1760), 2 Burr. 1040), LORD MANSFIELD was faced with the Conventicle Act (22 Car. 2 c. 1), which said

"that no other court whatsoever shall intermeddle with any cause or

causes of appeal upon this Act: but they shall be finally determined in the quarter sessions only." A

Nevertheless, LORD MANSFIELD ordered certiorari to issue, saying (2 Burr. at p. 1042): "The jurisdiction of this court is not taken away, unless there be express words to take it away: this is a point settled".

In 1800, in *R. v. Jukes* (10) ((1800), 8 Term Rep. 542), a conviction by justices was erroneous on the face of the record, because it did not exclude a possible defence. When the defendant moved to have it quashed, the prosecutor objected (ibid., at p. 544): B

"that the defendant having elected to appeal to the sessions, the certiorari was in effect taken away by the Act [36 Geo. 3 c. 60], because it said that the determination of the session should be final." C

LORD KENYON, C.J., however, said (ibid.):

"That would be against all authority; for the certiorari being a beneficial writ for the subject, could not be taken away without express words . . ." D

JOSEPH CHITTY, commenting on this case, said the words "finally determine" merely prohibited a reinvestigation of the facts: see CHITTY'S GENERAL PRACTICE OF THE LAW, vol. 2, pp. 218, 219. Finally, in 1823, in *R. v. Cashiobury Hundred JJ.* (11) ((1823), 3 Dow. & Ry. K.B. 35), the Court of King's Bench in its golden age, presided over by ABBOTT, C.J., summed up the whole matter by saying that "certiorari always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by the statute . . ." E

It was, no doubt, that train of authority which LORD SUMNER had in mind when he said in *R. v. Nat Bell Liquors, Ltd.* (12) ([1922] 2 A.C. 128 at p. 159):

"Long before Jervis's Acts* statutes had been passed which created an inferior court, and declared its decisions to be 'final' and 'without appeal', and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the court to bring the proceedings before itself by certiorari." F

I venture, therefore, to use in this case the words which I used recently, in *Taylor v. National Assistance Board* (13) (ante 183, at p. 185), about declarations, with suitable variations to certiorari: G

"The remedy is not excluded by the fact that the determination of the board is by statute made 'final'. Parliament gives the impress of finality to the decisions of the board only on the condition that they are reached in accordance with the law . . ." H

In my opinion, therefore, notwithstanding the fact that the statute says that the decision of the medical appeal tribunal is to be final, it is open to this court to issue a certiorari to quash it for error of law on the face of the record. It would seem to follow that a decision of the National Insurance and Industrial Injuries Commissioners is also subject to supervision by certiorari (a point left open by the Divisional Court in *R. v. National Insurance Comr., Ex p. Timmis* (14), [1954] 3 All E.R. 292), but they are so well versed in the law and deservedly held in such high regard that it will be rare that they fall into error such as to need correction. I

* The Summary Jurisdiction Act, 1848, the Indictable Offences Act, 1848, and the Justices Protection Act, 1848, are sometimes referred to as Jervis's Acts.

- A In contrast to the word "final", I would like to say a word about the old statutes which used, in express words, to take away the remedy by certiorari by saying that the decision of the tribunal "shall not be removed by certiorari". Those statutes were passed chiefly between 1680 and 1848 in the days when the courts used certiorari too freely and quashed decisions for technical defects of form. In stopping this abuse the statutes proved very beneficial, but the court never allowed those statutes to be used as a cover for wrongdoing by tribunals. If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end. Despite express words taking away certiorari, therefore, it was held that certiorari would still lie if some of the members of the tribunal were disqualified from acting: see *R. v. Cheltenham Comrs.* (15) ((1841), 1 Q.B. 467 at p. 474), where LORD DENMAN, C.J., said:
- C "The statute cannot affect our right and duty to see justice executed . . ."
- So, also, if the tribunal exceeded its jurisdiction (see *Ex p. Bradlaugh* (16) (1878), 3 Q.B.D. 509), or if its decision was obtained by fraud (see *R. v. Gillyard* (17) (1848), 12 Q.B. 527), the courts would still grant certiorari. I do not pause to consider those cases further: for I am glad to notice that modern statutes never take away in express words the right to certiorari without substituting an analogous remedy. This is probably because the courts no longer use it to quash for technical defects, but only use it in case of a substantial miscarriage of justice. Parliament nowadays more often uses the word "final", or "final and conclusive" or some such words, which leave intact the control of the Queen's courts by certiorari.
- D

- E The value of this ancient writ of certiorari is well shown by the present case in which it is only by reason of it that a workman blinded at work obtains the industrial insurance benefit to which he is by law entitled, as now acknowledged on all hands. The order must issue to quash the declaration of the medical appeal tribunal of June 13, 1956. There is no need for a mandamus because the tribunal will, no doubt, consider the claim afresh and come to a right decision on it.

- F **ROMER, L.J.:** I agree. In my judgment, it would be deplorable if we were constrained to hold that the decision of a medical appeal tribunal, however wrong in law, and however obviously wrong, was immune from review by Her Majesty's courts. I cast no reflection whatever on tribunals such as that in the present case, and they do their work conscientiously and with efficiency. In the nature of things, however, these and similar inferior tribunals (and there are many of them
- G nowadays) are bound to go wrong from time to time in matters of law. Their members consist, in the main, of people who have devoted their lives to activities far removed from the study and practice of the law; and neither by training nor by experience can they be expected to have that knowledge of principles of construction which is so necessary for the proper understanding and application of the various statutes and regulations which often come before them. Injustice
- H may well result, and a sense of injustice is a grievous thing. I, therefore, think (and I have said as much before) that it is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law. Parliament, of course, can make them so; but it is clear from the authorities to which my brethren refer in their judgments (which I have had the advantage of reading in advance) that a legislative intention to do so is not sufficiently expressed by the mere provision that the decision of such and such a tribunal shall be "final".
- I I agree with, and desire to add nothing to, the judgments of my Lords on that subject. With regard to s. 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, however, I am clearly of opinion that the provision that "any decision of a claim or question as provided by the foregoing provisions of this section shall be final" means no more than that such decisions shall not be the subject of appeal or reference. This is shown by the opening words of the sub-section, "Except as provided by this Part [Part 3] of this Act or by the Family Allowances

Act, 1945 . . .” Part 3 of the National Insurance (Industrial Injuries) Act, 1946, contains specific provisions for appeals in certain prescribed cases* and the Family Allowances Act, 1945, provides, by s. 5, for references as therein mentioned to one or more referees. The object, therefore, of s. 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, was merely to indicate which decisions (to the exclusion of others) might be the subject of an appeal or reference; the sub-section is not concerned with, and is certainly not prohibiting, applications for orders for certiorari, which are neither appeals nor references. I, accordingly, agree with the order which my Lord has proposed.

PARKER, L.J.: In this case counsel for the applicant moves for an order of certiorari to bring up and quash a decision dated June 13, 1956, of a medical appeal tribunal on the ground that there is a manifest error of law on the face of the record. Counsel for the respondents concedes that such an error appears and does not oppose an order of certiorari. Before, however, making such an order, the court must be satisfied that it has jurisdiction to do so. That the tribunal erred in law is clear, and for the reasons given by my Lord I am satisfied that the error appears on the face of the record. The question, however, remains whether the court has jurisdiction to make the order.

The remedy by way of certiorari to quash the decision of an inferior tribunal for an error of law on the face of the record has been long established though sometimes overlooked: see *Walsall Overseers v. London & North Western Ry. Co.* (18) ((1878), 4 App. Cas. 30); *R. v. Northumberland Compensation Appeal Tribunal, Ex p. Shaw* (4) ([1951] 1 All E.R. 268), and, in the Court of Appeal ([1952] 1 All E.R. 122). It is an important jurisdiction, and, although, no doubt, Parliament has the power in any case to deprive the courts of this supervisory jurisdiction, it could, as I conceive the position, only do so by clear words. In the present case, unlike many others, the statute provides that the decision of the tribunal shall be final. Thus s. 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, provides:

“Except as provided by this Part of this Act . . . any decision of a claim or question as provided by the foregoing provisions of this section shall be final.”

As appears from the preceding sub-sections, decisions include decisions of medical appeal tribunals, which are, accordingly, final. It is to be observed that the decisions also include decisions of the Industrial Injuries Commissioner, and the effect of the corresponding provision in regard to the National Insurance Commissioner was specifically reserved in *R. v. National Insurance Comr., Ex p. Timmis* (14) ([1954] 3 All E.R. 292).

One thing is clear beyond doubt. The ordinary remedy by way of certiorari for lack of jurisdiction is not ousted by a statutory provision that the decision sought to be quashed is final. Indeed, that must be so, since a decision arrived at without jurisdiction is, in effect, a nullity. This, however, is not so where the remedy is invoked for error of law on the face of the decision. In such a case it cannot be said that the decision is a nullity. The error, “however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not”: see per LORD SUMNER in *R. v. Nat Bell Liquors, Ltd.* (12) ([1922] 2 A.C. 128 at p. 151). But is the statement that the decision shall be final sufficient to oust the remedy? There are many instances where a statute provides that a decision shall be “final”. Sometimes, as here, the statute provides that subject to a specific right of appeal the decision shall be final. In such a case it may be said that the expression “shall be final” is merely a pointer to the fact that there is no further appeal, and the remedy by way of certiorari is not by way of appeal. Since, however, appeal is the creature of statute the

* See s. 37 of the National Insurance (Industrial Injuries) Act, 1946.

A expression is strictly unnecessary. In other cases the expression is used in the statutes when no rights of appeal are provided. In such a case it could be said that the expression was of no effect unless it was intended to oust the remedy by way of certiorari. Be that as it may, I am satisfied that such an expression is not sufficient to oust this important and well-established jurisdiction of the courts.

B Not only is there no authority to the contrary but Parliament has, I think, long recognised that the expression does not have that effect. As LORD SUMNER points out in *R. v. Nat Bell Liquors, Ltd.* (12) ([1922] 2 A.C. at pp. 159, 160):

C "Long before Jervis's Acts* statutes had been passed which created an inferior court, and declared its decisions to be 'final' and 'without appeal', and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the court to bring the proceedings before itself by certiorari. There is no need to regard this as a conflict between the court and Parliament; on the contrary, the latter, by continuing to use the same language in subsequent enactments, accepted this interpretation, which is now clearly established and is applicable to Canadian legislation, both Dominion and Provincial, when regulating the rights of certiorari and of appeal in similar terms. The Summary Jurisdiction Act, 1848, was intended to produce and did produce its result by a simple change in procedure without unduly ousting the supervisory jurisdiction of the superior court."

D Further, it is to be observed that the analogous remedy of setting aside the award of an arbitrator for an error of law on the face of the award is available even though the submission is, by s. 16 of the Arbitration Act, 1950, deemed to contain a provision that the award is final. Accordingly, although the matter has not been fully argued, I am satisfied that this court has jurisdiction in the present case to grant the order and that it should be made. No question of discretion arises since the applicant is clearly a party aggrieved.

F *Order of certiorari.*

Solicitors: *Gaster & Turner*, agents for *I. E. Geffen*, Durham (for the applicant); *Solicitor, Ministry of Pensions & National Insurance*.

[Reported by B. L. CHARLES, ESQ., Barrister-at-Law.]

* For the reference to these Acts, see footnote p. 802, ante.

COUNTY LABORATORIES, LTD. v. J. MINDEL, LTD.

[CHANCERY DIVISION (Harman, J.), March 8, 1957.]

Restrictive Trade Practices—Condition for price maintenance—Injunction against sale by retailer below fixed price—Whether goods acquired with notice of the condition—Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2 c. 68), s. 25 (1), (4).

After s. 25 of the Restrictive Trade Practices Act, 1956, came into force on Nov. 2, 1956, the plaintiffs stated on their price lists that goods marketed by them were sold subject to observance on resale of the fixed retail prices published in their current price list. The defendants, being aware of this condition, purchased from a wholesaler an article sold by the plaintiffs and sold it at less than the fixed retail price. The defendants did not know and did not inquire whether the article was sold by the plaintiffs before or after Nov. 2, 1956. The plaintiffs, however, were able to ascertain by a secret mark on the article that it was marketed after Nov. 1, 1956. They claimed an injunction restraining the defendants from selling at less than the fixed retail price goods marketed by the plaintiffs, relying on s. 25 (1), (4), of the Act of 1956* by which, on proof that goods sold by a supplier subject to a condition as to price have been resold in breach of the condition by a person who acquired them with notice of the condition, an injunction may be granted against breach of the condition by the person so acquiring the goods.

Held: an interlocutory injunction would not be granted because it had not been proved that the defendants, when they acquired the article, had knowledge that that particular article was subject to the resale price condition, since they did not know whether the article was sold by the plaintiffs before or after s. 25 of the Act of 1956 came into operation.

[Editorial Note. Part 2 of the Restrictive Trade Practices Act, 1956, which includes s. 25, came into operation on Nov. 2, 1956, by virtue of s. 27 of the Act.

As to the equitable doctrine of restrictive covenants not applying to chattels, other than ships, see 14 HALSBURY'S LAWS (3rd Edn.) 561, para. 1045, note (r); and for cases on the subject of resale price maintenance agreements not binding subsequent purchasers, see 39 DIGEST 526, 527, 1403-1409.]

Cases referred to:

- (1) *Tulk v. Moxhay*, (1848), 2 Ph. 774; 18 L.J. Ch. 83; 13 L.T.O.S. 21; 41 E.R. 1143; 40 Digest 313, 2667.
- (2) *Greer v. Downs Supply Co.*, [1927] 2 K.B. 28; 96 L.J.K.B. 534; 137 L.T. 174; Digest Supp.

Motion.

This was a motion by the plaintiffs to restrain the defendants until judgment or further order from reselling by their servants or agents or otherwise howsoever any goods which were particularised in the plaintiffs' current price list and which

* Section 25 of the Restrictive Trade Practices Act, 1956, provides: "(1) Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold, either generally or by or to a specified class or person, that condition may, subject to the provisions of this section, be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto.

"(4) Without prejudice to any other relief which may be granted in proceedings against any person in respect of a breach or apprehended breach of a condition which is enforceable against him by virtue of this section, the court may, if it thinks fit, upon proof that goods sold by the plaintiff have been resold by the defendant in breach of any such condition, grant an injunction restraining the defendant from reselling in breach of any such condition any goods already sold or thereafter to be sold by the plaintiff, whether of the same description as the goods proved to have been resold as aforesaid or of any other description."

A had been sold by the plaintiffs subject to the condition, of which the defendants had notice, that the fixed retail prices published in the said price list should be observed, at prices other than the fixed retail prices, subject to the provisions of s. 25 (2)* of the Restrictive Trade Practices Act, 1956.

Charles Russell, Q.C., and P. J. S. Bevan for the plaintiffs.

B *G. T. Aldous, Q.C., and C. Lawson for the defendants.*

HARMAN, J.: This is an application by the plaintiffs to enforce a novel provision contained in s. 25 of the Restrictive Trade Practices Act, 1956. That section seeks to reverse the law as it stood before and to make restrictive conditions run with chattels. In certain cases restrictive conditions run with land, but this provision extends that doctrine to chattels. It is necessary that the persons taking a chattel, being ex concessis not persons in privity with the plaintiff, should have notice; and I do not think that the doctrine of *Tulk v. Moxhay* (1) ((1848), 2 Ph. 774), can apply to sales of chattels. Taking with notice means, I think, "taking with express knowledge", and not being put on inquiry and, therefore, being fixed with what would have been ascertained if the inquiry had been pushed to its reasonable limit. The case cited to me by D counsel for the defendants, *Greer v. Downs Supply Co.* (2) ([1927] 2 K.B. 28 at p. 35), seems to show that the courts have refused to apply that doctrine to traders and trading matters.

The defendants are, I am told, well known cut-price retailers and, among other things which they retail at a cut price, is one of the plaintiffs' products, a preparation called Brylcreem. The defendants have known well enough at E all material times as far as this motion is concerned that in and since November, 1956, when s. 25 came into force, the plaintiffs have had issued a price list which draws attention to the new Act and says:

"All goods marketed by us are sold subject to observance of the fixed retail prices published in our current price list."

F It has been proved that the defendants knew of this document and, therefore, were perfectly well aware that the fixed retail price which they must observe, or which persons marketing the plaintiffs' goods must observe, was 2s. 10d. Nevertheless they sold this article at 2s. 6d., and it is said that they have committed a breach of the provisions of the statute. Their answer is that they have done no such thing. They say: "We quite agree that we know that all your goods marketed since November last were subject to this condition. You told us so; you sent us a price list, and there has been an interview. But we do not know in this particular instance that this particular pot was sold by you or that it left your factory after November, 1956. For all we know, it had left it in October". To that the plaintiffs retort: "As a matter of fact, the preparation was not put into this particular pot until February, 1957, so that that cannot have been the case". The defendants answer: "You know that, but we do not. The mark by which you tell it is a secret mark, unknown to us, and how are we to know how old or how new were the stocks of the wholesaler from whom we bought". It is, therefore, said: "Although the goods were acquired subsequently to the sending out of the notice to us, we had no express notice of the condition attached, because there was nothing to show us the date when the I pot of cream was filled".

I observe that on the front of the list of prices it is said:

"Acceptance of the goods by a wholesaler or retailer shall be deemed agreement by that trader to notify any customer to whom he sells other than by retail of the above conditions".

* Section 25 (2) provides that in respect of certain resales the condition as to fixed retail prices shall not be enforceable by virtue of that section.

In other words, the persons to whom, or the firms to whom, the plaintiffs sold were under an obligation to pass that information on, and so provide the necessary notice which brings s. 25 into operation. Whether that was done in this case I do not know; nor do the plaintiffs know. It may be that, when this action comes to trial, by means of discovery or interrogatories, it will be possible to find out; it may be possible to prove that such a notice was or was not given. All I can say at the present moment is that that information is missing.

Counsel for the plaintiffs said that, if s. 25 were construed as the defendants would have it construed, it would make nonsense of the Act. I have heard that plea before, and I am not at all impressed by it; I do not believe it to be true. It would be perfectly possible for manufacturers to show on their preparations that they were made after or before such and such a date; and, at any rate, the passage of time will cure that particular defect, if defect there be. But I observe that s. 25 limits the freedom of trade, and, therefore, although I am bound to give to s. 25 that effect which its language expresses, I am not prepared to go beyond that so as to produce an effect which the express language of s. 25 does not warrant. "Notice" in my opinion means knowledge, and for the purposes of this motion I do not think that the plaintiffs have satisfied the court that the defendants had notice that this particular jar of Brylcreem was sold subject to the condition, although they had notice no doubt of the existence of the condition, in that any articles put out subsequently to it were subject to it. They had not, nevertheless, notice that the original sale was necessarily subsequent to the notice, and I think that they were entitled not to ask anything further, if that is what they chose to do.

I am dealing with this on an interlocutory motion and, quite a different result may appear at the trial, when more is known; but, as at present advised, I do not think that the plaintiffs have proved their case, and I refuse their motion.

Motion refused.

Solicitors: *McKenna & Co.* (for the plaintiffs); *Thornton, Lynne & Lawson* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

CHARTER v. SULLIVAN.

[COURT OF APPEAL (Jenkins, Hodson and Sellers, L.J.J.), February 5, 6, 25, 1957.]

Contract—Breach—Damages—Measure—Sale of motor car—Repudiation by purchaser—Seller's resale to another purchaser at same price—Seller able to find purchaser for every such car that he could get from manufacturers—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50 (2), (3).

The plaintiff, a motor car dealer, agreed to sell a Hillman Minx car to the defendant for £773 17s. The retail price of such cars was fixed by the manufacturers. Subsequently he received a letter from the defendant refusing to complete the purchase, but seven or ten days later he resold the car to another purchaser at the same price. He brought an action for damages for breach of contract against the defendant, claiming as damages the loss of profit of £97 15s., which he would have made if he had completed the sale to the defendant in addition to selling a similar car to the second purchaser. At the trial the plaintiff's sales manager gave evidence that he was "certain we would have sold [the second purchaser] another Hillman Minx if not this one" and "if defendant had taken car we would have ordered one from stock; it would have taken a week to ten days to get one. Can sell all Hillman Minx we can get," and his evidence was accepted by the judge.

Held: the plaintiff was entitled to nominal damages of 40s. only, since the measure of damages was that enacted by s. 50 (2) of the Sale of Goods Act, 1893, viz., the loss directly and naturally resulting from the breach of contract, and the plaintiff had not proved a loss of profit, for, on the evidence, he had sold the same number of Hillman Minx cars and made the same profit as he would have done if the defendant had carried out his contract.

W. L. Thompson, Ltd. v. R. Robinson (Gunmakers), Ltd. ([1955] 1 All E.R. 154) distinguished.

Per JENKINS, L.J.: I doubt if there can be an available market for particular goods within s. 50 (3) of the Sale of Goods Act, 1893, unless those goods are available for sale in the market at the market or current price, i.e., a price fixed by reference to supply and demand as the price at which a purchaser for the goods in question can be found (see p. 813, letter I, post).

Appeal allowed.

[As to damages for non-acceptance of goods agreed to be sold, see 29 HALSBURY'S LAWS (2nd Edn.) 191, para. 256; and for cases on the subject, see 39 DIGEST 657, 658, 2501, 2502.

As to the measure of damages on a breach of contract for goods to be sold, see 29 HALSBURY'S LAWS (2nd Edn.) 194-198, paras. 260, 261, 262; and for cases on the subject, see 39 DIGEST 674, 2600 et seq.

For the Sale of Goods Act, 1893, s. 50 (2), (3), see 22 HALSBURY'S STATUTES (2nd Edn.) 1013.]

Cases referred to:

- (1) *Thompson (W. L.), Ltd. v. Robinson (R.) (Gunmakers), Ltd.*, [1955] 1 All E.R. 154; [1955] Ch. 177; 3rd Digest Supp.
- (2) *Dunkirk Colliery Co. v. Lever*, (1878), 9 Ch.D. 20; *subsequent proceedings*, (1879), 41 L.T. 633; *on appeal* H.L. sub nom., *Ellis Lever & Co. v. Dunkirk Colliery Co.*, (1880), 43 L.T. 706; 17 Digest (Repl.) 108, 225.
- (3) *Marshall & Co. v. Nicoll & Son*, 1919 S.C. (H.L.) 129; 56 Sc. L.R. 615; 39 Digest 674, 2600.
- (4) *Re Vic Mill, Ltd.*, [1913] 1 Ch. 465; 82 L.J.Ch. 251; 108 L.T. 444; 39 Digest 658, 2502.

Appeal.

The defendant appealed against an order of His Honour JUDGE RAWLINS in Aldershot County Court, made on Oct. 16, 1956, giving judgment for the plaintiff for the sum of £97 15s. and costs on scale 4. The defendant's grounds of appeal were: (i) the plaintiff's claim against the defendant was for £97 15s. in respect of the defendant's failure to perform a contract to purchase a Hillman Minx motor car from the plaintiff for the sum of £773 17s., on which the plaintiff would have made a profit of £97 15s.; (ii) the true measure of the plaintiff's damage was the difference between the market value of the car and its contract price, and the judge was wrong in law in holding the alleged loss of profit to be the measure of damage; (iii) the judge was wrong in law in holding that the plaintiff had suffered any damage, because the plaintiff's own evidence was that he had shortly afterwards resold the car to a Mr. Wigley for the same sum of £773 17s. and made the same profit thereon.

W. D. Collard for the defendant.

G. T. Aldous, Q.C., and S. J. Waldman for the plaintiff.

Cur. adv. vult.

Feb. 25. The following judgments were read.

JENKINS, L.J.: This is an appeal by the defendant in the action, Ernest Benson Sullivan, from a judgment given by His Honour JUDGE RAWLINS at Aldershot County Court on Oct. 16, 1956, whereby the learned judge awarded the plaintiff, Henry Alec Charter (who is a motor car dealer) £97 15s. damages against the defendant for breach of a contract for the sale by the plaintiff to the defendant of a Hillman Minx motor car. In his defence and at the trial of the action the defendant disputed the formation of any concluded contract for the sale to him by the plaintiff of the car in question, but on this issue the learned judge held against the defendant that a concluded contract was proved. From that pure finding of fact there is no appeal, and the sole issue now before this court concerns the measure of damages.

The contract which the learned judge held proved was entered into on June 29 or 30, 1956, when the defendant called at the plaintiff's showrooms and agreed to buy a new Hillman Minx de luxe saloon motor car which the plaintiff had in stock, together with extras in the shape of a heater and wheel discs, at a total price of £773 17s. At this price the sale, if completed, would have given the plaintiff a profit of £97 15s., of which £90 2s. 6d. was attributable to the car and the balance to the extras. A term of the bargain was that the plaintiff was to take in part exchange at the price of £350 a Commer van belonging to the defendant. On or about July 2, 1956, the defendant found that another dealer would be prepared to give him (as he thought) better terms, and on July 5, 1956, he wrote to the plaintiff a letter in which he refused to take the car. Some seven or ten days later the plaintiff resold the car to another purchaser, a Mr. Wigley, for the same price as the defendant had agreed to pay, namely, £773 17s., including the extras which had been fitted at the defendant's request.

The Hillman Minx car is a product of the motor manufacturing organisation known as the Rootes Group, and the plaintiff is an area dealer for this organisation, covering the North Hampshire area. In accordance with what is now a usual practice in the trade, the retail price at which these cars may be sold is fixed by the manufacturers, and it follows that (subject to any revision by the manufacturers of the wholesale or permitted retail price which is not in question here) the profit realisable by a dealer on the sale of a new car of any given model (as in the present case a Hillman Minx de luxe saloon) remains constant.

No point was made on either side of the fact that the defendant was to give another vehicle in part exchange, nor was any distinction drawn between the car itself and the extra items (a relatively small matter). The sale to the

A plaintiff can therefore be treated wholly as a sale for cash; and, although different considerations might apply to the extras as compared with the car itself, I propose for simplicity to treat £773 17s. as the fixed retail price simply of the car as supplied by the manufacturers and £97 15s. as the profit resulting from a sale of the car at that price. This indeed was the footing on which the case was argued before us.

B I have now, I think, sufficiently stated what I take to be the undisputed facts. Passing over at this stage certain evidence bearing on the state of the plaintiff's business in cars of the relevant description, and the effect (if any) on that business of the defendant's rejection of the car he agreed to buy, which was the subject of some controversy at the hearing before us, and to which I will later revert*, I turn now to consider what, on the undisputed facts of the case, is in the eye
C of the law the true measure of the damages, if any, over and above merely nominal damages, which the plaintiff has suffered through the defendant's failure to take and pay for the car he agreed to buy. Consideration of this question must inevitably begin with a reference to s. 50 of the Sale of Goods Act, 1893:

D “ (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

“ (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

E “ (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.”

F Counsel for the defendant argued that in the present case there was an available market for Hillman Minx de luxe saloon cars within the meaning of s. 50 (3) of the Act, and accordingly that the measure of damages ought, in accordance with the *prima facie* rule laid down by that sub-section, to be ascertained by the difference between the contract price and the market or current price at the time of the defendant's refusal to perform his contract. The result of this argument, if accepted, would be that the plaintiff could claim no more than nominal damages, because the market or current price could only be the fixed retail price, which was necessarily likewise the price at which he sold to the defendant and resold to Mr. Wigley.

G The plaintiff, however, is a motor car dealer whose trade for the present purpose can be described as consisting in the purchase of recurrent supplies of cars of the relevant description from the manufacturers, and selling the cars so obtained, or as many of them as he can, at the fixed retail price. He thus
H receives, on each sale that he is able to effect, the predetermined profit allowed by the fixed retail price, and it is obviously in his interest to sell as many cars as he can obtain from the manufacturers. The number of sales that he can effect, and consequently the amount of profit which he makes, will be governed, according to the state of trade, either by the number of cars that he is able to obtain from the manufacturers, or by the number of purchasers whom he is
I able to find. In the former case demand exceeds supply, so that the default of one purchaser involves him in no loss, for he sells the same number of cars as he would have sold if that purchaser had not defaulted. In the latter case supply exceeds demand, so that the default of one purchaser may be said to have lost him one sale.

Accordingly, it seems to me that, even if there was within the meaning of s. 50 (3) an available market for cars of the description in question, and even

* See p. 814, letters C to G, post.

if the fixed retail price was the market or current price within the meaning of the same sub-section, the prima facie rule which it prescribes should be rejected in favour of the general rule laid down by sub-s. (2); for it does not by any means necessarily follow that, because the plaintiff sold at the fixed retail price to Mr. Wigley the car which the defendant had agreed to buy at the self-same fixed retail price, but refused to take, therefore the plaintiff suffered no "loss directly and naturally resulting, in the ordinary course of events" from the defendant's breach of contract.

This makes it strictly unnecessary to decide whether there was in the present case an available market for cars of the description in question within the meaning of s. 50 (3). But I would find it difficult to hold that there was. Given default by some purchaser of one of his cars of the relevant description, the plaintiff's only alternative mode of disposal would be to sell it at the fixed retail price to some other purchaser. He could endeavour to find another purchaser by displaying the car in his saleroom, circularising or canvassing old customers or the public at large, and advertising by posters or in newspapers. The car would obviously be of interest to retail customers only (i.e., the car-using public as distinct from the trade) and any purchaser he might succeed in finding would necessarily have to be a purchaser at the fixed retail price. At that price there might be no takers, in which case the plaintiff would be left with the car on his hands. Section 50 (3) seems to me to postulate a market in which there is a market or current price, i.e., a price fixed by supply and demand at which (be it more or less than the contract price) a purchaser can be found. If the only price at which a car can be sold is the fixed retail price and no purchaser can be found at that price, I do not think it can reasonably be said that there is a market or current price or that there is an available market. If the state of the trade were such that the plaintiff could sell at the fixed retail price all the cars that he could get, so that the defendant's default did not result in the plaintiff effecting one sale less than he would otherwise have effected, it may well be that the plaintiff could not make out his claim to anything more than nominal damages. I am, however, inclined to think that this would not be on account of the necessary equality of the contract price and the fixed retail price at which alone the car could be sold, taken for the present purpose as the market or current price within the meaning of s. 50 (3), but because on an application of the general principle laid down by s. 50 (2) the plaintiff would be found to have suffered no damage.

In *W. L. Thompson, Ltd. v. R. Robinson (Gunmakers), Ltd.* (1) ([1955] 1 All E.R. 154) UPJOHN, J., had before him a claim for damages in a case resembling the present case to the extent that the damages were claimed in respect of the defendants' refusal to perform a contract with the plaintiffs for the purchase from the plaintiffs of a car (in that instance a Standard Vanguard car) which, like the car in the present case, could only be sold by the plaintiffs at a fixed retail price. It is, however, important to note that that case to which I am now referring proceeded on certain admissions, including an admission to the effect that in the relevant district at the date of the contract (which was also the date of the breach) (*ibid.*, at p. 156):

"... there was no shortage of Vanguard models to meet all immediate demands, at any rate in the locality",

which I take to mean (in effect) that the supply of such cars exceeded the demand. In these circumstances the plaintiffs by agreement with their suppliers rescinded their contract with them, and returned the car. In the ensuing action the plaintiffs claimed from the defendants damages amounting to the profit the plaintiffs would have made on the sale of the car to the defendants if the defendants had duly completed their purchase of it, and the learned judge held them entitled to those damages. The defendants raised the same argument as has been raised by the defendant in the present case, viz., that there was an

A available market for a car of the kind in question, within the meaning of s. 50 (3), that there was a market or current price in the shape of the fixed retail price, and that, as the fixed retail price was the same as the contract price, the plaintiffs had suffered no damage. In the course of his judgment, UPJOHN, J., referred to JAMES, L.J.'s definition of a market in *Dunkirk Colliery Co. v. Lever* (2) (1878), 9 Ch.D. 20 at pp. 24 and 25). JAMES, L.J., said (*ibid.*, at p. 24):

B "Under those circumstances the only thing that we can do is to send it back to the referee with an intimation that we are of opinion upon the facts (agreeing with the Master of the Rolls in that respect), that the facts do not warrant the application of the principle mentioned in the award, namely, that there was what may be properly called a market. What I understand by a market in such a case as this is, that when the defendant refused to take the three hundred tons the first week or the first month, the plaintiffs might have sent it in waggons somewhere else, where they could sell it, just as they sell corn on the Exchange, or cotton at Liverpool: that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place. That is my notion of the meaning of a market under those circumstances."

C UPJOHN, J., also referred to the Scottish case of *Marshall & Co. v. Nicoll & Son* (3) (1919 S.C. (H.L.) 129), where it was held in the Court of Session that there was an available market within the meaning of s. 51 (3) of the Sale of Goods Act, 1893, for annealed steel sheets, although they were not kept in stock and were not purchasable in the open market. In the House of Lords the decision was affirmed but their Lordships would seem to have been equally divided on the question whether there was an available market for the goods. In this state of the authorities, the learned judge felt himself bound by *Dunkirk Colliery Co. v. Lever* (2), and held (in effect) that JAMES, L.J.'s definition in that case prevented him from holding that in the case then before him there was an available market within the meaning of s. 50 (3).

F UPJOHN, J., went on to propound a more extended meaning for the phrase "available market" in these terms ([1955] 1 All E.R. at p. 159):

G "Had the matter been *res integra*, I think I should have found that an 'available market' merely means that the situation in the particular trade in the particular area was such that the particular goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted the goods in question could readily be disposed of."

He went on to say (in effect) that in the case then before him there was no available market because the supply of Vanguard cars at the material time exceeded the demand.

H I doubt if JAMES, L.J.'s observations in *Dunkirk Colliery Co. v. Lever* (2) should be literally applied as an exhaustive definition of an available market in all cases. On the other hand, I do not find UPJOHN, J.'s definition entirely satisfactory. I will not, however, attempt to improve on it, but will content myself with the negative proposition that I doubt if there can be an available market for particular goods in any sense relevant to s. 50 (3) of the Sale of Goods Act, 1893, unless those goods are available for sale in the market at the market or current price in the sense of the price, whatever it may be, fixed by reference to supply and demand as the price at which a purchaser for the goods in question can be found, be it greater or less than or equal to the contract price. The language of s. 50 (3) seems to me to postulate that in the cases to which it applies there will, or may, be a difference between the contract price and the market or current price, which cannot be so where the goods can only be sold at a fixed retail price. Accordingly I am of opinion that, whether there

was in this case "an available market" within the meaning of s. 50 (3) or not, it is a case in which s. 50 (2) should be applied to the exclusion of s. 50 (3).

It remains therefore to ascertain the loss (if any) "naturally resulting, in the ordinary course of events" from the defendant's breach of contract, and the measure of that loss must, in my opinion, be the amount (if any) of the profit he has lost by reason of the defendant's failure to take and pay for the car he agreed to buy. This accords with the view taken by UPJOHN, J., in *W. L. Thompson, Ltd. v. R. Robinson (Gunmakers), Ltd.* (1), and also with the principle stated in *Re Vic Mill, Ltd.* (4) ([1913] 1 Ch. 465), which UPJOHN, J., followed and applied.

I should next refer to the evidence of which I deferred consideration earlier in this judgment. The plaintiff's sales manager, a Mr. Winter, gave evidence, from the judge's abbreviated note of which I extract the following. From examination-in-chief:

"I'm certain we would have sold this purchaser [Mr. Wigley] another Hillman Minx if not this one"

(i.e., the one the defendant had rejected). From cross-examination:

"No other Hillman Minx in stock I think. If defendant had taken car we would have ordered one from stock—it would have taken a week to ten days to get one. Can sell all Hillman Minx we can get. We are Rootes Group area dealers for this area. We have lost sale of a car—sold same price to Wigley."

I think "from stock" must mean from the manufacturers' stock.

In the brief record of his judgment with which we have been provided, the learned judge in terms expressed his acceptance of Mr. Winter's evidence as to selling Mr. Wigley "another Hillman Minx if not this one", and as to being able to order one from stock and obtain it in seven to ten days; but he made no reference to what appears to me to be the vital passage in Mr. Winter's evidence: "Can sell all the Hillman Minx we can get". Notwithstanding the submission to the contrary of counsel for the plaintiff I think we should assume that the learned judge accepted as accurate the plaintiff's sales manager's own description of the state of the plaintiff's business in Hillman Minx cars. Moreover, I think we should take that description as signifying, according to the ordinary meaning of the language used, that the plaintiff could always find purchasers for all the Hillman Minx cars he was able to get.

Counsel for the defendant objected to Mr. Winter's statement to the effect that he was certain that he could have sold another Hillman Minx to Mr. Wigley if Mr. Wigley had not bought the one which the defendant had rejected. He said that this was mere hearsay and opinion and inadmissible as evidence, and that Mr. Wigley should have been called to prove his intention. I think this is hypercritical. The learned judge described Mr. Winter as a very experienced salesman and expressly accepted this part of his evidence. I therefore see no reason to doubt the correctness of Mr. Winter's assessment of Mr. Wigley's intention, and I accept it accordingly. I have not overlooked the evidence given by the plaintiff's storeman, Mr. Harold Charles Charter, and noted by the learned judge as "Delivery of Hillman Minx not easy at this time—might have to wait some time", but I attach no importance to it because, as will hereafter appear, the judge preferred the evidence of Mr. Winter.

The matter therefore stands thus. If the defendant had duly performed his bargain, the plaintiff would have made on that transaction a profit of £97 15s. The calculation accordingly starts with a loss of profit through the defendant's default, of £97 15s. That loss was not cancelled or reduced by the sale of the same car to Mr. Wigley, for, if the defendant had duly taken and paid for the car which he agreed to buy, the plaintiff could have sold another car to Mr. Wigley, in which case there would have been two sales and two profits; see *Re Vic Mill*,

A *Ltd.* (4) and particularly per HAMILTON, L.J. ([1913] 1 Ch. at p. 473, and per BUCKLEY, L.J., at p. 474). The matter does not rest there. The plaintiff must further show that the sum representing the profit which he would have made if the defendant had performed his contract has in fact been lost. Here I think he fails, in view of Mr. Winter's evidence to the effect that the plaintiff could sell all the Hillman Minx cars he could get.

B I have already expressed my opinion as to the meaning of this statement. It comes, I think, to this, that, according to the plaintiff's own sales manager, the state of trade was such that the plaintiff could always find a purchaser for every Hillman Minx car he could get from the manufacturers; and if that is right it inevitably follows that he sold the same number of cars and made the same number of fixed profits as he would have sold and made if the defendant had duly carried out his bargain.

C UPJOHN, J.'s decision in favour of the plaintiff dealers in *Thompson v. Robinson* (1) was essentially based on the admitted fact that the supply of the cars in question exceeded the demand, and his judgment leaves no room for doubt that, if the demand had exceeded the supply, his decision would have been the other way.

D In dealing with the present case we were put in some difficulty by the defendant's failure to perform the duty laid on him by R.S.C., Ord. 58, r. 20 (4), of obtaining from the judge and furnishing to this court a copy of the judge's note made under s. 108 of the County Courts Act, 1934, of the question of law involved in the present appeal. We accepted as the best available substitute a short note of the arguments and judgment taken by the plaintiff's solicitor and submitted by him to the learned judge, who signed it on Nov. 9, 1956, with the note "This appears to me accurately to represent my findings". The relevant part of this note reads thus:

F "It was [the defendant's solicitor's] contention that because the car had been sold to Mr. Wigley within seven to ten days the plaintiff had lost no profit. He further submitted that the plaintiff had not shown that there was no [the note here says an but clearly 'no' was intended] available market to bring the case within *Thompson v. Robinson* (1). Mr. Winter has said it would have taken a week to ten days to obtain another and Mr. Charter had said delivery of Hillman Minx not easy at that time. [The defendant's solicitor] stated further that the plaintiff had pleaded that he had lost the profit on this particular car but in fact the car had been sold. I applied for leave to amend the particulars of claim by deleting the words 'the said' and adding 'a second'. The [defendant's solicitor] raised no objection to the amendment and the judge granted leave. I was not called upon by the judge to reply. In a very short judgment His Honour stated he was satisfied the plaintiff had made out his case, and that the case came within the decision in *Thompson v. Robinson* (1) . . . He accepted the evidence of Mr. Winter whom he considered to be a very experienced salesman when he said he had some difficulty in getting Mr. Wigley to take the car, because it had already been registered, and that if he had not sold this car to Mr. Wigley, he would have sold another one to him. Mr. Charter did say that delivery of Hillman Minx was not easy at this time but he was only a storeman employed by the plaintiff and the delivery position of cars was not within his knowledge—he accepted what Mr. Winter had said that he could have ordered one from stock and obtained it in a week to ten days."

H I It will be seen that this note of the judgment contains no reference to Mr. Winter's statement: "Can sell all Hillman Minx we can get". Counsel for the plaintiff submitted that, if the plaintiff's solicitor's note signed by the judge was to do duty as the judge's note, we must deal with the case exclusively on the findings stated in that note, and that on those findings there was evidence on which the judge could properly hold that the plaintiff had suffered damage

in the shape of his loss of the profit he would have made on the car which he could have obtained from the manufacturers and sold to Mr. Wigley if the defendant had duly taken the car he agreed to buy but which owing to his default was sold to Mr. Wigley. But, as I have already said, I think that we must treat as part of the evidence before the learned judge, and accepted by him as true, Mr. Winter's statement "Can sell all Hillman Minx we can get". It is clear that the judge accepted Mr. Winter's evidence as a whole, and he said nothing to suggest that he rejected this part of it. As appears from what I have said above, I think that the meaning of Mr. Winter's statement is plain. It is the evidence of the plaintiff's own sales manager as to the state of the trade, and if accepted as accurate, as I think that it should be accepted, it seems to me completely destructive of the plaintiff's case on damages.

The materials before the court leave a good deal to be desired. The parties were no doubt pre-occupied with the issue of contract or no contract, and the argument in regard to damages based on *Thompson v. Robinson* (1) was perhaps something of an afterthought, as is suggested by the belated (and as I think unnecessary) amendment of the points of claim by substituting "a second motor car" for "the said motor car" in the first item of damage claimed. But it was for the plaintiff to prove that he did in fact sustain the loss of profit claimed, and this to my mind he wholly failed to do. The mere assertion by Mr. Winter, "We have lost sale of a car" is clearly not enough, particularly when read in conjunction with his "can sell all Hillman Minx we can get". Accordingly there was in my view no evidence on which the learned judge could properly hold that the plaintiff had suffered the damage claimed, and I would allow this appeal.

HODSON, L.J.: I agree that the appeal should be allowed and with the order proposed on the ground that the plaintiff, respondent to this appeal, has failed to prove a loss beyond that which has been recouped by the resale of the motor car in question.

SELLERS, L.J.: The judgment from which the defendant, the buyer, appeals found and established that on or about June 29 or 30, 1956, the defendant agreed to buy from the plaintiff a new Hillman Minx saloon motor car and that on July 5, 1956, when the car was licensed and ready for delivery as arranged, the defendant repudiated the agreement and refused to take delivery because he had found that he could get a better bargain elsewhere for his Commer van, which was to be taken in part payment of the price. The only question on the appeal is as to the damages the plaintiff is entitled to receive for the non-acceptance of the car by the defendant. The plaintiff claimed the loss of profit on the sale. The defendant denied that there had been in the circumstances any profit lost and alleged that nominal damages only were recoverable.

The car rejected by the defendant was put back into the plaintiff's showroom and was sold within a week or ten days to another customer at the same fixed retail price. This effective sale resulted in the normal profit to the plaintiff, but he claims that he has nevertheless lost a profit, for he would have sold and delivered, but for the defendant's default, two cars instead of one and would have made two profits instead of one. Having regard to the nature of this claim singularly little evidence was directed to the issue.

The plaintiff was the area dealer for the Rootes Group, who manufacture the Hillman Minx cars, and he was required to sell them at not less than their fixed price for a retail sale. He had only one Hillman Minx in stock, but, if the defendant had taken delivery, he would have ordered another one and would have expected a replacement within a week or ten days. The sales manager said he was certain he would have sold the new purchaser another Hillman Minx if the one in question had not been available (by reason of the defendant's default).

- A A seller's loss of profit on a sale may clearly directly and naturally result in the ordinary course of events from a buyer's wrongful neglect or refusal to accept and pay for the goods bought. But it may be that the seller is so circumstanced that he could sell the goods elsewhere, either at the same price as the contract price, or at some lesser price which would either extinguish or minimise the loss to the seller and therefore the damages which the defaulting buyer will have to pay.
- B Learned counsel for the defendant placed great reliance on s. 50 (3) of the Sale of Goods Act, 1893, and submitted that there was an available market for the car at the one fixed or current price, which was also the contract price, and therefore there could be no loss of profit recoverable as that sub-section established the measure of damages. No evidence was given as to anything the plaintiff might have done to bring about a resale of the rejected car except that which he did, viz., place it in his showroom and await a new buyer. Having regard to his success within ten days, the submissions on the meaning of "available market" seem to me to be somewhat theoretical and academic.

The Act does not attempt to define a market and it may be conceded that one can exist in a variety of circumstances and apart, of necessity, from a defined place, but, since its trading has to serve as a factor in measuring the damages, it must at least be a market in which the seller could, if he wished, sell the goods left on his hands. At the time of the defendant's refusal to accept, June 5, 1956, it has not been shown that there was any real market where the rejected car could have been offered for sale and sold. There was no available market. No doubt the current retail price was known and ascertained but there was no immediate buyer.

- E The plaintiff had the duty to act reasonably and mitigate the damages as far as he reasonably could. What he did resulted in a resale at the contract price but the question is whether that resale mitigated his loss and the same question would arise if a sale could have been made in an "available market". The plaintiff's case is that, by reason of the defendant's non-acceptance of the car he had bought, the plaintiff has lost the profit he would have earned and that the resale of the car to another customer did not and could not in the circumstances give him a substituted profit. He claims that he could have sold a Hillman Minx to the defendant and another to the new purchaser and made two profits, whereas he has made only one and lost irreplaceably the profit on the defendant's transaction (or at least on one of the two transactions).
- F

- G If a seller can prove that a profit has been irretrievably lost on a sale of goods by the buyer's default, it would in my opinion be recoverable as damages in accordance with s. 50 (2). But where there has in fact been a resale of the goods, the seller has the burden of proving a loss of profit beyond that which on the face of it has been recouped in whole or in part by the resale. In my view the plaintiff has failed to give adequate proof of such a loss in this case. The sales manager for the plaintiff said that he had lost the sale of a car, but he also said that he could sell all the Hillman Minx cars he could get. It was argued that the statement that he could sell all the cars he could get ought not to be taken literally, but should be qualified in some way. Even if that is so, which I see, on the evidence, no reason to concede, it does not establish affirmative evidence that the plaintiff could get all the Hillman Minx cars he could sell.
- H

- I If it could be proved that there were in effect unlimited supplies of Hillman Minx cars and a limited number of buyers in the circumstances in which a dealer was trading, then it would appear that the dealer could establish a loss of profit which could not be mitigated. On the other hand most dealers in cars (and in many other commodities) it might be visualised, have either a quota fixed by their supplier or a supply fixed by their own trading limits governed by their scope of trading. In such a case, if in a given trading period all the goods the dealer had available for sale had been sold, or would in all probability be sold, then the fact that one or more purchasers had defaulted and had been or

would be replaced by others would not reduce the dealer's maximum profits. The matter cannot of course be worked out ad infinitum, but would be decided on the probabilities of the case and having regard to the nature, extent and circumstances of the dealer's trading. If a dealer had twenty cars available for sale and twenty-five potential buyers, he still would make his full profit if he sold the twenty cars notwithstanding that two or three purchasers defaulted.

In *W. L. Thompson, Ltd. v. R. Robinson (Gunmakers), Ltd.* (1) ([1955] 1 All E.R. 154), UPJOHN, J., gave damages for loss of profit to dealers who had sold a Vanguard motor car to the defendants, who refused to take delivery. The dealers had returned the vehicle to their suppliers but the learned judge decided the case on the basis that the dealers had lost their bargain, that they had sold one car less than they otherwise would have done, which is the plaintiff's contention here. It is important to note in that case (*ibid.*, at p. 156):

"... that in the East Riding of Yorkshire, the transaction taking place actually in Hull, at the time the contract of sale took place there was no shortage of Vanguard models to meet all immediate demands, at any rate in the locality."

On those facts the learned judge in my view was right in saying that the plaintiffs had lost a customer and thereby a profit. There was no point in their keeping the car and awaiting a resale, as they could acquire a Vanguard car to meet each purchaser as he presented himself. They could not, in other words, avoid their loss. The reasoning of HAMILTON, L.J., and BUCKLEY, L.J., in *Re Vic Mill, Ltd.* (4) ([1913] 1 Ch. 465 at pp. 473, 474) quoted by the judge is singularly apt and adaptable to this case. UPJOHN, J. ([1955] 1 All E.R. at p. 160) states the possible extreme situations: one, where in the case of rejection "if any purchaser fell out, there were many waiting to take his place", the other:

"But on the assumed facts, circumstances had changed in relation to Vanguard motor cars, and in March, 1954, there was not a demand in the East Riding which could readily absorb all the Vanguard motor cars available for sale."

Whether the plaintiff could have proved a similar situation with regard to the Hillman Minx cars in his area I do not know, but I cannot find that it was either admitted or proved. It is for this reason that I would allow this appeal. There are two items in the damage claimed, loss of profit on a car heater and on wheel discs, both of which were ordered for the Hillman Minx and for which £7 12s. 6d. in all is claimed. These items might stand on a different footing from the loss of profit of £90 2s. 6d. claimed for the loss of the sale of the car, but no such distinction was made either at the trial or on the appeal and I would therefore find the plaintiff entitled to 40s. nominal damages only.

Appeal allowed. Order below varied by substituting 40s. as the damages recoverable.

Solicitors: *S. O. F. Bateman & Co.* (for the defendant); *Osmond, Bard & Westbrook*, agents for *Herrington & Carmichael*, Aldershot (for the plaintiff).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

Re F. (an infant).

[CHANCERY DIVISION (Harman, J.), February 22, 26, 27, 28, 1957.]

B

Adoption—Consent of parents—Parents' consent given by deed in 1954—Withdrawn after application for order—Infant in care of adopters for six years—Whether consent unreasonably withheld—Adoption Act, 1950 (14 Geo. 6 c. 26), s. 3 (1) (c).

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The applicants, who were wealthy, sought to adopt M., a female child born in 1950. After M.'s birth, her mother suffered a nervous breakdown and the applicants, who were then resident in Jamaica, looked after both the mother and M. until in February, 1951, the father took the mother to the United States of America, leaving M. in the care of the applicants. The two elder children of the father and the mother stayed with grandparents until June, 1951, when they also came to stay with the applicants. The father and the mother visited the children in 1952 and 1953, at times when the mother's mental health had improved, but in 1954 the mother suffered a relapse and had to undergo further mental treatment. It was then thought unlikely that she would recover. In February, 1954, the father and the mother and the applicants entered into an adoption agreement*, a deed by which after reciting that the applicants (called "the adopting parties") had "decided to reside and make their future permanent home in England and will shortly be leaving Jamaica and travelling to England" with M. for the purpose of adopting her, it was witnessed that "1. [M.] shall be permitted to live with and to be under the care of the adopting parties and to be educated and brought up by them at their expense . . . 3. The adopting parties will immediately upon establishing their residence and domicile in England apply to the High Court of Justice in England or to a county court or court of summary jurisdiction for an adoption order authorising them to adopt the infant pursuant to the Adoption Act, 1950 (of England), and any amendment thereof and the parents do and each of them doth hereby expressly waive any right which they may have to be made parties to or be given notice of the said intended application and hereby expressly consent to the making of such an adoption order as aforesaid in favour of the adopting parties". The father and the mother declared in the deed that they "fully understand the nature of such adoption order and that the effect thereof will be permanently to deprive them of their parental rights in respect of the infant". In August, 1954, the applicants and M. came to England. In February, 1955, the mother was discharged from hospital in America, and desired to have M. back with her. In June, 1956, the applicants issued an originating summons for the adoption of M. The father and mother opposed the application. M. had at all times known who her mother was, and knew that the applicants were not her parents.

Held: an order for M.'s adoption would not be made because the father and mother refused their consent, their refusal was not unreasonable and the consent which they had given by the adoption agreement was revocable until an adoption order was made.

I

[**Editorial Note.** Section 2 (4) (a) of the Adoption Act, 1950, forbids an adoption order being made without the consent of the child's parents, although the court can dispense with the consent (s. 3 (1)) if it is unreasonably withheld. In determining whether a father's refusal of consent is unreasonable the test is his attitude (*Hitchcock v. W. B.*, [1952] 2 All E.R. 119), and it is only exceptionally that a parent's withholding of his or her consent will be held to be unreasonable (*Re K.*, [1952] 2 All E.R. 877). It was held in *Re Hollyman*

* The material provisions of the adoption deed are printed at pp. 821, 822, post.

([1945] 1 All E.R. 290) that the consent to an adoption order must be operative when the order was made. The child's knowledge who her parents are can weigh heavily against an adoption order being made (see p. 823, letter D, post).

As to the consents required for the making of an adoption order, see 17 HALSBURY'S LAWS (2nd Edn.) 682, 683, para. 1410.

For the Adoption Act, 1950, s. 2 and s. 3, see 29 HALSBURY'S STATUTES (2nd Edn.) 468, 470.]

Originating Summons.

This was an application for the adoption of an infant, born in June, 1950. The parents, who had waived their right to take part in the proceedings and consented to the making of an adoption order by a deed in 1954, obtained leave to file evidence in opposition. Judgment was given in open court.

J. A. Plowman, Q.C., and *J. A. R. Finlay* for the applicants.

H. B. Grant for the respondents, the parents.

T. A. C. Burgess for the Official Solicitor as guardian ad litem.

HARMAN, J.: This is that comparative rarity, a contested application for adoption. It is one of the most anxious jurisdictions which falls on the Court of Chancery, for adoption, as has often been pointed out, is a permanent change in the status of the person adopted, and may alter his or her citizenship. It alters the family to which he or she belongs. It alters both the child's rights and the child's duties as a citizen of this country. It is, therefore, a matter which at the best, and even when unopposed, must be looked at with great circumspection as so momentous a change is to be made in a child's life, the child having in ninety-nine cases out of a hundred no say in the matter, because he or she is too young.

In the present case the applicants are persons who married in 1936 in Jamaica, and, as I understand, were then domiciled there. The husband is now sixty-five years of age, and the wife is fifty-one, and they have no children. The parents of the child proposed to be adopted were married in 1940 in the Isle of Cuba. They were and are citizens of the United States of America and domiciled there. They were missionaries in the Caribbean district. In 1946 a son was born to them, and in 1947 a daughter. In 1947, in the course of their mission work, they came to Jamaica and became friendly with the applicants, who, I gather, lived in a comfortable way, he being a planter who received missionaries from time to time and entertained them. The child in question, a girl, was born in June, 1950. It appears that after her birth, as indeed after the birth of two earlier children, her mother's health and nervous condition were much affected, and she became depressed and had what used to be called melancholia. She was taken in to the house of the applicants in about the end of 1950, and at that time she had what she described as a nervous breakdown. I gather she was not really responsible for her actions for a time, and she had strong suicidal tendencies. Anyhow, in February, the father decided that he must not leave her to, I gather, the devoted attention of the family of the applicants, but must take her to the United States of America. The question immediately arose what was to be done with the children. The youngest child, whom I shall call Margaret, was already in the applicants' house with her mother, and it was decided to leave her there. The two elder children were left with the maternal grandparents for a time, also in Jamaica. In February or March, 1951, the parents went back to the United States where the wife entered a mental hospital, and she was in and out of such places from then until the beginning of 1955. In about June, 1951, the elder children also came to lodge in the applicants' house, and the applicants looked after the three of them for a couple of years. The parents came to visit their children in 1952 for three months during the interval when the wife was not completely under

A melancholia, and they paid a similar visit in September, 1953, with this difference, that on that occasion they took a house and had with them in that house the elder children. Margaret, however, remained with the applicants as she had done right from the beginning when she was about eight months' old.

In January, 1954, the mother had a relapse. She again tried to commit suicide, and it was obvious she must return to the United States for further
B treatment. Indeed, it seemed very doubtful at that time whether she would ever recover or become a responsible member of society again. One can see from the letters that the father, not unnaturally, was very much in despair about it and was being forced to realise that from many points of view she might be described as a person not in her right mind. This was a critical moment for the applicants also, and it appears that the male applicant approached the
C father and expressed the desire of himself and his wife to adopt Margaret as their own child saying that they had become fond of the child, and were likely to grow more attached to her as time went by, no doubt producing arguments as to the obvious advantages which it would confer on the child, they being wealthy people. In response to that request, the father produced some proposals of his own. They are not expressed in a legal kind of language, but they do
D show that he at that time was not in a position really to look after any of the children. The wife, of course, was quite irresponsible and quite unable to take any responsibility. He produced a document before me which was agreed to be his proposals as they were then written out. The two elder children, according to these proposals, were to be put under the care of relatives, but Margaret, the third child, it says, "is to be adopted"; when one reads on she is to be
E supported by the applicants

"until such time as her mother is pronounced cured from her present illness by the doctors and is in a position to care and upbringing this child."

That was the father's suggestion acquiesced in, I gather, by his wife with whom he had talked it over. That, however, did not satisfy the applicants. They
F wanted something more than mere temporary custody, and they instructed their solicitor to draw a deed for the purpose, and he did. That deed, which is dated Feb. 1, 1954, is called on the outside "Adoption agreement". This is a document under seal made between the parents of the one part, and the applicants of the other part. It recites that the parents are about to leave Jamaica to return to the United States, and are satisfied that the applicants are fit persons to
G adopt the infant. It goes on as follows:

"And whereas the adopting parties were born and have hitherto lived in Jamaica aforesaid but have decided to reside and make their future permanent home in England and will shortly be leaving Jamaica and travelling to England with the infant for the purpose aforesaid [the adoption of the infant]—Now this deed witnesseth: 1. The infant shall be permitted to live with and to be under the care of the adopting parties and to be educated and brought up by them at their expense. 2. The adopting parties undertake at their own expense to give the infant a thoroughly good education suitable to their own rank in life and properly to maintain the infant and at all times during her infancy to furnish her with all things necessary or suitable for a person of her age in such rank as aforesaid. 3. The adopting parties will immediately upon establishing their residence and domicile in England apply to the High Court of Justice in England or to a county court or court of summary jurisdiction for an adoption order authorising them to adopt the infant pursuant to the Adoption Act, 1950 (of England), and any amendment thereof and the parents do and each of them doth hereby expressly waive any right which they may have to be made parties to or be given notice of the said intended application and hereby expressly consent
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to the making of such an adoption order as aforesaid in favour of the adopting parties.” A

Then it goes on in terms which show that the draftsman had carefully read the English Adoption Act, 1950, and the rules made under it:

“and the parents do and each of them doth hereby declare that they fully understand the nature of such adoption order and that the effect thereof will be permanently to deprive them of their parental rights in respect of the infant.” B

That document was signed by the parents of this child, although there is some suggestion by the mother in the evidence that she signed it without reading it. That is a matter which was not pressed, and I do not accept it. No literate person can say, when no fraud has been practised, that he or she who signed the document did not intend signing anything of the sort. The plea of non est factum is not allowable. Therefore these two people signed this document understanding it. No doubt, the mother was in many ways hardly responsible for her actions at the time. No doubt, the father was in a very distraught condition, having a wife whom he more and more recognised as being in the grip of this frightful malady, and the three children whom he was in great difficulty about supporting. In those circumstances, he was met with this offer, indeed this insistence on the part of the applicants, and he signed the document. In pursuance of that document the child was left with the applicants at their house in Jamaica. The parents went back to the United States, and the wife back to hospital. The two elder children went to grandparents in Kansas. C D E

In about August, 1954, the applicants came over to England with the child. They lived for a time at a hotel in London, and then they found themselves a house in which they now live and have settled down as persons domiciled and resident in this country. By the end of 1954 the mother had made a very remarkable recovery—at least she was well on the road to recovery—and she was discharged out of hospital in February, 1955. After a period when she was seen by the doctor fairly regularly, in July, 1955, she set up house again in the United States and had her husband and her two elder children in her charge and proceeded once more to live a normal life. She was not, however, contented. She wanted to get her youngest child back again. In February, 1956, after consulting her doctors and being told that she was fit to do so, she came to England and went down to the applicants' home and saw the daughter and renewed her acquaintance, I should say her friendship, with the applicants. Then, by the end of the month, it came out that her wish was to take the child back into her own hands and away from the control of the applicants. F G

By that time they had done nothing towards implementing their covenant to take adoption proceedings in England. I do not blame them for that. They were entitled to establish their residence here and their domicile which meant a reasonable duration of time; but it seems probable that the realisation of a claim being made by the mother caused them to start proceedings, which they did, by notifying the local authority on Feb. 28, 1956, in accordance with the Act. The mother, having made a formal demand for the child through solicitors, which was refused, returned to the United States of America with her two elder children to consult with the father as to her future course. H I

While she was gone these proceedings were started by originating summons in June, 1956, and they came on immediately before the long vacation as an ordinary matter in chambers, an application for adoption. The Official Solicitor as guardian ad litem reported on the matter with his usual care, and, but for the attitude of the parents, it seemed a case where adoption was eminently desirable in the infant's interests. But, more or less at the last moment, the parents appeared by counsel and announced their opposition and got leave

A from DANCKWERTS, J., to file evidence in support of that opposition. The matter has come before me during the last two days, therefore, as a resisted application.

There is nothing to say against any of the parties here, and there is a great deal to be said for all of them. The child's mother and the female applicant obviously have lived on terms of great affection for the last five or six years. B The female applicant has nobly, I think, sustained the mother through the valley of doubt and sorrow through which she has been passing. The younger woman called her her S.A., her "shock absorber". The mother wrote to the female applicant frequently and received, I have no doubt, the greatest encouragement from the letters she got in answer. All the time there was no question of keeping Margaret from her mother. The mother did not see her C much, but messages passed to and fro. She was kept in the child's mind as her mother. Presents were given. As I have said, in 1952 and in 1953 the mother came to the house of the applicants and there lived in amity with them and was recognised by everybody, including the child herself, as her mother.

This case is unique in my experience, in that this child has no doubt in her mind who her parents are, who her mother is. She has never been brought up D to consider the applicants as her father and mother. They have indeed been very careful to keep her mother in her mind throughout. So far from criticising them in that respect, I think they are worthy of every commendation; but it seems to me that that is fatal to their application. How can I possibly make an order depriving this child of the parents whom she knows and has been brought up to love and suddenly tell her that they are not her parents any E more, but that other people whom she loves, no doubt, but whom she does not regard as and whom she knows are not her father and mother are henceforth to stand in that relation to her? It seems to me that is not a thing that any court can do. That is enough to put an end to this application. No order can be made without the consent of the parents of the child desired to be adopted. The legal parents withhold that consent, and that is the end of it, F unless it can be said, as it is said, that their consent is unreasonably withheld*. I see no ground for that suggestion at all.

It cannot be unreasonable to withhold consent to the adoption of a child that they know, that they love, and that they are able and willing to bring up themselves. The only reason why it is said that consent is unreasonably withheld is because of the execution of the deed signed in 1954. I think the other G way of putting it is that the signature of that deed was an irrevocable act, and that they have consented, and, therefore, there is no question of unreasonably withholding consent because consent has been given and is irrevocable. Such a consent is never, I think, irrevocable. Certainly the statutory form of consent which the mother of an adopted child is enjoined to give under the rules of the Adoption Act, 1950, can be withdrawn up to the last moment and is never H irrevocable until the adoption order is made. That is most carefully explained always to the mother of a child proposed to be adopted. Once the order is made, the thing is irrevocable. Until that time, consent given may be withdrawn. So I cannot see that there is any more reason why this consent should not be withdrawn than any other consent. It is said that the applicants have changed their position on the faith of the promise not to oppose the adoption. I It is said that they came to England and that they have been put to expense to bring this child up, not as their own, but to bring her up and that they have now settled down in England which would not have happened if this document had not been signed. I am not satisfied that that is so. There is a certain amount of evidence that they were coming to England in any event, and though I have no doubt the prospect of going to England to adopt a daughter was one of the matters affecting them, I do not think that there is anything which could

* See the Adoption Act, 1950, s. 2 (4) (a), s. 3 (1) (c).

amount, so to speak, to a kind of estoppel against the parents. If there is none, A
and they are free to give or withhold their consent, and they do withhold it, I
can see no ground at all for saying that it is unreasonable that they should do so.

It is said that the mother's state of health is a matter which should make her
give her consent and make the father give his consent in case she has a relapse
into the unfortunate state of melancholia which was the bane of her life between
1950 and 1954. But the medical evidence shows, I think, that, if she has no B
further child, she is not likely to have any relapse, and that her depressed condi-
tion was directly connected with the incidence of childbirth. No woman of her
age, of course, can engage not to have further children, but that is a risk which
must be taken. The uncertainty of the future in that respect cannot make it
unreasonable, in my view, for the parents to withhold consent to their child
being taken out of her family and put into another one. C

There are a brother and sister in this case. They both know this child as
their sister. Are they to be told she is not their sister any longer? It seems to
me one has only to state it to see that such a thing is impossible. I feel the
very greatest sympathy for the applicants. They have behaved very well, and
they are not to be criticised in any way. But, in a matter of this sort, the D
parents by nature have rights which only in very special circumstances are
they to be debarred from using. These parents, in my judgment, have not
misbehaved themselves in any way so as to disentitle themselves from saying:
"This is our child: we will not have her made the child of another." Therefore,
I must refuse this application.

I should add that the child is with the applicants at their home. What will
happen to her is not a matter which I can control. All that I can do here and E
now is to refuse the application for adoption. I must hope, and I think that
I have reason to believe, that nothing drastic will be done; but there is always
another jurisdiction in the court by which the court can regulate the custody
and control of infants, and that is the jurisdiction dealing with wards of court.
In that jurisdiction very different considerations arise. I am not to be taken
as encouraging more litigation about this child. I hope that there will be no F
more. I only say this, that the court is not without resources even if the worst
should happen.

Application dismissed.

Solicitors: *Hyman Isaacs, Lewis & Mills* (for the applicants); *Petch & Co.*
(for the respondents); *Official Solicitor.*

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

A

FRANCIS v. YIEWSLEY AND WEST DRAYTON URBAN DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (McNair, J.), March 7, 8, 1957.]

B

Town and Country Planning—Enforcement notice—Validity—Wrong factual basis—Development alleged to have been carried out without planning permission—Permission originally granted for a limited period, since expired—No appeal to justices against notice—Right to question validity in High Court—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23 (2), (4).

C

On Feb. 1, 1949, F. began to use his land as a caravan site. This constituted development of the land within the meaning of the Town and Country Planning Act, 1947, and it was therefore necessary for F. to obtain planning permission from the local planning authority. F. applied for permission, but the local planning authority refused it. F. appealed to the Minister who, on Feb. 22, 1950, granted F. permission to use the land as a caravan site for six months. F. continued to use the land as a caravan site after the six months had expired, and on July 23, 1952, the local planning authority served him with an enforcement notice which alleged that "on or about Feb. 1, 1949 [F.'s land] was developed by placing thereon caravans for residential purposes. And . . . such development before mentioned was carried out without the grant of planning permission required under Part 3" of the Act of 1947. The notice continued: "Now therefore [the local planning authority] in exercise of the powers contained in s. 23 and s. 24 of the . . . Act of 1947 . . . give you notice to remove all caravans from the site within" a specified period after the time when the notice took effect, viz., twenty-eight days after service. F. did not appeal against the notice to a court of summary jurisdiction as he was entitled to, under s. 23 (4) of the Act of 1947, and he continued to use the land in contravention of the notice. No steps were taken by the local planning authority to prosecute F. under s. 24 (3) of the Act. On Dec. 29, 1955, F. brought an action for a declaration that the enforcement notice was invalid.

F

G

Held: (i) the enforcement notice was invalid because, although it sufficiently specified the development complained of for the purpose of s. 23 (2)* of the Act of 1947, it falsely stated that the development was carried out without planning permission (when in fact the Minister had granted permission, albeit only for six months) and the notice, therefore, lacked a true factual basis (see p. 830, letter D, post).

H

Keats v. London County Council ([1954] 3 All E.R. 303) and dicta of LORD COHEN and LORD EVERSHED in *East Riding County Council v. Park Estate (Bridlington), Ltd.* ([1956] 2 All E.R. at pp. 679, 681, 682) applied.

I

(ii) the fact that F. did not appeal under s. 23 (4) of the Act of 1947 against the enforcement notice did not preclude him from maintaining in the present action his claim for a declaration that the notice was invalid.

Perrins v. Perrins ([1951] 1 All E.R. 1075) distinguished.

[**Editorial Note.** Where permission for development has been given, but the permission is limited to endure only for a specified time, the development, when continued after the time limited, cannot be treated as development for which permission was not obtained (see p. 829, letter I, post), though its

* For the terms of this sub-section, so far as relevant, see p. 827, letter H, post.

continuance could be treated as non-compliance with a condition (see s. 23 (1) A of the Act of 1947).

For the Town and Country Planning Act, 1947, s. 23 and s. 24, see 25 HALSBURY'S STATUTES (2nd Edn.) 524, 527.]

Cases referred to:

- (1) *East Riding County Council v. Park Estate (Bridlington), Ltd.*, [1956] 2 All E.R. 669. B
- (2) *Keats v. London County Council*, [1954] 3 All E.R. 303; 118 J.P. 548; 3rd Digest Supp.
- (3) *Perrins v. Perrins*, [1951] 1 All E.R. 1075; [1951] 2 K.B. 414; 115 J.P. 346; 2nd Digest Supp.

Action.

In this action Kenneth John Roy Francis, the plaintiff, who was the owner of a plot of land known as "Riverside", and situated in Thorney Mill Road, West Drayton, Middlesex, sought a declaration that an enforcement notice dated July 23, 1952, served on him under the Town and Country Planning Act, 1947, by the Yiewsley and West Drayton Urban District Council, the defendants, who by delegation had the relevant functions of the local planning authority under the Act of 1947, was invalid and that the defendants had no power to serve the notice. D

On Feb. 1, 1949, caravans to be used for residential purposes were placed on the plaintiff's land; this constituted a development of the land and, accordingly, under the Act of 1947 planning permission was required from the defendants. It was, however, permissible under the Town and Country Planning (General Development) Order, 1950 (S.I. 1950 No. 728), art. 3, to use the land as a caravan site without obtaining planning permission for a period not exceeding twenty-eight days in any one year, as such a use of the land fell within Class IV of Sch. 1 to that order. On Mar. 1, 1949, twenty-eight days after the caravans had been placed on the land, the plaintiff applied to the defendants for permission to use the land as a caravan site. The defendants refused this application on May 10, 1949, and the plaintiff then appealed to the Minister of Town and Country Planning, under s. 16 of the Act of 1947. By a letter dated Feb. 22, 1950, addressed to the defendants, the Minister allowed the plaintiff's appeal against the defendants' refusal to grant permission. The letter stated that while the Minister considered the defendants' decision to be justified by the fact that they ultimately intended to acquire the plaintiff's land for use as a public open space, and also by the fact that the land was visible from an adjoining road, and there were likely to be drainage difficulties, nevertheless, the Minister E F G

"notes that there are at present some sixteen occupied caravans on [the plaintiff's land], and he is of opinion that the occupants of these caravans should be given reasonable time in which to find alternative sites or accommodation. For this reason alone, [the Minister] has decided to allow the appeal to the extent that he permits the use under appeal for a period of six months from the date of this letter, which is issued by the Minister as his formal decision". H

The six months during which the use of the land as a caravan site was permitted, expired on Aug. 22, 1950. On July 23, 1952, the defendants served on the plaintiff the enforcement notice which the plaintiff now claimed was invalid. The notice read as follows: I

"Whereas you are the owner and/or occupier of land situate at south of

A and fronting Thorney Mill Road, West Drayton, and bounded on the east and south by the River Colne, and known as 'Riverside'. And whereas on or about Feb. 1, 1949, the land above described was developed by placing thereon caravans for residential purposes. And whereas such development before mentioned was carried out without the grant of planning permission required under Part 3 of the Town and Country Planning Act, 1947. Now B therefore the Urban District Council of Yiewsley and West Drayton on behalf of the County Council of the Administrative County of Middlesex as local planning authority in exercise of the powers contained in s. 23 and s. 24 of the said Act of 1947 hereby give you notice to remove all caravans from the site within fifty-five days of the date on which this notice takes effect. This C notice shall subject to the provisions of s. 23 of the said Act take effect on the expiration of twenty-eight days after the service thereof upon you. Dated July 23, 1952."

The plaintiff took no action on receiving the enforcement notice. He continued to use the land as a caravan site and was so using it at the time of this action. D He did not appeal against the notice to a court of summary jurisdiction within twenty-eight days of service of the notice, as he was entitled to do under s. 23 (4) of the Act of 1947, nor did the defendants prosecute the plaintiff, under s. 24 (3) of the Act, for using the land in contravention of the notice. The plaintiff began this action on Dec. 29, 1955.

E *D. G. H. Frank* for the plaintiff.
J. P. Widgery for the defendants.

McNAIR, J., stated the facts and continued: The approach that should be made to questions which concern the regularity of steps taken under the Town and Country Planning Act, 1947, is stated by VISCOUNT SIMONDS in *East F Riding County Council v. Park Estate (Bridlington), Ltd.* (1) ([1956] 2 All E.R. 669 at p. 672), where he says:

"It was in the first place contended that the Act of 1947 was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities. This, as a general proposition, G commands assent . . ."

Bearing that in mind, I approach the criticisms which are made by the plaintiff against this enforcement notice and the answers made thereto. In the first place it is said by the plaintiff that whereas s. 23 (2) of the Act of 1947 requires that:

H "Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of . . . permission . . . or, as the case may be, the matters in respect of which it is alleged that any . . . conditions [subject to which the permission was granted] have not been complied with"

I this notice does not contain the specification required by that sub-section. The main points taken in support of the submission are, that if one looks at the notice itself one cannot find in it any allegation whether or not there has been a change of use of the land, which change alone would make requisite development permission, nor can one find in the notice any allegation that, to use the language of s. 12 (2) of the Act of 1947, there was any "material change in the use of any buildings . . ."; accordingly, it is said that the plaintiff is not told by the notice what the real complaint is against him.

On that submission I have been referred to two cases, both relied on by counsel on each side. They are first, *Keats v. London County Council* (2) ([1954] 3 All E.R. 303), in which the Divisional Court, in considering an appeal from a magistrates' court, had to deal with the contention that the enforcement notices concerned were too vague and did not contain sufficient specification of the complaint. The form of the notices in that case is set out in the report (*ibid.*, at p. 305) where it is stated:

"The alleged development specified by each of the notices was as follows: 'Beginning the use of the land described . . . for the purpose for which the same is now used namely as an industrial building within the meaning of the Town and Country Planning (Use Classes) Order, 1948, and the Town and Country Planning (Use Classes) Order, 1950.'"

In the leading judgment PARKER, J., said (*ibid.*, at p. 306):

"The first [point] . . . is that in each of the notices the description of the development is too vague. Counsel for the appellant contended that the notice should, at least, state the time of the development, the nature of the development and also the class into which the development falls. He points out that the class is of some importance because there is no change of use within the meaning of the Act [of 1947] if premises are used for a different purpose provided it is within the same class. As regards that point, if the wording on each of these notices had been merely, 'the use of the land as an industrial building', there might well be complaint in that it was not specific enough, but the notices say, 'for the purpose for which the same is now used.' Therefore, it becomes perfectly clear that the complaint is made with regard to the current use at the time when, in the case of the ground floor, the use was by a firm of optical manufacturers."

It seems to me that that judgment tends to support the view that it is sufficient if an enforcement notice specifies the use which is complained of, and that it is not necessary to state in the notice why it is alleged that that use constitutes a development.

In *East Riding County Council v. Park Estate (Bridlington), Ltd.* (1) the House of Lords considered the question of the validity of an enforcement notice which was there challenged on a rather similar ground to that put forward in the present case, namely, that the notice did not sufficiently specify the development of which complaint was made. The question was whether the enforcement notice was in the form required by the Act of 1947. The decision reached was that inasmuch as the notice did not make it clear whether what was complained of was development carried out before the Act of 1947 came into force, or development carried out after that Act came into force, the notice was ineffective, but in dealing with the necessary contents of an enforcement notice there are passages in the speeches delivered in that case which assist me in considering the present case. LORD COHEN says ([1956] 2 All E.R. at p. 679):

"Was this a good notice, having regard to the facts found which make it clear that the only breach of planning control which could be established was contravention of 'previous planning control'? This question raises a matter of construction of s. 23 (2) [of the Act of 1947]. As I read that section, while it prescribes no particular form, it does, by its terms, require that, in the case of development after the appointed day, the enforcement notice must bring home to the person on whom it is served first, whether the authority objects to development without permission or to failure to comply with conditions, and secondly, if the objection is to development, that the

A development is alleged to be without permission. No particular formula is prescribed, and the notice could satisfy this last condition either by an express statement to the effect that the development was without permission, or by a reference to s. 23 (2), which necessarily connotes an allegation that the development was without permission."

B LORD EVERSHERD says (*ibid.*, at p. 681):

"The notice must also draw specific attention to the grounds of complaint; that is, it must allege as regards any buildings or other matters of complaint either that they constitute development for which no permission has been granted, or (as the case may be) that they constitute, or have involved, non-compliance with conditions imposed when the permission was given."

LORD EVERSHERD takes up the same point where he says (*ibid.*, at p. 682):

"I have already expressed my view that a notice related to alleged contravention of the Act of 1947 control must, in order to satisfy the requirements of form according to s. 23 (2), not only indicate the buildings or other matters complained of, but must also make it sufficiently clear on which of the two grounds indicated in sub-s. (1) [of s. 23] they are objected to."

When LORD RADCLIFFE says ([1956] 2 All E.R. at p. 677) that it is necessary to state the grounds for issuing an enforcement notice, he is saying in terms, that it has to be stated whether the allegation is that the development has taken place without permission, or whether the allegation is that the development has taken place in breach of condition, and if the notice makes it plain which of those two grounds is relied on, and also identifies the act which is alleged to constitute the breach, that is sufficient, and the notice does not have to state the reasons why the act specified involves a breach. Accordingly, I reject the first point taken by the plaintiff*.

Secondly, it is said that the enforcement notice is invalid because in effect the defendants are by this notice seeking a wrong remedy. They are saying by the recitals in the notice† that this is a case where development has taken place without the grant of planning permission, whereas, on the admitted facts, it is plain that planning permission was granted by the Minister when he allowed the plaintiff's appeal from the decision of the defendants, albeit that permission was subject to the condition that the use of the land as a caravan site should not continue for longer than six months from the date of the Minister's decision. This enforcement notice entirely ignores the application for planning permission made by the plaintiff to the defendants, the refusal of permission by the defendants, and the ultimate decision, on the plaintiff's appeal, by the Minister. The notice treats the matter as if those events had never taken place, as if there had been merely a development of the land without the grant of planning permission; but when once it is established, as it is established here, that in fact a planning permission was given by the Minister, albeit only for six months, then it is shown that the whole basis of the enforcement notice is falsified, the basis being that development has been carried out without the grant of planning permission required under Part 3 of the Act of 1947.

On the proper construction of the Act of 1947, when once a local planning authority, or on appeal, the Minister, has given permission for a particular development, then, although that permission is limited by a condition that the use shall be discontinued after a limited time, that development can no longer

* Thus it is held that the notice sufficiently specifies the development complained of (see p. 830, letter D, post); the first point taken was stated at p. 827, letter G, ante.

† For the terms of the enforcement notice, see p. 826, letter I, to p. 827, letter C, ante.

be considered development which has been carried out without the grant of planning permission. A

Counsel for the defendants, however, as I understood his argument, submitted to me that as soon as the plaintiff continued to use the land as a caravan site, after the expiry of the six months permitted by the Minister, viz., after Aug. 22, 1950, the defendants were given a choice; they could either disregard the Minister's permission altogether and treat this as a case of development carried out without any planning permission, or, they could treat it as a case of a breach of a condition in the planning permission granted by the Minister, namely, a continuance of the use after the period of permission had expired; and that the defendants, in dealing with this case, elected to make use of the first choice. In my judgment, however, once permission for a use of land has been given, albeit subject to conditions, it can no longer be said that the use carried out under that permission can constitute development without permission under the Act of 1947, because the use has become a permitted development although subject to a condition. B

Accordingly, as this enforcement notice, although sufficiently specifying the development complained of as required by s. 23 (2), falsely states that that development was carried out without the grant of planning permission, it seems to me, subject only to the last point taken by counsel for the defendants, that the notice must be declared invalid because it lacks any true factual basis. C

The final submission of the defendants is formulated in para. 9 of the defence in these words: D

"Alternatively the plaintiff did not appeal against the enforcement notice to a court of summary jurisdiction pursuant to s. 23 (4) of the Town and Country Planning Act, 1947, and the defendants will rely on s. 24 of that Act." E

The argument of the defendants is based on s. 23, and, more particularly, on s. 24. It is said that whereas under s. 23 (4)*, the plaintiff, when served with this notice, had a right to appeal to a court of summary jurisdiction, and had a chance before such a court of alleging and proving that planning permission had been granted to him, whereupon the court would have quashed the enforcement notice, he in fact did not do so; the result is, that the matter then fell to be dealt with under s. 24 (3) of the Act of 1947, by way of prosecuting the plaintiff for using the land in contravention of the enforcement notice. It is said that on such a prosecution it would not have been open to the plaintiff to take the point that he now takes, namely, that the enforcement notice is invalid; it is therefore argued that as a remedy was provided for the plaintiff by the Act of 1947, this court cannot assist him by granting a declaration. F

Argument on this branch of the case was based on *Perrins v. Perrins* (3) ([1951] 1 All E.R. 1075), and, in particular, on the leading judgment of LORD GODDARD, C.J., who said (*ibid.*, at p. 1077) that if the owner of land took no steps to challenge an enforcement notice under s. 23 (4) of the Act of 1947 but waited until he was prosecuted under s. 24 (3) of the Act before taking objection to the notice, it would then be too late for him to object to it. LORD GODDARD says (*ibid.*, at p. 1077): G

"Whether the council were right or wrong in the view they took, it seems to me that the Act provides that, if the local authority serve a notice and it is not challenged within twenty-eight days, it becomes effective." H

* Section 23 (4) of the Act of 1947 provides: "If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time [before the notice takes effect], appeal against the notice to a court of summary jurisdiction . . . ; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates . . . shall quash the notice to which the appeal relates;" I

- A It must be borne in mind, however, that the Divisional Court was there dealing only with the question whether the court of summary jurisdiction were right or wrong in refusing to convict the respondent; that judgment must, therefore, be read subject to the limitation that it is only dealing with the defences which are open to an owner in a court of summary jurisdiction. That is a different question from that which is before me here. Contrast the case within s. 24 (1)
- B of the Act of 1947*, which enables a local planning authority to take steps required by an enforcement notice† (other than the discontinuance of any use of land) and to recover the cost as a simple contract debt in a court of competent jurisdiction. Under s. 24 (1), if the person entitled to appeal (under s. 23 (4)) against the enforcement notice to a court of summary jurisdiction fails to appeal he is not entitled in proceedings under s. 24 (1), i.e., proceedings before any court
- C of competent jurisdiction, to dispute the validity of the action taken by the local planning authority on any ground which could have been raised by an appeal under s. 23 (4). Section 24 (1) of the Town and Country Planning Act, 1947, contains a very precise exclusion of the subject's ordinary rights, but it is limited to that one case where the local planning authority are suing to recover the costs of steps taken by them pursuant to an enforcement notice.
- D Section 24 (3) contains no such provision at all, and in my judgment there is no reason why one should read into that sub-section what is contended for by the defendants, namely, that as the plaintiff did not exercise his right of appeal under s. 23 (4) within twenty-eight days after service of the enforcement notice on him, he is thereby precluded from raising in any court points against the validity of the enforcement notice.
- E In my judgment, inasmuch as this enforcement notice is based on a fundamental false basis of fact, it is invalid. I declare accordingly.

Declaration accordingly.

Solicitors: *Speechly, Mumford & Craig*, agents for *Woodbridge & Sons*, Uxbridge (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *A. Boote*, West Drayton (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* Compare, per LORD GODDARD, C.J., in [1951] 1 All E.R. at p. 1077.

† I.e., if the steps have not been taken by the person served with the notice; see s. 24 (1) of the Town and Country Planning Act, 1947; 25 HALSBURY'S STATUTES (2nd Edn.) 527.

HOOD BARRS v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Oaksey, Lord Morton of Henryton, Lord Cohen and Lord Keith of Avonholm), January 28, 29, 30, March 14, 1957.]

Income Tax—Deduction in computing profits—Capital expenditure—Purchase of standing timber by timber merchant.

On Apr. 6, 1947, the appellant commenced business as a timber merchant, saw-miller and joiner. On Sept. 30, 1947, he entered into an agreement in writing with a company (of which he was a director and shareholder), which owned a large estate, to purchase "as at Apr. 7, 1947, all the timber specified in the First part of the Schedule now standing and growing in or upon the forests referred to in the Second part of the Schedule . . . together with the boughs branches and other parts of the same trees respectively down to the soil whereon the same shall be growing but not the roots or other parts thereof which shall be within or below the surface of the soil together with the following powers and authorities namely: Full and free power and authority for the purchaser his servants agents and workmen to go to and return from the lands upon which the said trees are situate through over and along the existing or usual roadways or tracks for the purpose of felling cutting or sawing up and carrying away or otherwise dealing with the said trees . . ." It was agreed that the purchase price would be £24,275 and that "the purchaser may mark fell and carry away all the said trees and complete all the operations authorised at such times as he the purchaser shall consider convenient". The First part of the Schedule referred to "500 sitka . . . 500 pinus silvestris . . . 10,000 larch, large, 1,000 larch, small". A year later the parties entered into a similar agreement for the sale to the appellant of further lots of trees for £24,900. The two sums of £24,275 and £24,900 were paid by the appellants to the company. The trees were ripe for cutting. The agreements contained no time limit for the felling and carrying away of the timber, and there was no evidence that the appellant had such equipment as would enable him to complete the transaction within any short space of time.

Held (LORD OAKSEY dissenting): the two sums of £24,275 and £24,900 were capital expenditure by the appellant which should not be taken into account in computing his trading profits for income tax purposes, because the agreements provided him with a capital asset, viz., a means of supplying himself with timber, which, when selected and felled, would form part of his stock-in-trade.

Distinction stated by JENKINS, L.J., in *Stow Bardolph Gravel Co., Ltd. v. Poole* ([1954] 3 All E.R. at p. 646) approved.

Per VISCOUNT SIMONDS, LORD COHEN, and LORD KEITH OF AVONHOLM: it may be that, in appropriate circumstances, a timber merchant who buys standing timber can debit his profit and loss account with the cost (see p. 835, letter I, p. 840, letter I, and p. 845, letter H, post).

Appeal dismissed.

[As to expenditure that is not deductible in computing profits because it is capital expenditure, see 17 HALSBURY'S LAWS (2nd Edn.) 158-160, para. 325; and for cases on the subject, see 28 DIGEST 47-49, 237-252.]

As to the nature of stock-in-trade, see 17 HALSBURY'S LAWS (2nd Edn.) 122-124, paras. 227-231.]

A Cases referred to:

- (1) *Morison v. Lockhart*, 1912 S.C. 1017; 39 Digest 501, *h*.
 (2) *Alianza Co., Ltd. v. Bell*, [1904] 2 K.B. 666; 73 L.J.K.B. 755; 91 L.T. 463; *affd.* C.A., [1905] 1 K.B. 184; 74 L.J.K.B. 219; 92 L.T. 184; *affd.* H.L., [1906] A.C. 18; 75 L.J.K.B. 44; 93 L.T. 705; 5 Tax Cas. 172; 28 Digest 47, 233.

B

- (3) *Sharkey v. Wernher*, [1955] 3 All E.R. 493; [1956] A.C. 58; 36 Tax Cas. 275; 3rd Digest Supp.
 (4) *Kauri Timber Co., Ltd. v. Taxes Comr.*, [1913] A.C. 771; 109 L.T. 22; 28 Digest 47, 237, *c*.

C

- (5) *Marshall v. Green*, (1875), 1 C.P.D. 35; 45 L.J.Q.B. 153; 33 L.T. 404; 39 Digest 506, 1242.

- (6) *Duppa v. Mayo*, (1669), 1 Wms. Saund. 275; 2 Keb. 576; 85 E.R. 336; 39 Digest 206, 958.

- (7) *Evans v. Roberts*, (1826), 5 B. & C. 829; 8 Dow. & Ry. K.B. 611; 4 L.J.O.S.K.B. 313; 108 E.R. 309; 2 Digest 55, 296.

D

- (8) *Sainsbury (Stansbury) v. Matthews*, (1838), 4 M. & W. 343; 8 L.J.Ex. 1; 150 E.R. 1460; 2 Digest 55, 297.

- (9) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 28 Digest 52, 264.

- (10) *Stow Bardolph Gravel Co., Ltd. v. Poole*, [1954] 3 All E.R. 637; 35 Tax Cas. 459; 3rd Digest Supp.

E

- (11) *Craddock v. Zevo Finance Co., Ltd.*, [1944] 1 All E.R. 566; *affd.* C.A., [1946] 1 All E.R. 523, *n*.; 27 Tax Cas. 267; 2nd Digest Supp.

- (12) *Inland Revenue Comrs. v. Williamson Bros.*, 1950 S.C. 391; 31 Tax Cas. 370; 2nd Digest Supp.

- (13) *Golden Horse Shoe (New), Ltd. v. Thurgood*, [1934] 1 K.B. 548; 103 L.J.K.B. 619; 150 L.T. 427; 18 Tax Cas. 280; Digest Supp.

F

Appeal.

Appeal by the taxpayer, Henry Rupert Hood Barrs, from a decision of the First Division of the Court of Session (the Lord President (LORD CLYDE), LORD CARMONT, LORD RUSSELL and LORD SORN) dated Dec. 21, 1955, on a Case Stated by the Commissioners for the General Purposes of the Income Tax for the Division of Mull for the opinion of the Court of Session as the Court of Exchequer for Scotland, pursuant to the Income Tax Act, 1952, s. 64.

G

The appellant had appealed to the commissioners against assessments made on him (trading as Killiechronan Sawmills and Joinery Works) under Case I of Sch. D to the Income Tax Act, 1918, in respect of the years of assessment 1947-48 to 1951-52.

H

The facts appear in the opinion of LORD KEITH OF AVONHOLM, p. 841, letter D, to p. 843, letter G, post.

Roy Borneman, Q.C., and *C. Lawson* for the appellant.

The Lord Advocate (W. R. Milligan, Q.C.) (of the Scottish Bar), *Sir Reginald Hills*, and *W. R. Grieve* (of the Scottish Bar) for the Crown.

I

The House took time for consideration.

Mar. 14. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the facts of this case are fully stated in the opinion of my noble and learned friend, LORD KEITH OF AVONHOLM, which I have had the privilege of reading and I will not occupy time by stating them at length myself. Apart from some confusion which has arisen from the manner in which the Commissioners for the General Purposes of the Income Tax

for the Division of Mull originally stated a Case for the opinion of the Court of Session and on a remit made further so-called findings of fact, I do not think that the case would have presented any difficulty.

The appellant in 1947 began to trade in the name of the "Killiechornan Saw-mills and Joinery Works". In that and the following year he entered into agreements with a company called the "Chalmers Property Investment Co., Ltd.", of which he owned forty-nine per cent. of the capital. By these agreements he agreed to pay the sums of £24,275 and £24,900 in respect of a large quantity of trees then growing on the company's estates in the Island of Mull. The first agreement related to 10,000 large, and 1,000 small larches, 500 sitka and 500 pinus silvestris, the latter to 20,000 large and 1,000 small larch, 200 common ash and 100 common oak. In the first agreement no indication was given how the price was arrived at, unless it was to be found in a reference to S.R. & O. 1946 No. 2209, which regulated maximum prices for the sale of timber. In the second agreement the price was apparently arrived at by assuming a selection of trees which had not yet been made and fixing an average price. I have used the vague words "in respect of" and "related to", because, though in each agreement there purported to be a sale and purchase of "all the timber specified in the First part of the Schedule now standing and growing" in the forests therein mentioned, it is clear that the trees had not been selected and identified. On the contrary, the primary right of the appellant, the purchaser, was to

"mark fell and carry away all the said trees and complete all the operations authorised at such times as he the purchaser shall consider convenient."

From this it follows that he did not purchase the trees, for they remained the property of the company until severance: *Morison v. Lockhart* (1) (1912 S.C. 1017).

It was in these circumstances that he was assessed in an arbitrary or conventional figure in respect of his trade for the years 1947-48 to 1951-52 inclusive for the purpose of determining, as was said, the question of principle whether the two sums that I have mentioned of £24,275 and £24,900 could be taken into account for the purpose of computing his trading profits for the years in question. The appellant alleged that they could as representing the purchase price of stock-in-trade; the Crown denied it, saying that these were capital sums paid for an enduring right to cut timber. The commissioners held that the payments were in the nature of capital expenditure, and this was the question submitted for the opinion of the court. The proceedings before the court, the remit to the commissioners and their further findings are fully stated in the opinion of my noble and learned friend and I refer to what he will say. It appears that, when the matter came before the commissioners, whether originally or at a later stage, they had no other accounts of the trade than a profit and loss account and a balance sheet for the year ended Mar. 31, 1948, together with a stock valuation as at the same date. It is worth while to glance at these documents, for it is possible that the commissioners may have been misled by them into making a statement much relied on by the appellant, for which there was no possible justification, that the payments in question

"constituted the purchase of stock-in-trade of the business of timber merchants and that this stock is represented in the sales of the business."

The stock valuation, which is reflected in the other documents to which I have referred, states the "cost price of timber" at £24,275, adds "Annual appreciation

A of growth at 80/90 year maturity 1·17 say 1% £242 15s.", deducts "depreciation attributable to gale damage—blown trees, damaged trees and extra costs lumbering, 10% £2,451 15s. 6d.", thus arriving at a figure of £22,065 19s. 6d. To this figure there is added the net value of "blown trees" and the ultimate amount of £23,061 5s. is reached.

B My Lords, it is not putting it too high to say that this statement is sheer nonsense. The appellant had not by selection and marking, much less by felling and carrying away, appropriated any trees. Yet he claims that already by Mar. 31, 1948, he had an identifiable stock of trees of which some had grown and others had been blown down. It is hardly to be supposed that, having a right of selection, he deliberately selected trees that had been blown down.

C That there was no such scarcity as to require him to do so is plain from the fact that six months later he agreed to purchase a larger number of trees from the same forests. The commissioners do not seem to have had any other accounts for later years, and I am not prepared to assume in their absence that they would have assisted the appellant. It is obvious that, at this date, the only relevant asset possessed by the appellant was a valuable right to cut timber for which he

D had paid a large sum, and that, when the commissioners on a remit made the finding to which I have referred, they were proceeding on a wholly false basis and their finding must be disregarded. There was, it is true, a statement that, at a date unknown after the appellant made the agreements to which I have

E referred, he acted as contractor to the company and supplied some of the fencing stobs in respect of a certain large hill farming scheme, and a later statement identifying the stobs with the timber which was the subject of the agreements. But these statements, vague as to time and quantity, cannot displace what is

F ex facie the plain character of the asset that was purchased. This being the position as far as it can be ascertained from the Case Stated, the further findings of the commissioners, and their somewhat contradictory conclusions, I do not doubt that the sums payable under the agreements were (to answer the question of law as put in the Case) of the nature of capital expenditure, and that the Court of Session was right in so holding.

My Lords, I think it right to add, in view of the argument at the Bar, that, in my opinion, this appeal does not raise any broad question of principle, nor do I think it relevant to discuss the impact of the Sale of Goods Act, 1893, on a purchase of an ascertained tree or trees. Though the agreements are in certain respects

G unusual, and though the manner in which the case has been presented to the court is probably unprecedented, in essence this case raises once more the familiar question which from *Alianza Co., Ltd. v. Bell* (2) ([1904] 2 K.B. 666) onwards has been the subject of so many judicial decisions. But, unlike many cases

H where it is difficult to say on which side of the line the case falls, here I can find no factor which does not lead inescapably to the conclusion that the payments were in the nature of capital expenditure. I will not repeat what has been said by the Lord President (LORD CLYDE) and LORD SORN on this point. I agree with them.

I I will only make two further observations. In the first place, it does not follow from this decision that, whenever a timber merchant buys standing timber in small or large quantities, he cannot debit his profit and loss account with the cost. It may well be that, until he has reduced the trees into possession, it would be correct to show the right to do so rather than the trees themselves as an asset, particularly when the trees are not even identified. But I doubt whether this would be regarded as necessary for the purpose of the administration of the income tax law, and it is not a very material factor. The issue will be determined by a consideration of all the factors to which the Lord President and

LORD SORN refer. Not the least important of them will be whether the purchase is of one tree or thirty thousand. A

Lastly, I must refer to a contention put forward at a late hour by learned counsel for the appellant. I cannot find that it was advanced to the Court of Session and I do not think that he was entitled to raise it in this House. It appeared to be founded on what was said in this House in the recent case of *Sharkey v. Wernher* (3) ([1955] 3 All E.R. 493), and it was to the effect that, as and when he cut down the trees and made the timber available for his business, he was entitled to debit his trading account with the market value of such timber. I will only say that this may or may not be so. I express no opinion, for it has nothing whatever to do with the Case Stated for the opinion of the court or the appeal before this House. B C

The appeal should, in my opinion, be dismissed with costs.

LORD OAKSEY: My Lords, I have the misfortune to differ from your Lordships in this case.

The question is whether two payments made by the appellant, a timber merchant and sawmiller, for standing timber were capital or revenue payments. It was settled by agreement between the parties approved by the commissioners for Mull that this question should be decided in principle in the first place and the facts were, therefore, not fully gone into. The commissioners in the first instance upheld the nominal assessments made by the Crown for the five years in question, holding that the two payments were capital payments and that, in any event, they were not satisfied that the sums were proper commercial prices for the timber in question. On appeal on July 2, 1954, the Court of Session remitted the Case to the commissioners to amplify and amend the Case and, if so moved by either party, to take further evidence. The commissioners, on May 26, 1955, without further hearing, made the following further findings: D E

“(i) The words ‘capital payments’ were used by us to denote payments made from the capital of the business and were intended so to indicate that the payments under the contracts referred to were substantial sums and therefore represented capital in the ordinary meaning of the word. But as these payments did not purchase what can be regarded as fixed capital assets we must regard them as having been made from the circulating capital of the business. We further find in fact that the payments in question referred to in our previous decision constituted the purchase of stock-in-trade of the business of timber merchants and that this stock is represented in the sales of the business. F G

“(ii) In our decision we said that we ‘were not satisfied that the said sums were proper commercial prices’. By this we meant to say that we were unable to state what the proper commercial prices should be rather than that we had any reason to assume that the prices were wrong.” H

And on Aug. 9, 1955, the commissioners issued further findings of fact as follows:

“(i) That the timber specified in the Case Stated was in fact stock-in-trade of the appellant’s business. They relied on evidence that such timber was being sold and used for a hill farming scheme. I

“(ii) That the prices for the said timber specified in the Case Stated could not be considered by them from the evidence submitted to be other than correct. They relied on the evidence of the district valuer dealing with values of timber in the Isle of Mull.”

In my opinion, the commissioners of Mull are open to no criticism for their change of view. LORD PRESIDENT COOPER had pointed out in his judgment of

- A July 2, 1954, that the Court of Session did not know whether the appellant had availed himself of the rights he enjoyed under the agreements. The commissioners thereupon found as a fact that the timber in question was stock-in-trade, and relied for that finding on evidence that such timber was being sold and used for a hill farming scheme. The commissioners also explained the sense in which they had used the word "capital" and are not, I think, open to criticism for a
- B change of view on a question of such difficulty.

- The Crown then appealed to the First Division of the Court of Session, who said that, in view of the confusion which had emerged as to the commissioners' findings, they would not answer the questions stated in the Case, but held that the two payments did not fall to be taken into account in computing the appellant's trading for the years under appeal. The facts stated by the commissioners
- C are that the appellant, in pursuance of written contracts, had paid to a company which owned certain forests in the Island of Mull the sums of £24,275 and £24,900 for standing timber in certain named forests which was to be felled and carried away by the appellant at such times as he considered convenient, the number and categories of trees being stated and the price arrived at in accordance with the maximum prices permitted by S.R. & O. 1946 No. 2209, although in one
- D contract the statutory rule price was not referred to. A licence from the government was necessary for the cutting of any timber. The individual trees were not specified but were to be selected by the appellant and were to be cut down to the soil but not the roots or other parts which should be within or below the surface of the soil. The trees were seventy to eighty years old and were ripe for cutting.

- The Crown's contention is that the trees were partes soli, and that there is no
- E distinction between the present case and the cases of mines such as *Alianza Co., Ltd. v. Bell* (2) ([1906] A.C. 18), and *Kauri Timber Co., Ltd. v. Taxes Comr.* (4) ([1913] A.C. 771), in which it was held that no allowance could be made for exhaustion of the mines, and that payments for the timber there in question were capital which could not be deducted in arriving at the balance of profits and gains
- F of the mine or timber owner. In my opinion, these cases do not govern the present case. Mines are specifically dealt with in the Income Tax Act, 1952: standing timber is not. In the *Kauri* case (4), the Privy Council was dealing with a New Zealand statute, which is not the same as the British statute, and the observations of the Board (*ibid.*, at p. 779) show that the decision was not intended to decide anything beyond the construction of the New Zealand statute, and,
- G indeed, the Board expressly adopted the judgment of BRETT, J., in *Marshall v. Green* (5) ((1875), 1 C.P.D. 35), which they said properly accepted the note in SAUNDERS' REPORTS.

The note in WILLIAMS' SAUNDERS on *Duppa v. Mayo* (6) ((1669), 1 Wms. Saund. 275 at p. 277c) is as follows:

- H "The principle of these decisions appears to be this—that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation, and from the nutriment afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for *goods*. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or fructus industriales (i.e. the corn and other growth of the earth which are produced, not spontaneously, but by labour and industry), a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest
- I

in land, but merely for the sale of goods. *Evans v. Roberts* (7) ((1826), 5 B. & C. 829), *Sainsbury v. Matthews* (8) ((1838), 4 M. & W. 343). And it will make no difference whether they are to be reaped or dug up by the buyer or by the seller. 10 A. & E. 759. 2 Perr. & D. 594. The true question is, whether, in order to effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an easement of the right to enter the land, for the purpose of harvesting and carrying them away, is all that was intended to be granted to the buyer . . .”

In the present case, the timber was mature timber seventy to eighty years old and ripe for cutting, and, although the time for felling was not specified, it is to be presumed that a timber merchant who had paid such a large sum of money for ripe timber would fell it within a reasonable time. In any event, it could not have been contemplated that the purchaser would derive a benefit from further growth of the timber, and it is, therefore, to be regarded as goods, and the rights acquired by the appellant do not constitute an interest in land.

If I am right in thinking that the appellant acquired no interest in the land on which the trees stood, the distinction between the two classes of cases is that, in the case of mines, the purchaser purchases the land of which the mine forms the integral part, and, although he makes use of the products of the land as his stock-in-trade, yet he has the land when that stock-in-trade has been exhausted, and his purchase is, therefore, regarded as the purchase of a capital asset and not as a forward purchase of stock-in-trade. But, as LORD SORN said in the present case (1956 S.C. at p. 162):

“My reason for this is that, under the ordinary contracts for purchases of standing timber which a regular timber merchant makes to supply himself with his current requirements, the merchant has to go and win the material for himself, and yet I have never heard it suggested that, by entering such a contract, he is acquiring a capital asset and cannot debit the cost in his annual accounts.”

It appears to me that, if the decision of the Court of Session is right, every sale of a standing tree is the purchase of a capital asset. The fact that it is a comparatively small transaction cannot make any difference. It is the purchase of a growing tree which, it is said, is *pars soli*, and, if it is the fact that the tree is *pars soli*, at the time when the contract is made, regardless of whether the soil remains in the seller or the buyer after severance, I cannot see that it makes any difference whether the purchase is for one tree or one thousand. If the woods or forests had been bought in their entirety in the present case and the property in them and in the ground on which they stand had been acquired by the appellant, I should agree that the purchase price had been a capital payment. The fundamental distinction which the Income Tax Acts make is between fixed capital and circulating capital or stock-in-trade. All payments laid out for the purposes of trade are, of course, capital in a sense, but the class of capital which cannot be set off against the profits is the capital which is employed to produce the income without any intention of using it up, whereas the capital which can be set off against the profits is the capital which it is intended to circulate by sales and fresh purchases.

A timber merchant such as the appellant, who buys mature standing timber, has no interest in the forest unless he purchases the forest as such, except as a purchase of his stock-in-trade which he must acquire in order to carry on his trade. He is not interested in the forest in the way that a landowner is, as a fixed asset, nor in what it may grow in the future, either by replanting or natural regeneration. The purchase price is not, to use VISCOUNT CAVE, L.C.'s words in *British Insulated & Helsby Cables v. Atherton* (9) ([1926] A.C. 205 at p. 213)

- A "an expenditure . . . once and for all . . . with a view to bringing into existence an asset . . . for the enduring benefit of a trade". Purchases of standing timber are merely a way of acquiring the timber merchant's stock-in-trade in the way most convenient to him and to the landowner, and the question is not how does the taxpayer acquire his stock-in-trade but what is his stock-in-trade? It does not cease to be his stock-in-trade because he buys it by a forward
- B contract, nor because he buys a little or much of it at one time. As CHANNELL, J., said in the *Alianza* case (2) ([1904] 2 K.B. at p. 673):

- C "The legislature might if it chose say that the gross receipts of a business should be treated as profits for the purpose of income tax without any allowance for current expenses, and, if it did say so, the rule would have to be followed. But it has not gone quite so far as that. I find nothing in the rules to say that if the business to be assessed is that of manufacturing an article and selling it, and nothing more, the cost price of the material consumed in the manufacture is not to be taken into account in assessing the profits. In the ordinary case, the cost of the material worked up in a manufactory is not a capital expenditure; it is a current expenditure, and
- D does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years. I do not think it would be necessary that the payment for the raw material should be in the year of assessment, or even in the three years over which the average extends. It is not necessary to
- E deal with that point at present, and I do not decide it; I merely say that I do not think it would be necessary. The question in this case which we have to consider is what is the nature of the adventure or concern which this particular company is carrying on. If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure."

- F The only thing I wish to add is that the only question before the commissioners was the question of principle, and it was not suggested that the two sums of £24,275 and £24,900 were expenses of any of the particular five years in question. For these reasons, I am of opinion that this appeal should be allowed, and the case sent back to the commissioners with a direction that the sums paid for
- G the trees cut in the years in question on the basis of the contract should be allowed as deductions from the appellant's profits.

LORD MORTON OF HENRYTON: My Lords, I agree with the decision of the First Division of the Court of Session and with the speech which is about to be delivered by my noble and learned friend, LORD KEITH OF AVONHOLM.

- H The question arising in the present case is the same as the question posed by JENKINS, L.J., in *Stow Bardolph Gravel Co., Ltd. v. Poole* (10) ([1954] 3 All E.R. 637 at p. 646):

- I "Is this a case of a purchase of the raw material of the trade, or of the stock-in-trade, in which a particular trader deals, or is it a case of a purchase of a capital asset from which the taxpayers will be able to derive raw material or stock-in-trade as and when the requirements of the taxpayers' business make it expedient to do so?"

In my opinion, having regard not only to the nature of the right acquired but to the other circumstances of the present case, the purchase now under consideration is accurately described as a purchase of the latter kind.

Counsel for the appellant sought to put forward an alternative argument, in the event of his main contention being rejected. The argument was that the

appellant would be entitled to deduct, in his trading accounts, for each year in which he exercised his right to cut down trees and made the resulting timber available for use in his business, a sum equal to the market value of that timber at the date when it was so made available. In support of this argument he cited *Craddock v. Zeno Finance Co., Ltd.* (11) ([1944] 1 All E.R. 566 at p. 570), *Inland Revenue Comrs. v. Williamson Bros.* (12) ((1950), 31 Tax Cas. 370), and *Sharkey v. Wernher* (3) ([1955] 3 All E.R. 493 at pp. 498, 504). I am of opinion that this question did not arise under the Case Stated, as any sums so claimed to be deducted would not be a part of the two sums of £24,275 and £24,900 paid by the appellant under the two agreements in question and, indeed, would bear no relationship to either of these sums. Consequently, I express no opinion on it. I would dismiss the appeal.

LORD COHEN: My Lords, this is an appeal from an interlocutor of the Court of Session dated Dec. 21, 1955, finding that the sums of £24,275 and £24,900, payable by the appellant under two agreements dated respectively Sept. 30, 1947, and Sept. 30, 1948, both relating to the purchase of standing timber, did not fall to be taken into account in computing the trading profit of the business of the appellant as a timber merchant, saw-miller and joiner for the years under appeal. The appellant based his appeal on two main grounds—(i) he said that the matter was concluded in his favour by findings of fact of the General Commissioners; (ii) he said that, if your Lordships rejected his first contention, your Lordships, acting as a tribunal of fact, should conclude that the said agreements were purchases of stock-in-trade and, therefore, fell to be taken into account in computing the appellant's trading profit for the years under appeal.

My Lords, I have had the opportunity of reading in print the speech which the noble and learned Lord, LORD KEITH OF AVONHOLM, is about to deliver. I agree on both points with the conclusion he has reached. I will, therefore, not trouble your Lordships with a detailed recapitulation of the facts, but will state shortly my reasons for agreeing that this appeal should be dismissed.

On the first point, the substance of the appellant's contention is to be found in the letter of the General Commissioners dated Aug. 9, 1955, "issued in clarification of and to be read in conjunction with their original finding" on the points submitted to them. In that letter, the General Commissioners say that the timber specified in the Case Stated (i.e., the timber comprised in the two agreements attached to the Case Stated) was, in fact, stock-in-trade of the appellant's business. I agree with LORD SORN that, regarded as a finding of fact, this finding was in flat contradiction with the original finding, and cannot form a firm basis for a decision of the issues between the parties, and I would add that, in my opinion the question whether the timber comprised in the agreements was or was not stock-in-trade of the appellant's business raises a question as to the construction of the agreements and the question is, therefore, a question of mixed fact and law proper for reconsideration before the Court of Session.

On the second point I find myself in complete agreement with LORD SORN. Like him, I see no reason for doubting that, under the ordinary contracts for purchases of standing timber which a regular timber merchant makes to supply himself with his current requirements, the merchant is not acquiring a capital asset and is entitled to make the appropriate debit in his annual accounts. Equally, I think it is clear from the authorities to which your Lordships' attention was directed and in particular from the judgment of the Judicial Committee of the Privy Council in *Kauri Timber Co., Ltd. v. Taxes Comr.* (4) ([1913] A.C. 771) that the terms of the contract in question in a particular case and the surrounding circumstances may be so special that the proper conclusion may be that, under

A the contract, the trader acquired a capital asset from which he intended to get and win his stock-in-trade. In each case it must be, as counsel for the appellant admitted, a question of degree, and for the reasons given by their Lordships in the Court of Session and about to be given by the noble and learned Lord, LORD KEITH OF AVONHOLM, I have no doubt but that in this case, as in *Kauri's case* (4), what the appellant, under the agreements in question, acquired was not goods or B stock-in-trade but an enduring interest in the land and the natural increment of the trees of the nature of a capital asset.

I, therefore, agree that the appeal should be dismissed.

C LORD KEITH OF AVONHOLM: My Lords, this is an appeal from a judgment of the First Division of the Court of Session, sitting as Court of Exchequer, making a finding on a Case Stated by the Commissioners for the General Purposes of the Income Tax for the Division of Mull. The case arose out of assessments made on the appellant under Case I of Sch. D to the Income Tax Act, 1918, in the form of random assessments for the five fiscal years, 1947-48 to 1951-52. The procedure in the case has taken an unusual and remarkable course. As the procedure, however, is involved to some extent with the facts D of the case, it will be convenient for a full understanding of the case to deal with the facts before coming to matters of procedure.

E The appellant carries on business as a timber merchant, saw-miller and joiner under the name "Killiechronan Sawmills and Joinery Works", Killiechronan, Aros, Isle of Mull. He commenced business on Apr. 6, 1947. He is also a shareholder and director of a company known as the "Chalmers Property Investment Co., Ltd." (hereinafter called "the company") which owns a large estate in the Isle of Mull. He holds forty-nine shares in the company out of an issued capital of a hundred shares. On Sept. 30, 1947, and Sept. 30, 1948, the appellant and the company entered into two agreements. Apart from the schedules to the agreements, the prices mentioned therein and the dates from which the agreements were to run, these agreements are in identical terms, and it will be F sufficient to quote in full the material portions of the first agreement. The company (called "the vendors") and the appellant (called "the purchaser") agreed as follows:

G "1. The vendors will sell and the purchaser will buy as at Apr. 7, 1947, all the timber specified in the First part of the Schedule now standing and growing in or upon the forests referred to in the Second part of the Schedule hereto which forests form part of the vendors' estate situate and being at Killiechronan Aros Mull together with the boughs branches and other parts of the same trees respectively down to the soil whereon the same shall be growing but not the roots or other parts thereof which shall be within or below the surface of the soil together with the following powers and authorities H namely:—

I "Full and free power and authority for the purchaser his servants agents and workmen to go to and return from the lands upon which the said trees are situate through over and along the existing or usual roadways or tracks for the purpose of felling cutting or sawing up and carrying away or otherwise dealing with the said trees and the boughs tops logs and bark thereof at all usual and convenient times and also to top lop and strip off the bark thereof and also to place and dry the bark of the said trees on convenient parts of the said premises to be appointed by the vendors or their agents for that purpose and also for any of the purposes aforesaid to employ horses wagons motor traction and other mechanical contrivances which may be necessary or convenient and also to dig and use sawpits and stages and erect and construct sawmills and other erections and to break and saw up the said timber and stack up the same upon proper and convenient parts of the ground.

" 2. The purchase price shall be the sum of £24,275 (twenty-four thousand two hundred and seventy-five pounds).

" 3. The purchaser may mark fell and carry away all the said trees and complete all the operations authorised at such times as he the purchaser shall consider convenient.

" 4. The cutting of the trees and all the operations hereby authorised shall be done in a proper customary and workmanlike manner and so as to cause as little injury or damage as possible to the standing timber underwood grass crops and other property of the vendors or its tenants and the purchaser shall make compensation for all injury or damage which he shall commit or occasion in or upon the vendors' lands.

" 5. The purchaser will amend and repair all such hedges ditches fences and gates as may be injured or damaged in the felling cutting down or carrying away of the said trees including all gaps made in the hedges by the cutting away of trees therefrom and for the purposes aforesaid will allow and supply proper hedge botes and timber.

" 6. All questions in dispute between the parties hereto touching this agreement or the rights duties and liabilities of either party hereunder shall be referred to a single arbitrator pursuant to the provisions of the Arbitration Acts, 1889 to 1934.

" The schedule above referred to

First Part

500 sitka or silver spruce
500 pinus silvestris or contorta
10,000 larch, large
1,000 larch, small

Second Part

Pairce Choille
Old Killiechronan
Coire Pholachie
Garden Plantations
Narrow Plantations
Horse Park Wood

" The above in accordance with S.R. & O. 1946 No. 2209."

In the second agreement entered into exactly a year later and operative as at Apr. 7, 1948, the price agreed was £24,900 for further lots of trees in the same forests specified as follows:

" First Part

" 200 common ash, selected, at avge. 25c. @ 5/-	...	£1,250
100 common oak, selected, at avge. 20c. @ 4/-	...	400
20,000 larch, large 6" and over avge. 18c. @ 1/3	...	22,500
1,000 larch, small, under 6" at avge. 10c. @ 9d.	...	750
		£24,900

Second Part

Pairce Choille
Old Killiechronan
Coire Pholachie
Garden Plantations
Narrow Plantations
Horse Park Wood

" The above in accordance with S.R. & O. 1946 No. 2209."

A The sums of £24,275 and £24,900 were paid by the appellant to the company. It is found in the Stated Case that these sums were arrived at

B “(A) by estimating the cubic content of certain trees according to the ‘Hoppus system’ (which is a method recognised in the timber trade of estimating the cubic content of trees by means of certain measurements and tables), (B) by applying to the cubic content so arrived at, the maximum prices laid down by S.R. & O. 1946 No. 2209 referred to in the said agreements, and (C) by deducting from the resultant figure, a sum by way of discount.”

C It will be observed that, while the cubic content and rates applied are indicated in the schedule to the second agreement, no such figures appear in the schedule to the first agreement. It is stated in the Case that

“it was estimated before us that the trees in question were some seventy to eighty years old and were therefore ripe for cutting but we were not in a position finally to determine the age or quality of the trees in question.”

D For the purposes of this appeal I shall accept it that the trees were ripe for cutting. The only other material fact found in the Case is that, after the appellant entered into the agreements, he acted as contractor to the company and supplied some of the fencing stobs in respect of a hill farming scheme put into operation by the company under the Hill Farming Act, 1946. From a subsequent finding of the commissioners made in circumstances which I shall refer to in a moment, it would appear that some, at least, of these fencing stobs were
E supplied from timber procured under the agreements in question.

In view of what subsequently happened, I should here quote in full the original finding of the commissioners:

F “We, the commissioners, who heard the appeal after consideration of the foregoing facts and the contentions of the appellant and [Crown] decided to uphold the assessments appealed against and on Nov. 27, 1952, our decision to that effect was communicated to the parties. After an inquiry on behalf of the appellant as to the effect of that decision, we amplified it and our amplified decision was communicated in writing to the parties on Jan. 3. That the previous decision made by the commissioners at their meeting on Nov. 27, 1952, was not intended to uphold the actual figures
G of assessments which were never intended to be serious assessments, but to uphold the contention of the Inland Revenue on the matter of principle involved. The commissioners decided that the two sums referred to in the two agreements for the purchase of timber were capital payments and in any event they are not satisfied that the said sums were proper commercial prices for the timber in question.”

H The concluding words from “and in any event” are not material to this appeal and need not be further noticed.

I The appellant appealed against this determination of the commissioners and, on the appeal coming before the First Division of the Court of Session, the court, on July 2, 1954, under reference to the opinion of the court, remitted to the commissioners to amplify and amend the case with power, if so moved by either side, to take further evidence. The Lord President (LORD COOPER) in the course of his opinion said:

“The difficulty in which we now find ourselves is that it is not clear to us, even after hearing the argument from the appellant, what exactly are the points which it is sought to raise, or what are the materials on which our decision of a question of law is to be based. It has been pointed out more than once that a Stated Case must always raise a clear and distinct point of law, and I am afraid that this case does not.

"For instance, the first question of law is stated, if I may so put it, in vacuo, unrelated to the facts, or even to pro forma figures for the trade or business with regard to any of the years of assessment, five in number beginning in 1947 and ending in 1952. We do not know whether the accounts for one year and statements printed in the appendix were ever before the commissioners, nor on what basis they were compiled, least of all in regard to the vital figures of the alleged cost of the timber debited against the receipts earned by the appellant. We do not even yet know whether, and if so to what extent, the appellant has availed himself of the right he enjoys under certain agreements to enter upon the lands of somebody else and to fell and remove the trees growing on that land, nor whether timber so acquired was utilised in earning the receipts of his business in any of the years covered by the assessments. It seems to me that, until the case is presented to us in such a form as to clarify these matters and to provide us not with detailed figures (which can be left for later adjustment), but at least with pro forma computations and an indication of the basis on which the appellant on the one hand and the Inland Revenue on the other maintain that the liability of the appellant should be determined, it is not feasible for us to appreciate or to decide the question in controversy."

Proceeding on this remit, the commissioners, after an interval of almost a year, issued two documents which had no recognisable relationship to the points on which the First Division wished to be enlightened. It is necessary to quote these in full. The first runs:

"We, the General Commissioners for Income Tax for the Mull Division for the County of Argyll, have given at the request of the solicitors for the appellant further consideration to the words 'capital payments' employed by us in our decision, and we make the following further findings:—

"(i) The words 'capital payments' were used by us to denote payments made from the capital of the business and were intended so to indicate that the payments under the contracts referred to were substantial sums and therefore represented capital in the ordinary meaning of the word. But as these payments did not purchase what can be regarded as fixed capital assets we must regard them as having been made from the circulating capital of the business. We further find in fact that the payments in question referred to in our previous decision constituted the purchase of stock-in-trade of the business of timber merchants and that this stock is represented in the sales of the business.

"(ii) In our decision we said that we 'were not satisfied that the said sums were proper commercial prices'. By this we meant to say that we were unable to state what the proper commercial prices should be rather than that we had any reason to assume that the prices were wrong.

"Tobermory

May 26, 1955."

The second document is as follows:

"Aug. 9, 1955.

"I am directed by the commissioners to inform you that on May 26, 1955, the General Commissioners of Income Tax for the Division of Mull in the County of Argyll issued in clarification of and to be read in conjunction with their original finding on the two points referred to them in November, 1952, findings of fact as follows:—

"(i) That the timber specified in the Case Stated was in fact stock-in-trade of the appellant's business. They relied on evidence that such timber was being sold and used for a hill farming scheme.

(ii) That the prices for the said timber specified in the Case Stated could not be considered by them from the evidence submitted to be other than correct. They relied on the evidence of the district valuer dealing with values of timber in the Isle of Mull.

Such findings of fact were finally decided by the commissioners on May 26, 1955, and have been duly notified to the parties.

Yours faithfully,

(Sgd.) D. M. McWilliam

Clerk to Commissioners."

When the case came back to the Court of Session, counsel for the Crown moved the court to remit back to the commissioners to hear and determine the appeal de novo. This was opposed by counsel for the appellant and the motion was refused, the Lord President (LORD CLYDE) saying:

"There is no precedent for such a course which in any event I do not consider in the light of the history of the case would serve any useful purpose."

The additional findings were incorporated as part of the Case. The view taken by the First Division on the merits of the appeal is summarised in the following passage from the opinion of the Lord President (1956 S.C. at p. 158):

"In my opinion, in the case of contracts so unusual as these and covering as they do an indefinite track of time, it is not possible in the circumstances to conclude that the price paid for the selective right conferred by them represents a payment for the raw material of the business. The decision of the commissioners, therefore, that these were capital payments and that the contention of the Inland Revenue on principle should be sustained, appears to me to be well founded."

LORD CARMONT and LORD RUSSELL concurred, and LORD SORN, on an independent consideration of the facts of the case, reached the conclusion that the right acquired by the appellant was the acquisition of a capital asset.

My Lords, the judges of the First Division, in my opinion, reached a right conclusion. There is included among the documents attached to the Stated Case a profit and loss account of the appellant's business for the year ended Mar. 31, 1948. That is the only account produced in the case, and it is earlier than the date of the second agreement. It brings in, as in a trading account, the sum paid under the first agreement as a purchase during the year and shows as stock at the end of the year this sum of £24,275 reduced to £23,061 5s. A further statement shows that this depreciation is wholly due to gale damage, less the value of the blown trees and natural appreciation of growth of the standing trees.

It is unnecessary in this case to consider whether standing trees can ever be so treated. LORD SORN considered that there may be cases where a timber merchant buying standing trees for his current requirements is entitled to debit the cost in his annual accounts. This may be so if regard is had to current requirements, and the timber merchant proceeds to cut down the trees and reduce them into his possession within a short time of their acquisition. It may be that the cut timber then becomes his stock-in-trade and that the price paid for the trees should enter into the cost price of this stock-in-trade. I say no more because much may depend on the circumstances of the particular case, and such a case is not, in my opinion, this case.

The number of trees here was very large, thirty thousand large larch, and two thousand small larch, as well as other conifers and a quantity of hard timber. There is no evidence that there was any immediate outlet for such a large quantity of timber. The appellant's balance sheet shows him as possessing at Mar. 31, 1948, relatively modest plant and machinery costing some £832, and

loose tools and equipment costing some £118, a total of £950. These figures do not suggest that the appellant was able to cope within any short period of time with the large quantity of trees made matter of the agreements. Further, the trees under the two agreements were quite unidentified, though, no doubt, understood to be trees of varying average sizes or contents. The appellant was to "mark fell and carry away all the said trees and complete all the operations authorised at such times as he the purchaser shall consider convenient". As was observed in the Court of Session, this absence of any time limit presents an unusual feature. It gives the appellant a right to defer the cutting of the trees for a very long period, if not indefinitely, though practical considerations and the ripe condition of the trees might well stimulate the appellant to exercise his rights with such promptitude as was consistent with his capacity and opportunity to do so. The fact, however, remains that, when the agreements were completed, he had no right of property in a single tree. He had merely a right to select and thereafter to cut. Even by selection he acquired no property in the trees. He could obtain no property in any part of a tree till he had felled it to the ground. I find it impossible to hold that this very peculiar right is capable of being treated as stock-in-trade of the appellant. The nature of the right, the indefiniteness of the period for its exercise, and the lack of identification of the trees on which the right was to be exercised, to which may be added the size of the transaction and the absence of any evidence of intention or means to complete it within any foreseeable time, all, in my opinion, negative the idea that the appellant had anything that could be called stock-in-trade.

In my opinion, what the appellant acquired here was merely a right to go on to the company's land to mark, cut and carry away such trees, up to a specified number, as fell within the size and description mentioned in the agreements. The money paid for this right was, in my opinion, a capital and not a revenue expenditure. There may be many cases where the dividing line is a narrow one. But in this case I consider that the scale falls heavily on the capital side of the line. I find it fruitless to examine the many cases that were cited at the hearing. In these cases the question generally was what was the proper inference to be drawn as to the nature and purpose of the transaction in the particular circumstances of the case. No infallible test can be propounded for all cases.

A similar question was recently considered in *Stow Bardolph Gravel Co., Ltd. v. Poole* (10) ([1954] 3 All E.R. 637), in which it was decided that the purchase of unworked deposits of gravel by a dealer in sand and gravel was capital and not revenue expenditure. There, JENKINS, L.J., said (*ibid.*, at p. 646):

"I would say that the taxpayers here do carry on the business of dealers in sand and gravel, but that one part of the business consists, not merely in purchasing gravel but in obtaining gravel, and there may be expenditure necessary or desirable with a view to obtaining gravel which is nevertheless not the purchase price of gravel as stock-in-trade of the business."

Mutatis mutandis this passage could be applied to the appellant here as dealer in timber. As it was expressed in argument in the case cited, he has provided himself with a means of supplying himself with timber which when procured would form part of his stock-in-trade. A similar illustration was given by ROMER, L.J., in *Golden Horse Shoe (New), Ltd. v. Thurgood* (13) ([1933], 18 Tax Cas. 280), with reference to a manufacturer of gas acquiring a coal mine with a view to supplying himself with coal for his gas-works.

Reliance was placed by counsel for the appellant on the definition of "Goods" in s. 62 (1) of the Sale of Goods Act, 1893, viz.:

" 'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

A Forest trees some seventy years old are not industrial growing crops and it was the last part of the definition that was prayed in aid. As between parties to a contract the definition may, in cases to which it applies, be important as affecting their rights and duties under the contract, but it may be doubted whether, in a case with third parties, in this case the Revenue, it can have the effect of making something stock-in-trade which would not properly be so regarded until reduced into possession. But, in any event, the considerations already referred to would preclude an appeal to this definition. There are no trees ascertained as the subject-matter of the contract and, therefore, no one can say what are the trees attached to and forming part of the land that are said to be "goods". Further, there is no obligation on either vendor or purchaser to sever the trees. At best, the appellant has only a licence to sever trees at such times as he shall consider convenient. The definition, in my opinion, has no application to the circumstances of this contract, and it is unnecessary to consider what the precise effect of this definition may be in an appropriate case.

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It remains only to consider the effect of the additional findings made by the commissioners. These findings are in contradiction of the previous decision of the commissioners upholding the contention of the Inland Revenue on the matter of principle involved and were made without any additional evidence being led. It was represented by counsel for the appellant that the finding that the payments were "made from circulating capital", that they "constituted the purchase of stock-in-trade" and that the timber "was in fact stock-in-trade" were findings in fact which should not be disturbed. In truth, they are findings in law or of mixed fact and law which, for the reasons I have already expressed, are opposed to all the real findings of fact and documents in the case.

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In my opinion the court below came to a right conclusion. The assessments, I apprehend, have still to be considered on actual figures, and nothing that I have said in upholding the decision that the sums in question were capital payments is intended to preclude consideration of what, if any, allowance is to be made for timber actually cut down and taken into stock by the appellant.

F I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Tyrrell Lewis & Co.*, agents for *Fyfe, Ireland & Co.*, Edinburgh (for the appellant); *Solicitor of Inland Revenue*, agent for *Solicitor for Scotland of Board of Inland Revenue* (for the Crown).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

DAY v. DAY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), November 16, 1956, March 6, 8, 1957.]

Divorce—Desertion—Defence—“Just cause”—Adultery by deserted spouse prior to date of desertion—Effect on deserting spouse’s mind—Onus on petitioner—Continuance of separation without cause—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 1 (1) (b).

Where a petitioner for divorce, who has himself been guilty of misconduct, whether cruelty or adultery, seeks a decree on the ground of desertion, he is entitled to a finding of desertion if he proves that his misconduct was not the cause of the desertion; whether he obtains relief will depend on the exercise of the court’s discretion (see p. 853, letter D, post).

The husband left the wife in 1943. In 1944 he committed adultery and informed the wife; but she took no step to obtain a divorce. In 1953 the husband wrote to the wife, making a bona fide offer to return and resume cohabitation with her. The wife’s reply amounted to a refusal but she did not refer to the fact that the husband had committed adultery nor did she put that forward as a reason for not receiving him back. The husband petitioned for divorce on the ground of the wife’s desertion as from 1953, i.e., as from the date of her refusal to resume cohabitation. On the question whether the wife could be said to have deserted “without cause” within the meaning of s. 1 (1) (b) of the Matrimonial Causes Act, 1950, in view of the husband’s adultery prior to the date of her refusal of his offer,

Held: the husband had proved that his adultery was not the cause of the wife’s desertion since on the facts she had formed her intention not to resume cohabitation independently of his adultery; accordingly, the wife was guilty of desertion and the husband would be granted a decree in the exercise of the court’s discretion.

Observations of SIR BOYD MERRIMAN, P., in *Herod v. Herod* ([1938] 3 All E.R. at p. 732) and of DU PARCQ, L.J., in *Williams v. Williams* ([1943] 2 All E.R. at p. 751) applied.

[As to conduct amounting to just cause, see 12 HALSBURY’S LAWS (3rd Edn.) 257, para. 484, note (1); and for cases on the subject, see 27 DIGEST (Repl.) 365-367, 3018-3037.]

For the Matrimonial Causes Act, 1950, s. 1 (1) (b), s. 10 (1), see 29 HALSBURY’S STATUTES (2nd Edn.) 389, 398.]

Cases referred to:

- (1) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest (Repl.) 360, 2973.
- (2) *Williams v. Williams*, [1943] 2 All E.R. 746; 113 L.J.P. 18; 169 L.T. 375; 27 Digest (Repl.) 346, 2875.
- (3) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; 27 Digest (Repl.) 350, 2895.
- (4) *British Columbia Electric Ry. Co., Ltd. v. Loach*, [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946; 36 Digest (Repl.) 182, 981.

Petition.

In this case the husband petitioned for divorce on the ground of the wife’s desertion and prayed for the exercise of the court’s discretion in his favour in respect of his own adultery. The suit was undefended and came before WILLMER, J., on Nov. 16, 1956, when it appeared that the husband’s adultery was committed by him prior to the date of the wife’s alleged desertion. WILLMER, J., adjourned the case for argument by the Queen’s Proctor on the question whether or not in those circumstances the wife could be said to have deserted “without

A cause " within the meaning of the Matrimonial Causes Act, 1950, s. 1 (1) (b). The facts appear in the judgment.

J. W. Miskin for the husband.

J. P. Comyn and Roger Gray for the Queen's Proctor.

Cur. adv. vult.

B Mar. 8. **WILLMER, J.**, read the following judgment: The material facts in the present case, as I find them, are as follows. The parties were married in 1919, and there are four children of the marriage, all daughters, born respectively in 1920, 1924, 1926 and 1928. In 1928, after the birth of the youngest child, the wife refused to have any further marital intercourse, and about 1933 withdrew from the husband's bedroom. She became cold towards the husband, and this led to quarrels. Quarrels also arose out of the association of the wife with another woman, to whom the husband took exception. The husband says that his wife was always nagging and quarrelling, and eventually, about 1939, he informed her that as soon as the youngest child was fourteen years of age he proposed to leave her. The wife replied to the effect, " Take your money and don't come back any more ". Consequently in 1942, when the youngest child reached the age of fourteen, the husband in fact left. In 1943 the husband returned to the matrimonial home for two periods of two weeks each, the first occasion being during convalescence after an illness, and the second occasion, towards the end of the year, being for a holiday. On the latter occasion the parties shared a bedroom, and sexual intercourse took place, at any rate during the first week. The wife then again refused intercourse, saying, as she had said before, that she found it disgusting and that she would not have it again. Since the end of 1943 the parties have been continuously separated, the husband paying only occasional visits to the matrimonial home, usually in connection with family occasions, such as the children's weddings. There has been no further marital intercourse, and I am unable to find that any of the husband's visits amounted to a resumption of cohabitation.

F In early 1944 the husband wrote to the wife asking whether, if he committed adultery, she would give him his freedom. The wife replied, " I will see about it. " Shortly afterwards the husband in fact committed adultery, as disclosed in his discretion statement—namely, two acts of adultery with an unknown woman at a hotel at about the time of Easter, 1944. The husband informed the wife of the fact of his adultery, but the wife took no steps towards seeking a divorce, nor did she at any time make any complaint against the husband for having committed adultery. The parties continued living separate and apart, and in early 1953 the husband, apparently having disposed of his business, and being then a man of over sixty years of age, wrote to his wife suggesting that he might return and resume cohabitation with her. The wife's letter in reply has been preserved, and the material part is in the following terms:

H " If you have your heart in coming back here, then it is up to you, but it will not be easy, we have been parted too long now, you have pleased yourself in the way you live and I likewise, but come by all means. You will need a job, and I will want more than £1 a week, but I am afraid I do not want to act as a wife any more, this was the reason I was so hateful before. I do not like intercourse, but there are other things in life without that. "

I There was further correspondence between the parties, substantially in the same strain, the wife maintaining her attitude that, if the husband returned, it would in effect be as a lodger only. In none of her letters did she refer to the fact that the husband had committed adultery, or put this forward as a reason for not receiving him back as a husband. The husband was not prepared to return on the wife's terms, and in fact has never done so. Moreover, although up to 1953 he continued to maintain the wife, he ceased to do so after the wife's refusal to receive him back as a husband. The wife has never taken proceedings against the husband for maintenance.

By his petition the husband alleges desertion on the part of the wife since about May, 1953, on the basis of the wife's refusal to accede to his request for a resumption of cohabitation. It is implicit in the manner of presentation of the petition that the separation prior to 1953 was consensual, the gist of the husband's case being that by his invitation to resume cohabitation he then withdrew his consent to the continued separation, so that the wife, by refusing his invitation and continuing the separation without his consent, became a deserting party. It was suggested in argument that it would be open to me to find, on the facts proved, that the wife had been guilty of constructive desertion ever since the original parting, or at least since 1943. There has, however, been no application to amend the petition. In the circumstances I decline to find that there was any desertion on the part of the wife at any time prior to 1953. I am satisfied that the separation until that date was consensual, and that the petition as drawn puts forward the husband's case in the only way it could be put forward. I am satisfied that the husband's offer to resume cohabitation in 1953 was bona fide, in the sense that he did genuinely desire to resume cohabitation as husband and wife. I find that the wife did not in 1944, or at any other time, raise any objection to the fact of the husband having committed adultery. She did not put that forward as a ground for refusing the husband's offer to return; nor has she put forward any other grounds which, in my judgment, could amount to just cause for refusing to receive the husband back.

The facts, as set out above, raise in the neatest possible form a question which, to my mind, goes to the root of the law relating to desertion, and about which, so far as I am aware, there is no direct authority—namely, whether or not a spouse, who has admittedly been guilty of the matrimonial offence of adultery prior to the inception of the alleged period of desertion, can ever successfully plead that the other spouse has been guilty of desertion without cause, notwithstanding that that other spouse does not seek to rely on the adultery as just cause for the separation. The question appeared to me to be one of such fundamental importance that I thought it right to ask for the assistance of the Queen's Proctor, so that the matter could be fully argued before me. In the result I have had the advantage of listening to a most helpful and interesting argument by counsel for the Queen's Proctor, and I should like to express my indebtedness to him, as well as to counsel for the husband, for the clear and lucid way in which they presented their submissions.

In the case of adultery committed by a petitioner after he or she has been deserted, it is well settled that the desertion is not necessarily terminated as a matter of law. If the petitioner can show that the respondent did not know of the adultery, or, if it was known, that his or her conduct was not in any way affected by it, the desertion will be held to be still continuing, and it becomes a matter for the discretion of the court whether, having regard to the petitioner's adultery, relief should be granted. Such is the effect of the well-known decision of SIR BOYD MERRIMAN, P., in *Herod v. Herod* (1) ([1938] 3 All E.R. 722), a decision which has many times been approved by the Court of Appeal, and which has been frequently followed in this court. The argument for the husband in the present case has been that precisely the same considerations apply to adultery committed before the attempted desertion as apply to adultery such as was in question in *Herod v. Herod* (1). It is fair to say that until today that has been the generally accepted view, as is shown by the comments of modern text-book editors—see, for instance, LATEY ON DIVORCE (14th Edn.), at p. 173, and RAYDEN ON DIVORCE (6th Edn.), at pp. 138-139, particularly note (a). Moreover, it is clear that this was the learned President's view at the time when he decided *Herod v. Herod* (1), as is shown by some remarks which he made obiter in the course of his judgment in that case. He said (*ibid.*, at p. 732):

“It may be said that this line of reasoning would enable a spouse whose

A adultery, not condoned, had preceded the alleged desertion to obtain a decree at the discretion of the court, whereas such adultery, at least, ought on principle to be held to cause or excuse the desertion. In my opinion, however, precisely the same consideration applies. If it is left in doubt whether the respondent knew of the adultery, or, if known, whether his or her conduct was affected by it, the petitioner would fail to discharge
B the burden of proof. If . . . it were established that the respondent's intention to withdraw from cohabitation was formed entirely independently of the petitioner's misconduct, the offence would be proved. The question is to be determined according to the circumstances of each case. I do not think that a spouse could be heard to say that adultery at which he or she had connived, or to which his or her conduct had conduced, was a reasonable
C excuse for desertion."

Arising from what is said in that last sentence, I think it right to say that in the present case it has not been suggested, and I do not find, that the wife connived at the husband's adultery, or that her conduct conduced to it. Nor has she ever condoned it. The most that has been said in the present case is that the
D circumstances in which the husband's adultery occurred—more especially having regard to the wife's apparent indifference to it—would be matters properly to be taken into consideration if I am satisfied that the charge of desertion is made out and it becomes necessary to exercise my discretion.

The view expressed by the learned President in the passage from his judgment in *Herod v. Herod* (1), to which I have just referred, gains further support from some remarks made by DU PARCQ, L.J., in *Williams v. Williams* (2) ([1943] 2 All E.R. 746), to which my attention was called. That again was a case in which the adultery in question was committed after a period of desertion had commenced. Accordingly, in so far as what the learned lord justice said referred to adultery committed before any act of desertion, his remarks must equally be treated as obiter. He is, however, reported to have said this (*ibid.*, at p. 751):

F "When it is apparent that facts existed which, if they influenced the deserting spouse, were a sufficient cause to excuse the desertion, it is for the deserted spouse to prove, to the reasonable satisfaction of the tribunal, that those facts did not operate to cause the desertion or its continuance."

It is clear, therefore, that such opinions as have been expressed hitherto
G have been in favour of the view that no distinction in principle is to be drawn between adultery committed before and that committed after the time when desertion is alleged to have started. Notwithstanding these expressions of view, however, it has been argued on behalf of the Queen's Proctor, now that the matter has arisen directly for decision, that there is a fundamental difference in principle between adultery committed before the inception of the alleged
H desertion and that committed during its continuance. In the latter case one starts with the matrimonial offence of desertion already current, and the only question could be whether its continuance is affected by the subsequent adultery. In the former case the question is whether a charge of desertion can ever be got on to its legs (if I may use that expression) without asserting a duty on the part of the alleged deserter to continue cohabitation with a spouse
I who ex hypothesi has been guilty of adultery. Is the situation altered on proof that the alleged deserting spouse did not know of the adultery, or that his or her mind was not in fact affected thereby? Even so, he or she cannot either continue to cohabit with, or (in the case of spouses already separated) take back, the adulterous spouse without condoning the adultery. Yet, on the husband's argument, this is precisely what he or she must do in order to avoid being held a deserter.

A simple illustration will, I think, suffice to show the force of the argument on behalf of the Queen's Proctor. Take the case of a husband who, during

cohabitation, commits adultery, and thereafter for years succeeds in concealing it from his wife. Later the wife, still in ignorance of the husband's adultery, leaves him for quite other reasons—reasons which could not of themselves be said to give her just cause, e.g., unreasonable refusal to follow her husband to another part of the country when his work necessarily requires him to live there. After three years the husband files a petition on the ground of desertion and, being an honest man, discloses his adultery and asks for the discretion of the court to be exercised in his favour. Too late, for the petition is already on the file, the wife learns for the first time of the husband's adultery. What is she to do? On the argument for the husband she has no defence to the charge of desertion, for her ignorance of the adultery precludes her from setting that up as a justification for her refusal to cohabit with her husband. To avoid being found a deserter she must, therefore, go back to her husband (if he is then willing to withdraw his petition and take her back), and thereby willy-nilly condone his adultery. It may be said that in such a case there would be good grounds for refusing to exercise the court's discretion in favour of the petitioning husband. That does not, however, get rid of the difficulty that there would still be a finding of desertion against the wife and in favour of the adulterous husband. Similar considerations would apply in the case of a husband who, when already in desertion, proceeds to commit adultery which he conceals from his wife. Suppose such a husband subsequently makes a bona fide offer to return. The wife, being ignorant of the adultery, cannot refuse to have him back on that ground. She rejects his offer on other, and insufficient, grounds. Is it to be said that, in accordance with the principles of *Pratt v. Pratt* (3) ([1939] 3 All E.R. 437), she not only terminates her husband's desertion, but is herself liable to be in desertion from that time onwards, notwithstanding the adultery of her husband of which she is ignorant?

Having regard to the difficulty of cases such as these, it was submitted on behalf of the Queen's Proctor that one spouse cannot set up a case of desertion against the other, if he or she has been guilty, himself or herself, of antecedent, uncondoned adultery, notwithstanding that the other spouse does not know of such adultery or does not seek to rely on it as affording just cause. The fact of antecedent adultery, it is said, is not something analogous to a statute of limitations, i.e., something which affords a valid defence if the point is taken by the other spouse, but otherwise of no effect. On the contrary, it is contended, it is the duty of the court, in the public interest, to take the point and to withhold relief, notwithstanding that the other spouse did not know of, or was unaffected by the knowledge of, the prior adultery. The onus is on the petitioner, whether the case be defended or undefended, to prove that the desertion complained of was without cause, and this he cannot do if he has to admit that he has been guilty of prior and uncondoned adultery.

I hope that I have fairly stated the arguments addressed to me on behalf of the Queen's Proctor. I certainly feel their force, and it is not without hesitation that in the end I have found myself unable to accede to them. But I am not prepared to differ from the views expressed by SIR BOYD MERRIMAN, P., and by DU PARCQ, L.J., in the cases to which I have already referred, or to hold that there is any distinction in principle between adultery committed prior to the inception of the desertion alleged and adultery committed during the continuance of desertion already current. Apart from the weight which must naturally be attached to the dicta of the learned President and DU PARCQ, L.J., I should myself arrive at the same conclusion as a matter of construction of the words of the statute which I have to apply. By s. 1 (1) of the Matrimonial Causes Act, 1950, a petition for divorce may be presented

"on the ground that the respondent . . . (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition."

- A The statute makes no distinction between cause in relation to the inception of desertion and cause in relation to its continuance. In either case the question to be decided is whether the desertion was "without cause". On the wording of the statute the inquiry whether or not there was cause must be the same, whether the petitioner's adultery was committed before the inception or during the continuance of the desertion complained of. So far as the wording
- B of the statute is concerned, therefore, I can see no distinction between adultery before and adultery during the currency of the desertion alleged. The learned editors of *RAYDEN ON DIVORCE* (6th Edn. at p. 138 note) suggest that the word "cause" in the statute must mean effective cause. I am aware that the practice of attaching epithets to the word "cause" has been frowned on by no less an authority than LORD SUMNER: see *British Columbia Electric Ry. Co., Ltd. v. Loach* (4) ([1916] 1 A.C. 719); but at least one may be permitted to hold that a cause is something which causes. This indeed seems to me to be the ratio decidendi of *Herod v. Herod* (1), so far as concerns adultery committed during the continuance of desertion already current, and in my judgment the same effect must be given to the word in relation to adultery committed prior to the inception of the desertion alleged. If the petitioner has in fact, by his own
- D misconduct—be it adultery or cruelty—caused the desertion of which he seeks to complain, either in its inception or in its continuance, then clearly he cannot bring himself within the words of the statute. If, however, he proves to the satisfaction of the court that his adultery was not the cause of the desertion complained of, whether in its inception or in its continuance—a fortiori, if he can show that its inception or continuance was in fact due to quite other causes,
- E such as would not afford the respondent any legitimate excuse—then in my judgment he brings himself within the statute and is at least entitled to a finding of desertion in his favour. Whether or not he is to obtain relief will then be a matter calling for the exercise of the court's discretion.

It is not disputed that the burden is on the petitioner to satisfy the court that his adultery was not the cause of the desertion complained of. On the

F facts of the present case that involves the husband proving affirmatively that the mind of the wife was not in any way affected by her knowledge of the husband's adultery. Clearly the burden is a heavy one, and doubtless in many cases it will be one that a petitioner will not be able to discharge. In the present case the petitioning husband has in my judgment discharged the burden. Having seen her letters, I am satisfied that the mind of the wife was quite

G unaffected by her knowledge of the husband's adultery, and that neither that nor any other misconduct on the part of the husband was the cause of the wife's refusal to resume cohabitation with him. In the absence of evidence of any other grave and weighty matter, I find that the wife's refusal was without just cause, and in such circumstances I am satisfied that the wife was guilty of desertion without cause.

- H That leaves only the question whether in all the circumstances of the case I ought in my discretion to grant the husband the relief prayed for. In approaching that question I pay regard, as a mitigating circumstance, to the fact that neither before its commission, when the husband was threatening to commit adultery, nor at any time since has the wife voiced any objection whatsoever to the fact of the husband's adultery. Neither in the interests of the parties
- I themselves, nor in the public interest, can there be any virtue in perpetuating a marriage, which for the last fifteen years has been a marriage in name only. In the circumstances I propose to exercise my discretion in favour of the husband, and to pronounce a decree nisi accordingly. I confess that I have reached this conclusion with some measure of regret. That is not because I begrudge the husband the relief to which I have held him entitled. My regret is due to the fact that there will be no opportunity for reviewing my decision in a higher court. It is inherent in the procedure under s. 10 (1) of the Matrimonial Causes

Act, 1950, that the Queen's Proctor, when he is invited to assist the court by attending to argue a question of law such as arose in this case, does not become a party to the suit, and accordingly has no right of appeal. I think that it is unfortunate that, when a question arises of such importance as that which has arisen in the present case, no machinery exists, if the decision of this court is in favour of the petitioner, for submitting that decision to the consideration of a higher court.

Decree nisi.

Solicitors: *R. H. Marcus* (for the husband); *Queen's Proctor.*

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

Re DELIUS' WILL TRUSTS.

EMANUEL AND ANOTHER v. ROSEN AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), March 12, 1957.]

Charity—Music—Trusts for the advancement of the works of Delius, the testatrix' late husband—Gift over to testatrix' brother if nothing further could be undertaken in connection with the furtherance or perpetuation of Delius' works—Whether trusts charitable.

The testatrix was the widow of Frederick Delius, the composer. She died on May 28, 1935, having by her will, dated May 27, 1935, bequeathed to her trustees all the copyrights of the musical works of Delius to which she was entitled, and by cl. 12 of the will she directed the trustees to apply the income from the royalties and the income of her residuary trust fund "for or towards the advancement . . . of the musical works of [Delius] under conditions in which the making of profit is not the object to be attained and which might be economically impossible by any concert operative or other organisation (as my intention is to create a charitable trust within the legal meaning of that phrase) by means of (1) the recording upon the gramophone or other instrument for the mechanical reproduction of music of those works of [Delius] which in the opinion of my trustees and their advisers are suitable for reproduction (2) the publication and issue of a uniform edition of the whole body of the works of [Delius] or any part thereof or the publication and issue of any separate work hitherto unpublished under the editorship of Sir Thomas Beecham . . . Provided that the publication and issue of any separate work hitherto unpublished shall be made only with the consent in writing of Sir Thomas Beecham . . . and (3) the financing in whole or in part of the performance in public of the works of [Delius]". By cl. 14 there was a gift over of the residuary trust fund to a brother of the testatrix if, during the lifetime of the brother, "it shall at any time appear to [the] trustees that the trusts and object of cl. 12 . . . have been fulfilled to their fullest possible extent and there remains nothing further that [the] trustees can undertake in connection with the furtherance or perpetuation of the works of [Delius]".

Held: the trusts declared by cl. 12 were valid charitable trusts for the following reasons—

(i) the purpose of the trusts being to spread and establish knowledge and appreciation of Delius's works among the public of the world, and having regard to the musical worth of the works, the trusts were charitable trusts for the promotion of the art of music (dicta of LORD GREENE, M.R., in *Royal Choral Society v. Inland Revenue Comrs.*, [1943] 2 All E.R. at p. 104, applied), even though their object was to promote the music of a particular composer (*Re Shakespeare Memorial Trust*, [1923] 2 Ch. 389, applied); and

A (ii) the charitable nature of the trust was not vitiated merely because incidentally the reputation of the testatrix' husband would be enhanced; and

B (iii) although a charitable trust must not have the potentiality of benefiting a non-charitable beneficiary, yet these trusts could not benefit the residuary legatee since the condition in cl. 14 of the will that nothing further could be undertaken "in connection with the furtherance or perpetuation of the works" of Delius could never be fulfilled.

[As to gifts for particular objects, such as the promotion of the arts, being charitable, see 4 HALSBURY'S LAWS (3rd Edn.) 218, para. 497; and for cases on the subject, see 8 DIGEST (Repl.) 326-331, 91-126.]

C Cases referred to:

- (1) *Royal Choral Society v. Inland Revenue Comrs.*, [1943] 2 All E.R. 101; 112 L.J.K.B. 648; 169 L.T. 100; 25 Tax Cas. 263; 2nd Digest Supp.
- (2) *Re Shakespeare Memorial Trust, Lytton (Earl) v. A.-G.*, [1923] 2 Ch. 389; 92 L.J.Ch. 551; 130 L.T. 56; 8 Digest (Repl.) 330, 122.

Adjourned Summons.

D The trustees of the will, dated May 27, 1935, of Jelka Delius, deceased, issued an originating summons for the determination of the question whether, on the true construction of the will, the trusts declared in cl. 12 thereof and concerning her residuary trust fund and royalties in respect of the musical works of her husband, the late Frederick Delius, were valid and effectual charitable trusts. The summons further asked that, if the answer to the preceding question were

E in the affirmative, if necessary a scheme might be directed.

Frederick Delius died on June 10, 1934. The testatrix died on May 28, 1935. The testatrix' brother, to whom, under cl. 14 of the will, there was a gift over of the testatrix' residuary trust fund if the trusts declared by cl. 12 were fulfilled during his lifetime, died on Nov. 27, 1935, leaving a son, the first defendant. The testatrix had no children and her next of kin were the first defendant and a

F niece. The second defendant, the Custodian of Enemy Property, was interested in the moiety of the residuary trust fund which might pass to the niece.

The relevant clauses of the will appear in the judgment.

T. A. C. Burgess and Miss D. M. Rowland for the plaintiffs, Philip Emanuel and Barclays Bank, Ltd.

G C. F. Fletcher-Cooke for the first defendant, Georg Rosen, a nephew of the testatrix.

N. C. H. Browne-Wilkinson for the second defendant, the Custodian of Enemy Property.

Denys B. Buckley for the Attorney-General.

H ROXBURGH, J.: This is the will of the widow of Frederick Delius. By cl. 8 she devises and bequeaths to her trustees "all copyrights and interests in copyrights of the musical works of my late husband to which I am entitled . . ." Clause 9 reads:

"I direct that the net royalties and profits or moneys in the nature of royalties or profits . . . shall be income and shall be held upon the trusts contained in cl. 12 of this my will."

I Clause 12 is as follows:

"My trustees shall apply the royalties income and the income of my residuary trust fund for or towards the advancement in England or elsewhere of the musical works of my late husband Frederick Delius under conditions in which the making of profit is not the object to be attained and which might be economically impossible by any concert operatic or other organisation (as my intention is to create a charitable trust within the legal meaning of that phrase) by means of (1) the recording upon the gramophone or other

instrument for the mechanical reproduction of music of those works of my late husband which in the opinion of my trustees and their advisers are suitable for reproduction (2) the publication and issue of a uniform edition of the whole body of the works of my late husband or any part thereof or the publication and issue of any separate work hitherto unpublished under the editorship of Sir Thomas Beecham Bart. Provided that the publication and issue of any separate work hitherto unpublished shall be made only with the consent in writing of Sir Thomas Beecham Bart. and (3) the financing in whole or in part of the performance in public of the works of my late husband . . .”

In cl. 13 the testatrix directs that her trustees

“shall before carrying out the trusts contained in cl. 12 . . . obtain and faithfully observe the advice and opinion of Sir Thomas Beecham . . . and Frederic Austin . . . or the survivor thereof (so long as they or such survivor shall be alive) with respect thereto and I direct that my trustees shall act upon such advice or opinion accordingly.”

Frederic Austin is, unfortunately, dead, but Sir Thomas Beecham, the survivor, is still able to assist in these matters.

Then comes cl. 14 which, I must confess, has caused me (and, indeed, still causes me) some difficulty. It is in these terms:

“If during the lifetime of my said brother it shall at any time appear to my trustees that the trusts and object of cl. 12 of this my will have been fulfilled to their fullest possible extent and there remains nothing further that my trustees can undertake in connection with the furtherance or perpetuation of the works of my late husband then and in such case I give my residuary trust fund unto my said brother.”

The brother died on Nov. 27, 1935, which was very soon after the testatrix died, but, of course, she could not foretell that that would be so.

First, I have to decide what is the purpose of this trust. In arriving at a conclusion on that point, I must have regard not only to the language in which the purpose is expressed (and, indeed, that is, of itself, reasonably clear) but also to the means which are indicated for achieving that purpose, and these, in my judgment, make the position even clearer. It seems to me that the purpose is the spreading and establishment of knowledge and appreciation of Delius's works amongst the public of the world. It is, indeed, a remarkable piece of history to what extent that objective has been achieved in the twenty-one years or so since the testatrix died. The copyrights in Delius's works were valued at the date of the testatrix's death at £1,483, and at that time formed a comparatively small portion of her residuary estate. The royalties received in the year ending Apr. 5, 1936, amounted to £103; in the year 1946 they amounted to £2,233; and in the year 1956 they amounted to £7,278—a very remarkable story, which is, no doubt, largely to be attributed to Sir Thomas Beecham.

Accordingly, the position has now arisen that certain of Delius's works are so well known that no guarantee is required by the recording companies in respect thereof, but the trustees are now advised that some of the lesser known works which were recorded in the early history of the trust should be re-recorded if the work of the trust can continue to be carried on. Sir Thomas Beecham has been engaged for some years on the task of editing the whole of the compositions of Delius with a view to the publication and issue of a uniform edition of the whole body of his musical works in accordance with the provisions of cl. 12 of the will, but the printing and publication of the major portion of this edition has been held in abeyance pending the decision of this court whether the trusts in cl. 12 after the period of twenty-one years from the death of the testatrix constitute valid and effectual charitable trusts or are void as infringing the rule against perpetuities or otherwise.

- A I have stated what I understand to be the purpose of the trusts, and the question is: Is that purpose charitable in the eye of the law? I do not think that I can do better in this connection than to read certain paragraphs from the judgment of LORD GREENE, M.R., in *Royal Choral Society v. Inland Revenue Comrs.* (1) ([1943] 2 All E.R. 101). There are certain points which necessarily occur to the mind in connection with a musical composition. It might be suggested, as regards some music at any rate, that its purpose was limited to giving pleasure, and, as regards all music, that it must truly be said that it does give pleasure. That is a feature about music. When I say "all music", I mean all that can be truly called music. Indeed, I think a lot of pleasure is derived by some people from something which can hardly truly be called music, but, at any rate, pleasure is a circumstance intimately connected with music.
- C That in itself, however, does not operate to destroy the charitable character of a bequest for the advancement of the art of music. I would adopt, if I may, with great satisfaction, the words of LORD GREENE, M.R. ([1943] 2 All E.R. at p. 104):

D "Curiously enough, some people find pleasure in providing education. Still more curiously, some people find pleasure in being educated: but the element of pleasure in those processes is not the purpose of them, but what may be called a by-product which is necessarily there."

That seems to me to be all that need be said about the aspect of pleasure connected with the music of Delius.

LORD GREENE, M.R., then said (*ibid.*):

- E "Dealing with the educational aspect from the point of view of the public who hear music, the Solicitor-General argued that nothing could be educational which did not involve teaching—as I understood him, teaching in the sense of a master teaching a class . . . I protest against that narrow conception of education when one is dealing with aesthetic education. Very few people can become executants, or at any rate executants who can give pleasure either to themselves or to others; but a very large number of people can become instructed listeners with a trained and cultivated taste. In my opinion, a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being."
- G

Those words have been freely adopted in subsequent cases, and I adopt them and hold also that they are directly applicable to this trust. I do not find it necessary to consider what the position might be if the trusts were for the promotion of the works of some inadequate composer. It has been suggested that perhaps I should have no option but to give effect even to such a trust.

H I need not investigate that problem, because counsel who have argued before me have been unanimous in the view that the standard of Delius's work is so high that that question does not arise in the present case.

The point which has been made—and it is one of interest and importance—is this. It is said, first, that this trust is not for the promotion of music in general, but for the promotion of the music of a particular individual composer. That could not of itself vitiate the charitable nature of the trust, because, after all, aesthetic appreciation of music in a broad sense can only be derived from aesthetic appreciation of the works of a large number of composers. It is the aggregate of the work of a large number of composers which is the basis of the aesthetic appreciation, and, therefore, if it is charitable to promote music in general it must be charitable to promote the music of a particular composer, pre-supposing (as in this case I can assume) that the composer is one whose music is worth appreciating.

I

In order to make that plain, I refer to *Re Shakespeare Memorial Trust, Lytton (Earl) v. A.-G.* (2) ([1923] 2 Ch. 389), where the charitable trust was, to put it shortly, to promote the works of Shakespeare. I cannot conceive that anybody would doubt that a trust to promote the works of Beethoven would be charitable, but the real strength of the point put in this case arises from the fact that this trust was created by Delius's widow, and I imagine that nobody would doubt that, amongst the many motives which actuated her, affection for her deceased husband was to be found. First, however, we must be careful to distinguish motive from purpose, because motive is not relevant in these cases except in so far as it is incorporated into the purpose. Then I look at the purposes, and it is possible, I agree, to approach the purposes on the hypothesis that their intention was, as counsel for the Custodian of Enemy Property put it in his able argument, to enhance the reputation of the testatrix' husband. This, of course, is rather subtle. It is a question which is the cart and which is the horse, because, the more aesthetic appreciation of Delius's music is achieved, the more Delius's reputation will necessarily be enhanced. The two things fit together, and there is no doubt whatever that both objects have, in fact, already been to a large extent achieved. In my view, however, it is not fair to approach the problem from that point of view. I think that there is every reason to suppose that the testatrix took the view, and was well advised to take the view, that, if the work of Delius was brought before the public in an efficient manner, the aesthetic appreciation of the public would grow, and, inherent in that growth, would be the enhancement of Delius's reputation, which was in itself a desirable thing, and I, for my part, refuse to disentangle it. I do not think there is any reliable evidence on which I can disentangle it. What seems to me to be quite clear is that these purposes would plainly be charitable if the name "Beethoven" were substituted for the name "Delius", and, in my judgment, the purposes do not cease to be charitable because in this context the name is "Delius" and not "Beethoven".

I still have to deal with this difficult cl. 14. Counsel for the Custodian of Enemy Property laid stress on this clause from two points of view. He said, first, that it indicated that the purpose was merely the enhancement of the husband's reputation. Otherwise, he said, there never could be any occasion for the gift over. I cannot accept that submission because it seems to me that the clause does not fit, whichever view is taken of the trusts. It does not fit if the paramount purpose is regarded as being the aesthetic education of the public, nor does it fit if the purpose is regarded as being the enhancement of the husband's reputation. Therefore, so far as that is concerned, I do not think that it either helps or hinders counsel's submission, but he raises what is a much more formidable point. A charitable trust must not have inherent in it the potentiality of individual profit for a non-charitable beneficiary. That is mentioned by LORD GREENE, M.R. ([1943] 2 All E.R. at pp. 104, 106) and is, I think, self-evident. If it were possible for this *prima facie* charitable trust to redound to the personal benefit of a residuary legatee, then it would be impossible to say that it was a charitable trust. It does not matter for this purpose that the brother unfortunately died long ago, because he might not have done so, and, therefore, I do not think that the fact of his having died can affect the true construction of the will.

But, construe cl. 14 however I may, I cannot make sense of it, on any view. First, there is the question (which is not overwhelmingly important, but which has some importance) as to what these words mean:

"If during the lifetime of my . . . brother it shall at any time appear to my trustees that the trusts and object of cl. 12 of this will have been fulfilled to their fullest possible extent and there remains nothing further that my trustees can undertake in connection with the furtherance or perpetuation of the works of my late husband . . ."

- A I do not know whether the words beginning "there remains nothing further" are intended to be governed by "shall at any time appear to my trustees that" so as to give the trustees a discretion over the latter part of the clause, as undoubtedly they have over the first part. Grammatically the latter part "and there remains . . ." seems to be perfectly logical and accurate, and, construed as a separate sentence, the trustees have not a discretion. The words
- B are a statement of fact. I think, however, that probably the testatrix intended the trustees to have a discretion, and, in order not to bother over what is a small matter, I would assume, without deciding, that they have a discretion. Still, it is a discretion which they have to exercise bona fide, or which they would have had to exercise bona fide if the circumstances had in the event arisen, but I cannot think of any circumstances in which it could ever be the bona fide opinion
- C of the trustees that they could not undertake anything further. The clause does not say "could not properly undertake" or "could not reasonably undertake", or anything of that sort. The words used are "could not undertake", and, as far as I can see, however distinguished an author or composer may be, there never comes a point when nothing can be done in connection with the furtherance or perpetuation of his works. Indeed, in a sense, the more distinguished the
- D author becomes, the more there is that can be done to further or perpetuate his works. It is a sort of cumulative process, and there is now much more, in a sense, that can be done than could have been done twenty years ago, because there are so many more potential listeners than there were then.

- Counsel for the Attorney-General suggested that perhaps what the testatrix had in mind was a complete failure to popularise any of Delius's music anywhere.
- E That might have been so at the time of the testatrix' death when the value of the copyright was small, but it would not have vitiated the trust, because it would only have meant that there would not have been a profit on the trust for the residuary legatee but a loss on the trust. Therefore, it is impossible to see how there could possibly be a profit to the residuary legatee from this prima facie charitable trust. I am utterly unable to see how there could possibly
- F have been a profit to the residuary legatee because, the more the value of the copyrights grew, the more things there were that could be done to further or perpetuate the works of Delius.

- Perhaps in this connection I might refer to *Re Shakespeare Memorial Trust* (2). There one has the literary figure who became the greatest in English literature, and after some three hundred years or so there is still plenty to do to further or
- G perpetuate his works. To my mind the process knows no end, and although Delius, I have no doubt, does not rank quite with Shakespeare, I feel without the least doubt that his reputation will grow and that it will become more and more possible to do things to further or perpetuate his works. Therefore, I come to the conclusion that no financial benefit could ever have arisen to the residuary legatee from the prima facie charitable trusts, and that they are,
- H therefore, charitable.

- I do not propose to direct a scheme, but I propose to give liberty to apply for a scheme, because so long as Sir Thomas Beecham is able and willing to continue the work which he has done so successfully for the last twenty-one years or so I feel that he is better able to do it than anybody else in England, but, if he should find it too heavy a burden for him, then I think a scheme would be eminently
- I desirable.

Order accordingly.

Solicitors: *W. R. Bennett & Co.* (for the plaintiffs); *Holland & Co.* (for the first defendant); *Solicitor, Board of Trade* (for the second defendant); *Treasury Solicitor.*

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PRACTICE NOTES.**DIVORCE REGISTRY.**

The following three Practice Notes have been issued by the Senior Registrar. They are intended to take effect on Apr. 30, 1957, when the Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), will come into operation by virtue of r. 1 (3). Those rules, except for r. 21, do not affect proceedings commenced before that date.

Divorce—Petition—Form of petition—Prayer for discretion—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 4 as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), r. 5.

Where a petition filed on or after Apr. 30, 1957, contains a prayer that the court will exercise its discretion, the full wording set out in r. 4* must be employed, including the words "notwithstanding the adultery of the petitioner during the marriage."

B. LONG,
Senior Registrar.

Mar. 5, 1957.

Divorce—Petition—Form of petition—Residence of petitioner—Omission of statement of residence—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 4 (1) (d) substituted by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), r. 5 (1).

Where it is sought to obtain a registrar's order, under r. 4 (1) (d), that the residence of a petitioner be omitted from the petition, the following procedure should be adopted:—

The petition should be filed, the address having been omitted from it, but not from the affidavit verifying it. The solicitor should apply, ex parte, on an affidavit by the petitioner stating the address and the grounds of the application.

If this is granted, the registrar will order that the copy petition to be served shall omit the affidavit that is part of the document; that a similar copy shall be lodged with the papers, the marriage certificate being annexed thereto; that the original petition and the affidavit in support of the application be enclosed in a sealed envelope, and be not opened without leave of the court (the envelope being so indorsed); and that any subsequent affidavit may be worded "I, A . . . B . . ., the above-named petitioner, whose address is retained on the court file under seal, by virtue of an order dated . . ., make oath and say:—".

If the application is refused, the registrar will make an order directing amendment of the petition before it is served.

B. LONG,
Senior Registrar.

Mar. 5, 1957.

Divorce—Practice—Ancillary relief—Amendment of petition—Application for relief—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 3 (3), proviso, r. 15, r. 19, r. 44 (1), as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176), r. 4, r. 16.

(i) At any time up to the hearing of a cause, the omission of a prayer for ancillary relief from a petition or answer may be remedied by an application under r. 15 or r. 19* for leave to amend the pleading, re-service of which will normally be ordered.

(ii) An application under the proviso to r. 3 (3)* for leave to make an application for ancillary relief which should have been included in the petition or answer must be made to a judge on summons which should be supported by affidavit. If in such cases an extension of time is necessary under r. 44 (1)*, it should be sought in the same summons.

*Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 3 (3), proviso, r. 4, r. 15, r. 19, r. 44 (1), as amended by Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176); see 10 HALSBURY'S STATUTORY INSTRUMENTS 197, et seq., and Service.

- A (iii) In cases in which the leave of a judge under the proviso to r. 3 (3) is not required, an application for extension of time under r. 44 (1) may be made to a registrar on summons, supported by affidavit.
- (iv) In cases (ii) and (iii) the summons and affidavit should be served on the respondent to the application, whether or not he has entered an appearance.
- (v) The Practice Note dated May 17, 1955* is hereby cancelled.

B

Mar. 5, 1957.

B. LONG,
Senior Registrar.

C

D

NOTE.

E

COUNTY LABORATORIES, LTD. v. J. MINDEL, LTD.

[CHANCERY DIVISION (Harman, J.), March 26, 1957.]

F

The order dismissing the interlocutory motion for an injunction (reported at p. 806 ante) not having been drawn up† and the parties having reached a settlement, this action was mentioned to HIS LORDSHIP. By consent the motion was treated as trial of the action and, the defendants undertaking not to sell by retail any articles manufactured or distributed by the plaintiffs below the current fixed retail selling price, all further proceedings in the action were stayed.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

* See Practice Direction ([1955] 2 All E.R. 465).

† Compare, as regards the position before an order has been drawn up, *Re Harrison's Share under a Settlement* ([1954] 2 All E.R. 453).

VILLA D'ESTE RESTAURANT, LTD. v. BURTON.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Ormerod, L.J.J.),
February 8, March 13, 1957.]

*Rent Control—Rent tribunal—Jurisdiction—Increase of contractual rent—
Whether increase recoverable—Furnished Houses (Rent Control) Act, 1946
(9 & 10 Geo. 6 c. 34), s. 2 (2), (3).*

The rent of a flat, to which the Furnished Houses (Rent Control) Act, 1946, applied, had been reduced by the rent tribunal in 1949 from £413 to £339 per annum, and had subsequently been increased in 1952 and in 1953. By a lease dated Sept. 28, 1954, the landlords let the flat for five years to a new tenant at the yearly rent of £393, being the amount of the rent entered in the local authority's register of contracts referred to the rent tribunal as the last rent determined by the tribunal. In 1955 the landlords applied to the rent tribunal under s. 2 (3) of the Act of 1946, the tribunal increased the rent to £452 per annum from Dec. 21, 1955, and the increased rent was entered in the local authority's register. The tenant refused to pay more rent than that reserved by the lease. The landlords claimed the difference between the increased rent and the rent at the rate specified in the lease.

Held: (LORD EVERSLED, M.R., dissenting) the effect of the determination of the rent tribunal was, by virtue of s. 2 (3) and s. 2 (2) of the Act of 1946*, to modify the contract contained in the lease and to render the increased rent payable, and the landlords were therefore entitled to recover the sum claimed.

Appeal allowed.

[**Editorial Note.** It is to be observed that in the present case the maximum amount of the rent which it was lawful to require or receive at the time of the lease of Sept. 28, 1954, was the amount (£393, p.a.) fixed at that date by the last previous decision of the rent tribunal; see *Furnished Houses (Rent Control) Act, 1946, s. 4 (1) (a)*. Thus the lease could not legally reserve a higher rent.

For the *Furnished Houses (Rent Control) Act, 1946, s. 2*, see 13 HALSBURY'S STATUTES (2nd Edn.) 1086.]

Case referred to:

- (1) *Bowness v. O'Dwyer*, [1948] 2 All E.R. 181; [1948] 2 K.B. 219; [1948] L.J.R. 1774; 31 Digest (Repl.) 654, 7573.

Appeal.

This was an appeal by the landlords from a judgment of His Honour JUDGE BENSLEY WELLS at Marylebone County Court, given on Nov. 23, 1956, whereby the landlords' claim for £15 7s. 6d. arrears of rent was dismissed and judgment for £10 5s. 2d. on the counterclaim for overpayment of rent was given for the tenant.

* The *Furnished Houses (Rent Control) Act, 1946, s. 2*, so far as relevant, provides: "(2) Where any contract to which this Act applies is referred to a tribunal, then . . . the tribunal shall consider it and . . . shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable . . . and shall notify the parties and the local authority of their decision in each case."

"(3) Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for reconsideration of the rent so entered on the ground of change of circumstances, and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable."

- A *M. D. Sherrard* for the landlords.
J. T. Plume for the tenant.

Cur. adv. vult.

Mar. 13. The following judgments were read.

- B **MORRIS, L.J.:** By a lease dated Sept. 28, 1954, the appellant landlords demised to the respondent, the tenant, flat No. 4 at No. 1, Lancaster Gate in London. The term was for five years from Sept. 29, 1954. The rent was to be the yearly inclusive rent of £393 11s. payable by equal quarterly payments in advance on the usual quarter days. The tenant agreed to pay by way of further rent a sum equal to the amount by which the general and water rates payable should exceed those payable for the year 1954-55. The flat was unfurnished, but certain services were provided by the landlords. For this reason the lease was a contract to which the Furnished Houses (Rent Control) Act, 1946, applied, and as the premises were in a district in which the Act was in force the contract was one that could be referred to the appropriate rent tribunal (see s. 2 (1) of the Act of 1946). The landlords applied to the Paddington Rent Tribunal for an increase of rent. The tribunal increased the rent from £393 9s. to £452 12s. 6d. They so fixed the rent for the period "from Dec. 21, 1955, until the expiration of the Act." The date of notification to the parties to the contract and to the local authority of the decision of the tribunal was Dec. 28, 1955. The local authority is charged with the duty of preparing a register and of keeping it up to date. The date of entry in the register of the rent as increased by the tribunal was Dec. 30, 1955.

- E Pursuant to the decision of the tribunal, the landlords demanded rent at the increased rate and demanded it as from Dec. 21, 1955. The tenant refused to pay and put forward as his reason for refusal that he was not obliged to pay any more than he had contracted to pay by the terms of his lease. If he is wrong as to this, no point is taken that the date as from which the increase is payable is other than Dec. 21, 1955. The claim made by the landlords in the county court was for £15 7s. 6d., being the amount underpaid if between Dec. 21, 1955, and Lady Day, 1956, the rent payable was at the rate of £452 12s. 6d.

- F The form of reference by the landlords to the tribunal is not before us. The tenant appears to have been represented by his solicitor at the hearing before the tribunal. If his present contention is correct, then the proceedings before the tribunal were a waste of time, for there could be no point in fixing an increased rent "from Dec. 21, 1955", if no increase could be imposed, and if contractual terms due to cover the period down to Sept. 29, 1959, could not be varied and if there were no question of any variation by agreement. No proceedings by way of certiorari have been taken; but it has not been submitted that there is any bar which prevents the tenant from presenting his argument.

- G The case raises therefore the question whether the tribunal had power to do what they did and whether the effect and result of what they did was that the tenant became obliged in law to pay rent at the increased figure determined by the tribunal.

- H The learned county court judge has based his judgment on the supposition that the matter was before the rent tribunal or was dealt with by the tribunal pursuant to the provisions of s. 2 (4) of the Act of 1946. Section 2 (4) provides:

- I "Where on any reference of a contract, the rent whereunder includes payment for services, the tribunal are of opinion that it would be proper that the rent payable for the premises should include an amount in respect of increase since Sept. 3, 1939, in the cost of providing such services, and are also of opinion that in all the circumstances a rent higher than the rent payable under the contract might properly be chargeable for the premises in order to include an amount in respect of such increase, they may approve a rent higher by not more than such amount as they think reasonable in that respect."

The judgment of the learned judge was that s. 2 (4) does not permit a landlord to impose an increase of rent during the currency of an existing contract of tenancy. He accordingly rejected the landlords' claim; but the judgment appears to proceed on the basis that the position would have been different had the application to the tribunal been under s. 2 (3). Counsel for the tenant has, however, very fairly stated and admitted that both parties understood that the application had been made under s. 2 (3). The appeal was accordingly argued before us on that basis. A B

The duty of preparing a register and of keeping it up to date is imposed on the local authority by s. 3 (1) of the Act. Section 3 (2) is in the following terms:

"The register shall be so prepared and kept up to date as to contain, with regard to any contract under which a rent is payable that has been approved, reduced or increased under the last foregoing section (being a contract relating to premises situated in the area of the local authority), entries of—(a) the prescribed particulars with regard to the contract; (b) a specification of the premises to which the contract relates; and (c) the rent as approved, reduced or increased by the tribunal, and, in a case in which the approval, reduction or increase is limited to rent payable in respect of a particular period, a specification of that period." C D

We were furnished with certified copies of certain entries in the register. The register is called a "Register of contracts referred to the rent tribunal". An entry made on Oct. 29, 1949, in respect of this flat recorded the "names and addresses of parties to the contract referred to the tribunal". The landlords were stated to be the lessors and a Mrs. Tetttersall was the lessee. The services then provided were as under the current lease. They were: E

"Cleaning and lighting of halls, passages and staircase, lift maintenance, supply of hot water, central heating, services of caretaker."

It was recorded that the rent was reduced from £413 15s. 6d. per annum to £339 per annum from Oct. 27, 1949. In an entry made on May 31, 1952, the only differences were that the lessee was a Mrs. J. Bentala and that the rent was increased from £339 per annum to £371 13s. 6d. per annum from May 28, 1952. In an entry made on Apr. 25, 1953, Mrs. J. Bentala still being then the lessee, the only differences were that the rent was increased from £371 13s. 6d. per annum to £393 9s. per annum from Apr. 23, 1952. F

It is provided by s. 4 (1) of the Act as follows: G

"Where the rent payable for any premises is entered in the register under the provisions of this Act, it shall not be lawful to require or receive—(a) on account of rent for those premises in respect of any period subsequent to the date of such entry (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered." H

At the time when the landlords, on Sept. 28, 1954, granted a lease to the tenant the "rent payable" for flat 4 was entered in the register. The entry was that which had been made on Apr. 25, 1953, as referred to above. Accordingly it was not lawful to require an amount of rent more than £393 9s. (The figure of 11s. in the lease rather than 9s. was doubtless a slip.) I

The question now arises what is the result in law of the decision of the tribunal in December, 1955, which came about as the result of an application made by the landlords under s. 2 (3).

Section 2 (3) begins with the words

"Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case

A to the tribunal for reconsideration of the rent so entered on the ground of change of circumstances . . .”

By s. 2 (1) the “lessor” and the “lessee” are defined. They may refer to the tribunal “a contract to which this Act applies”. The opening words of s. 2 (3) refer to entry in the register “in accordance with the provisions hereinafter contained”. That is a reference to s. 3. If the requirements of s. 3 (2) are read into s. 2 (3), then that sub-section provides that where the rent payable for any premises has been entered in the register so that the register contains, with regard to any contract under which a rent is payable that has been approved, reduced or increased, entries of the names and addresses of the parties to the contract referred to the tribunal (see para. 2 of Sch. 2 to the Furnished Houses (Rent Control) Regulations, 1946 (S.R. & O. 1946 No. 781), dealing with the “prescribed particulars”), then it is lawful for the lessor or the lessee to refer the case to the tribunal for reconsideration of the rent so entered on the ground of change of circumstances. What then is the “case”? One possible view is that, as the scheme of the Act is to refer contracts, the “case” that may be referred for reconsideration of the rent entered in the register is the case of a contract that has previously been referred. But in December, 1955, the contract between the landlords as “lessors” and the tenant as “lessee” had never been before the tribunal. The name of the “lessee” was not on the register. On this possible view before there could be reconsideration of the rent entered in the register, there would have had to have been a prior reference of “the contract” between the parties and not merely some prior reference of a different contract between other parties. This view would involve that after a new contract is made referable to premises where the rent payable for such premises is entered in the register there would have to be a reference of the new contract if only for the purpose of having the rent “approved” and that this would have to take place before the lessor could at some later date ask for an increase. This might, however, involve a somewhat formal expedition to the tribunal. The parties do not submit any such view of the matter and both parties are content to assume that the “case” which can be referred includes a contract which has not previously been before the tribunal, provided that as a result of some earlier reference there is in the register an entry of “the rent payable for” the premises.

It is, therefore, common ground between the parties that the application which the landlords made to the tribunal was a reference under s. 2 (3) and that the application was properly made within the contemplation of that sub-section. The “case” was referred to the tribunal for reconsideration, on the ground of change of circumstances, of the rent payable for the premises as entered in the register. In that situation, the result (provided for by s. 2 (3)) is that the provisions of s. 2 (2)

“shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable.”

It becomes necessary, therefore, to see what are the provisions of s. 2 (2) and to see the effect of the modification. One provision in s. 2 (2) is that the tribunal may make such inquiry as they think fit. They must give to each party (and in certain circumstances to a housing authority) an opportunity of being heard or of submitting representations in writing. They have certain other powers. They may “approve the rent payable under the contract”. They may “reduce it to such sum as they may in all the circumstances think reasonable”. The word “it” must clearly refer to “the rent payable under the contract”. The tribunal may therefore “reduce the rent payable under the contract to such sum as they may in all the circumstances think reasonable”. This must in my

judgment mean that the tribunal is given a power to effect a statutory modification of the contract. This was denoted in the judgment of this court in *Bounness v. O'Dwyer* (1) ([1948] 2 All E.R. 181) where in dealing with s. 2 (2) it was said (*ibid.*, at p. 182):

"... the scheme of the Act appears to be that the tribunal has power to alter the existing contract for the future, but not retrospectively, by reducing the rent payable under the contract".

It next becomes necessary to consider the further power given by the modification. If the modification is read into s. 2 (2), then it seems to me that the powers of the tribunal on a reference under s. 2 (3) are to reconsider the rent entered in the register on the ground of change of circumstances, and (i) to approve the rent payable under the contract, or (ii) to reduce the rent payable under the contract, or (iii) to increase the rent payable under the contract. Any reduction or increase must be to such sum as the tribunal may in all the circumstances think reasonable. Just as the exercise of the power to reduce has the effect of altering an existing contract for the future, so the exercise of the power to increase will have a similar effect.

Counsel for the tenant submitted that in the absence of words such as those found in the Housing Repairs and Rents Act, 1954, s. 40 (2), viz., the words

"... the landlord shall be entitled to recover the amount of the increase agreed or determined as aforesaid notwithstanding anything in the terms of the tenancy or statutory tenancy or any enactment..."

a reference to a tribunal cannot result in any obligation to pay more rent than is provided for in a contract. But in my judgment the exercise of a power to increase the rent payable under a contract must result in such an obligation. In this context, in my judgment, the sum payable under a contract is the sum which has to be paid under the contract and which therefore becomes due and owing under the contract. If the sum payable under the contract is reduced, then only the reduced amount is due under the contract. More than the contractual amount, as reduced, must not (after there is entry in the register) be demanded (see s. 4 (1)). If the sum payable under the contract is increased, then the increased amount is, as from the date which is specified, due under the contract. Again, once the increased figure has been entered in the register, demand for any more than the increased rent payable must not be made (see s. 4 (1)).

Where there has been a reference to a tribunal of a contract between a lessor and a lessee and where as a result there has been an entry in the register of "the rent payable for" the premises, then, if the lessee vacates and if a new contract is made with a new lessee, it is probable that the rent will be of the amount entered in the register. The lessor cannot demand payment of any greater sum (see s. 4 (1)); but the new lessee can go to the tribunal, in spite of the contractual terms of the lease, and ask for reconsideration of the rent entered in the register and ask for a reduction of the rent payable under the contract. The lessor might have been quite unwilling to make a contract at a lower rent. Yet the new lessee could claim a reduction. It would seem very strange if Parliament had enacted that a variation could always be downwards but never upwards, even though the rent in the contract was not the result of free negotiation but was limited so as not to exceed the rent last fixed by the tribunal.

If the rent in a new lease was agreed at less than the amount entered in the register, a reference to the tribunal would be unlikely. Thus, to take an example with figures that are perhaps improbable, if the rent payable for the premises was entered at £500 and the rent in a new contract was £400, either party could refer the "case" to the tribunal. They could refer it for "reconsideration of the rent entered" (that is to say, the £500) on the ground of change of circumstances. The lessor would be unlikely to do this for, having agreed a rent of

- A £400 when he was free to charge £500 if he could get it, he would be unlikely to persuade the tribunal to reconsider, in any way that he would welcome, the rent entered in the register or to persuade them to increase the rent of £400. The lessee would be unlikely to refer the "case", for it would be unlikely that the tribunal would reduce the rent of £400. In my judgment, in the circumstances of this case the tribunal had power to increase the sum payable under the contract. The tribunal altered the contract by increasing the rent payable as from Dec. 21, 1955. The tenant became liable to pay at the increased rate. I think, therefore, that the appeal succeeds.

- ORMEROD, L.J.: I agree that this appeal should be allowed. The question for decision is whether the appellants (the landlords) are entitled to recover from the respondent (the tenant) an increased rent of the premises flat No. 4 at No. 1, Lancaster Gate, London. The premises were demised by the landlords to the tenant for a term of five years from Sept. 29, 1954, at a yearly rent of £393 11s. per annum, having been previously the subject of a number of references both for reduction and increase of rent under s. 2 of the Furnished Houses (Rent Control) Act, 1946, and the rent reserved by the landlords was the rent entered in the register in accordance with s. 3 of the Act. As the result of a reference by the landlords to the rent tribunal in 1955 under s. 2 (3) of the Act, the rent was increased to £452 12s. 6d. per annum from Dec. 21, 1955. The landlords claim that they are entitled to recover this increase from the tenant.

- The question turns on the proper construction of s. 2 (3) of the Act. Counsel for the landlords argued that, as the effect of the sub-section is to give the tribunal power in a proper case to increase "the rent payable", this must mean a power to increase "the rent payable under the contract". Section 2 (3) enacts that the provisions of s. 2 (2) shall apply "subject to the modification that the tribunal shall have power to increase the rent payable"; and s. 2 (2) empowers the tribunal on a reference to approve the "rent payable under the contract" or reduce it or dismiss the reference according as they may think reasonable. It would seem, therefore, reading the two sub-sections together, that their combined effect is to give the tribunal power in a proper case to increase the rent payable under the contract. Support for this construction is in my view provided by s. 3 of the Act which provides for a register to be prepared and kept by the local authority. Section 3 (2) provides that the register shall be so prepared and kept as to contain specified entries with regard to "any contract under which a rent is payable that has been approved, reduced or increased under the last foregoing section". It is interesting to note, too, that s. 2 (4) which deals with references of contracts whereunder the rent includes payment for services gives to the tribunal power to "approve" a higher rent if there has been an increase in the cost of providing such services since Sept. 3, 1939. The difference in the wording between this sub-section and sub-s. (3) seems to imply that a rent in a case under sub-s. (4) may only be increased up to an approved amount by agreement.

- As I have said, my view of the combined effect of s. 2 (2) and s. 2 (3) is that the tribunal is empowered in a proper case to increase the rent payable under the contract, and the conclusion would seem to follow that there may in consequence be a statutory alteration of the terms of a contract of tenancy which the parties are bound to observe.

- Counsel for the tenant argues that this is not so. His submission is that even if the proper construction of the sub-section is to empower the tribunal to increase the rent payable under the contract, the effect is not to make the tenant liable for a larger rent than that reserved by the lease but, if the increase was more than a reinstatement of a rent previously reduced, to cause the increased rent to be entered in the register in respect of the premises which could become the rent reserved in any future contract of tenancy. He pointed out that if the rent payable under the contract was reduced, the tenant was protected by s. 4,

which makes it unlawful to require or receive any rent in excess of that entered in the register, but that there was no specific provision for the recovery of an increase of rent, similar for instance to the Housing Repairs and Rents Act, 1954, s. 40 (2), which gives a landlord power to recover the amount of certain agreed or determined increases notwithstanding the terms of the tenancy. I find it difficult to accept this view. Section 2 (3) is clearly intended for the relief of landlords and the effects of the suggested construction would be most uneven, depending as they would on the length of the tenancy. A B

It was suggested during the course of the argument that, as the lease in question was a document under seal the terms of which the parties covenanted to observe, a court would be particularly reluctant to adopt a construction of the section which would have the effect of altering the terms of the covenants unless it was expressed in the clearest manner. This is an attractive argument, but, in my view, it should not prevail here. The section is not dealing primarily with contracts under seal. It is dealing with contracts of tenancy, which may be leases under seal, or simple contracts in writing, or even oral according to circumstances. C

A different approach to the construction of s. 2 (3), and one which commends itself to LORD EVERSHED, M.R., is based on the words which empower the parties to the lease or the local authority "to refer the case to the tribunal for reconsideration of the rent so entered, etc." There was some discussion during the argument of the reason for the use of the word "case". In my view it is used because the reference causing the original entry in the register may well have been under a different contract from the one being referred. But it is argued that as "reconsideration" can only refer to reconsideration of a rent which has been determined on a previous reference, therefore the power to increase is limited to an increase to some figure from which it has previously been reduced. I find that I cannot agree with this view. It is true that some colour is lent to it by the fact that in an original reference the tribunal has no power to increase. It may only approve or reduce; and it may, therefore, be argued that increase under s. 2 (3) should be nothing more than a partial or total reinstatement of the previously reduced rent. There are, however, in my view several objections to this. Section 2 (3) is not, as I see it, necessarily dealing with a reference for reconsideration of a contract which has already been referred. It is dealing with a "rent". The original reference may have been under an earlier contract where the rent was reduced from a figure higher than the rent reserved in the contract in question. In this case, the original rent which was reduced by the tribunal on Oct. 27, 1949, was £413 15s. 6d. Would the effect of the increase to the original figure entitle the landlord to recover the rent in excess of the reserved rent? This seems to be the only logical conclusion. Again if the suggested construction is the correct one it could only operate if the rent had been reduced, either under the subsisting contract or some earlier one, whereas it appears from the opening words of the sub-section that it is intended to deal with rent payable for any premises entered in the register. And rent must be entered in the register if it has been reduced, or approved or indeed increased. But perhaps the most cogent argument against a construction of the sub-section which so limits the power of the tribunal to increase the rent payable is that the sub-section contains no express limitation of the power and I can find no sufficient indication from the words that such a limitation should be implied. D E F G H I

For these reasons, I am of opinion that the appeal should be allowed.

LORD EVERSHED, M.R.: I regret to find that I have arrived at a conclusion on this short point different from that which has commended itself to both my brethren; for in my judgment the effect of "the increase of the rent payable" (to use the language of s. 2 (3) of the Act of 1946) by the tribunal from £393 9s.

A to £452 12s. 6d. in December, 1955, has not, in the circumstances, been to allow the landlords now to claim that increased rent from their tenant.

It has been the contention of the landlords that, by the terms or the necessary inference of the statute, the effect of "the increase of the rent payable" (and its registration pursuant to s. 3) is to substitute the increased figure of £452 12s. 6d. for the figure of £393 11s. specified in the lease of the premises from the landlords to the tenant dated Sept. 28, 1954; and it is said, with some force, that since a reduction by the tribunal of the contractual rent payable by a tenant to a landlord has the practical effect of substituting the reduced rent for the contractual rent—and since therefore the contract between the parties is to that extent over-ridden—it is both just and natural that the landlord should get a corresponding benefit in the converse case of a rent increase. I have been unable to extract that result from the language of the Act. It is not in doubt that the Act nowhere in terms so provides; and for my part I am unable to agree that such is the parliamentary intention according to the necessary implication of the relevant sections.

Counsel for the tenant contended that s. 2 (3) contemplated the making of references by a landlord (or a local authority) at a time when no contract subsisted in regard to the premises concerned—provided only that there had earlier been a reference relating to the premises which had resulted in an approval or reduction of the then contractual rent followed by registration of the rent so approved or reduced. It was on this ground that (according to counsel) the language of s. 2 (3) does not wholly correspond with that of s. 2 (2)—particularly by the use of the terms "rent payable for any premises" or "rent payable" instead of "rent payable *under the contract*". On this view, the increased registered rent becomes merely a maximum lawfully chargeable by the landlord when he thereafter lets the premises.

It is not in my judgment necessary to express a view on this part of counsel's argument. I must not be taken to accept it; but I am content to assume that the references contemplated by s. 2 (3) are references (like those under sub-s. (2)) during the pendency of a lease or tenancy. I am further content to assume that the "rent payable" mentioned in sub-s. (3) means the rent payable under a subsisting contract. The latter assumption at least makes easier the incorporation into sub-s. (3), by reference, of the provisions of sub-s. (2); and is moreover supported by the terms of s. 3 (2) providing that the register must "contain with regard to any contract under which a rent is payable that has been approved, reduced or increased" the entries there specified. Even so, however, the conclusion sought by the landlords in the present case does not, as it seems to me, follow. By its reference to the rent payable under a contract is meant, in my judgment, the rent payment of which can be demanded or enforced under that contract. In the case where the contractual rent has been approved no difficulty, obviously, arises. In the case where the rent has been reduced, the consequence is expressly covered by the terms of s. 4 (1), which make it unlawful for the landlord to require or receive rent in excess of the reduced rent entered on the register and provide that any sum paid by way of rent in excess of the reduced registered figure should be recoverable by the tenant. The provisions of s. 4 (1) plainly apply not only to the then subsisting contract (notwithstanding its express terms) but also (as I understand the argument) to any contract later made while the reduced rent remains on the register, at least to the extent of any rent actually demanded or paid under such later contract. I am not entirely clear how far the landlords go in their argument that a rent approved or reduced by the tribunal under s. 2 (2) is automatically substituted for the rent expressed to be payable under (a) an existing, or (b) any further contract (so long as that rent remains on the register). So far, however, as the existing contract is concerned, s. 4 would (on the landlords' view) be otiose, and not required to achieve the penal purposes of s. 9. In any case, if s. 2 (2) and s. 2 (3)

have the automatic consequences contended for by the landlords, I cannot think that s. 4 would have taken its existing form. A

This brings me to the converse case: for whatever be the purpose of, and reason for, s. 4, it is clear, as I have already stated, that there is nowhere found any express provision substituting a rent increased by the tribunal for a lower rent contained in an existing contract—still less (if such is suggested to be the intention) for that contained in a contract subsequently made, a matter to which I will later return. There is not even found in regard to the power of increase in s. 2 (3) the qualification “to such sum as (the tribunal) may in all the circumstances think reasonable” which is applied to the power of reduction and is also found in s. 2 (4). Yet, as counsel for the tenant reminded us, when Parliament in the later Act in *pari materia*, the Housing Repairs and Rents Act, 1954, clearly desired to provide in the landlord’s favour for the substitution of a higher rent for that expressed in the contract, it did so in clear language—see s. 40 (2) of the Act of 1954, which lays it down that where the tribunal constituted under the Act of 1946 has determined that, on the grounds there stated, it is just that the landlord should be entitled to an increase of rent B C

“the landlord shall be entitled to recover the amount of the increase . . . notwithstanding anything in the terms of the tenancy . . .” D

It is, in my judgment, legitimate to bear in mind the circumstances in which the Act of 1946 was passed. The main purpose of the Act plainly was to protect a tenant, in the notorious conditions then prevailing of housing shortage, against undue charges for rent. Section 2 (2) contemplated an approval or a reduction, but not an increase, of rent, and a reference capable of resulting in an increase in the rent payable under sub-s. (3) (for cases under sub-s. (4) can for present purposes be omitted from consideration) requires that there should have previously at some time been a reference under sub-s. (2). In existing circumstances the normal case of increase contemplated by sub-s. (3) (though the subsection may not be so confined by its terms) would be the case where for one reason or another a rent previously reduced would be again increased to some figure not by any means necessarily as great as, but certainly not exceeding, the contractual rent. In all such cases no difficulty would arise. The express terms of the Act (including the provisions of s. 4) provide for the result without any theory of “substitution” of the registered rent for the contractual rent. E F

What, then, is the position in a case, such as the present, where the tribunal has decided or purported to decide on an increase to a figure above the figure stated in the existing contract? In the present case, I observe that the terms of the “contract” are contained in a lease under seal in common but elaborate form. The tenant is, in consideration of “the rent hereby reserved”, granted a term of five years and the landlords’ rights of re-entry and the like are, by cl. 4 of the lease, expressed to come into existence in the event of “the rent hereby reserved or any part thereof” being in arrear as there specified. *Prima facie*, under such a document—put forward, incidentally, by the landlords though paid for by the tenant—the landlords would clearly be estopped from asserting that the rent was other than as therein stated. (It is true that the tenant appears to have attended and argued before the tribunal in December, 1955, but no point has been made that he has thereby in any way altered his position.) In such a case as the present, it would, in my judgment, have at the least to be shown in order to sustain any claim for rent above that stated in the lease, by reference to clear language or necessary implication in the statute, that the Act of 1946 superseded the lease and the legal rights thereby created or ensuing (e.g., the right to distrain on non-payment of rent). In my judgment it is not so shown. Nor is the result to render the Act by any means practically ineffective in cases of increase of rent under s. 2 (3). I have already mentioned the case—*prima facie*, as I think, the common case—where the increase following a previous reduction still does not exceed the contractual rent. Nor would there G H I

- A be any difficulty in a landlord properly protecting himself against the event of an increase above the contractual rent. The rent provided in the lease could well be stated as £x together with such further sum (if any) as the tribunal under the Act of 1946 might from time to time authorise. Indeed, in the lease under consideration provision is expressly made for additional rent corresponding to rate increases, though it was conceded by counsel for the landlords that, in
- B the existing circumstances, such increases could not be lawfully demanded without a prior authorisation of the increase by the tribunal. In my judgment, therefore, proper effect can be given to the terms of s. 2 (3) of the Act without any implication of a provision for substituting the increased rent for the (lower) contractual rent.

- In my judgment, the clue to the problem is provided by the use of the words
- C "the case" and "*re-consideration*" in s. 2 (3). There was some discussion of the two former words during the argument, and counsel for the tenant was content that the words should not be treated as synonymous with "the contract", so as to limit the application to one under a contract which, as such, had already been the subject of previous registration (as the present lease had not). He was content, in other words, to treat "the case" as meaning "the
- D question of the rent payable for the particular premises". Even so, the invocation of the sub-section is for a *re-consideration* of that subject-matter, that is of the previous determination of the tribunal in regard to it, "on the ground" that the circumstances have since changed. I observe that as regards any premises the initial reference must be limited either to approval or to reduction of the contractual rent. There can, on this first occasion, be no possibility of an
- E increase of the contractual rent whatever the circumstances. In the simple case—as I think, the ordinarily contemplated case—what, on an application under s. 2 (3) the tribunal is called on to do is to "*reconsider*" (because of changed circumstances) its previous determination either to approve or to reduce the contractual rent—in the first alternative, obviously, on the lessor's application, in the latter on the lessee's. In the case, then, of a *first* application
- F under sub-s. (3) by a lessor (and I am for simplicity assuming the continuance of the same lease), there could in my judgment be no question of an increase of the rent to a level above the contractual level—a thing which the tribunal could never have done on the initial reference under sub-s. (2) and which, in my view, it could no more do on a *re-consideration* of the case when first applied to under sub-s. (3). But it is no doubt true (for such is the necessary effect of the opening
- G words of the sub-section) that an application may be made under sub-s. (3) when the rent for the premises entered in the register has been *increased*, that is, pursuant to an earlier reference under the same sub-section, though not, for reasons which I have given, to a level higher than the contractual rent, at least if the earlier reference was the first under the sub-section. Is the result different? Is it the capricious effect of the sub-section that an increase of the rent above
- H the contractual level is permissible provided that there has been a previous reference under the sub-section which has resulted in an increase—albeit to a level not above the contractual level? In my judgment, such a result would be highly unreasonable. The reconsideration can never involve, in my judgment, such disregard of the contractual rent.

- I have assumed in the preceding paragraphs the continuance of a single
- I contractual rent. The intervention of new contracts at new rents involves added complications to which ORMEROD, L.J., has adverted in his judgment; but I do not think it necessary to pursue them. The questions which my brother has posed emphasise the fact that in this case (but not for the first time) the court is not so much asked to say what, according to the language used, Parliament had it in mind to provide, as to apply the parliamentary language to circumstances which Parliament cannot ever have contemplated at all. My analysis is in my judgment sufficient to support the view that, in the absence of

clear terms, the provisions of the Act do not contemplate or permit the inference that, in such a case as that with which we are concerned, the increased figure determined on by the tribunal is for all purposes to be substituted for the rent specified in the lease current between the parties. A

I have already referred to the question of the effect of an increase in the rent payable, such as that now under consideration, on any future contract or lease entered into by the landlords in regard to the premises. Suppose after the determination of the present lease with the tenant, the landlords entered into a new lease with some third party, in all material respects (including the amount of the rent) identical with those in the present lease. Would the landlords nevertheless be entitled to claim rent at the registered figure of £452 12s. 6d. per annum? Would what I will call the "substitution theory" go so far? Counsel for the landlords said not—on the ground, as I understood him, that the landlords would in truth then be estopped, or on the ground that the lessee's acceptance of a five year term would be taken as good consideration for the landlords' acceptance of a sum for rent less than that which they could lawfully demand. I find, for my part, the answer far from wholly satisfying, but it is unnecessary to give a definite answer to the question suggested. I would, however, make this comment on the general argument of "fairness" mentioned at the beginning of this judgment. If the landlords are right, a landlord may enter into a lease for, say, seven years with a lessee at £x per annum, being, as the landlord knows, the maximum figure which the lessee is prepared or can afford to pay; the landlord may then "refer the case" to the tribunal and obtain an increase of the rent to £x+y: and the lessee would be bound for the full term to pay that increased sum of £x+y per annum and have no opportunity of limiting his liability by an earlier determination of the lease. B C D E

I do not forget the language of s. 3 (2) of the Act to which ORMEROD, L.J., referred during the argument and which I have earlier quoted. If my view is right, the rent payable "under" the tenant's lease has not, in law, been increased: and therefore no entry under the sub-section would strictly have to be made. Alternatively, if the entry is made (as in fact it has been), then in law it is ineffective to alter the terms of the existing lease; though it would operate to authorise the landlords on the occasion of any fresh lease (unless reduced again in the meantime) to require a rent at the rate of £452 12s. 6d. per annum. In any event, s. 3 is primarily concerned with registration and cannot, in my judgment, suffice by inference to over-ride the express provisions of the existing lease under seal. F

I would dismiss the appeal.

Appeal allowed. Judgment for the landlords; counterclaim dismissed.

Solicitors: *Hunters* (for the landlords); *Asher Fishman & Co.* (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A

PINNICK v. PINNICK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), February 11, 12, 27, 1957.]

B

Husband and Wife—Separation—Consensual separation—No agreement to maintain wife while living apart from husband—No change of circumstances—Whether wife entitled to maintenance.

Justices—Husband and wife—Maintenance—Wilful neglect to maintain—Consensual separation—No agreement as to maintenance—No change of circumstances after separation—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4.

C

The parties were married in 1952 and separated by mutual consent in 1956. At the time of the parting there was no agreement, expressed or implied, on the part of the husband to maintain the wife nor was there any subsequent change in the parties' circumstances. On a complaint by the wife that the husband had been guilty of wilful neglect to provide her with reasonable maintenance,

D

Held: the wife was not entitled to maintenance, since the separation was by consent and she had not proved any agreement, expressed or implied, by the husband to maintain her while she lived apart from him.

Baker v. Baker ((1949), 66 (pt. 1) T.L.R. 81) applied.

Chapman v. Chapman (Apr. 4, 1951, not reported), *Price v. Price* ([1951] 2 All E.R. 580, n.), and *National Assistance Board v. Parkes* ([1955] 3 All E.R. 1) considered.

E

Per CURIAM: the question on what financial terms a consensual parting has taken place, and the question whether some fresh need of the wife and notice thereof to the husband has occurred so as to entitle the court to find wilful neglect to maintain in spite of those terms are two separate and distinct questions. If this is so, there is no inherent conflict between the decisions in *Baker v. Baker* ((1949), 66 (pt. 1) T.L.R. 81) and *Tulip v. Tulip* ([1951] 2 All E.R. 91) (see p. 877, letter I, to p. 878, letter A, post).

F

Appeal allowed.

[As to the duty of a husband in relation to the maintaining of his wife after their separation by consent, see 12 HALSBURY'S LAWS (3rd Edn.) 484, para. 1080; and for cases on the subject, see 27 DIGEST (Repl.) 82, 630, 85, 635, 636.]

G

For the Summary Jurisdiction (Married Women) Act, 1895, s. 4, see 11 HALSBURY'S STATUTES (2nd Edn.) 849.]

Cases referred to:

H

- (1) *Baker v. Baker*, (1949), 66 (pt. 1) T.L.R. 81; 27 Digest (Repl.) 82, 630.
- (2) *Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378; 27 Digest (Repl.) 85, 635.
- (3) *Starkie v. Starkie* (No. 2), [1953] 2 All E.R. 1519; 118 J.P. 59; 3rd Digest Supp.
- (4) *Chapman v. Chapman*, (Apr. 4, 1951), unreported (cited in *Stringer v. Stringer*, [1952] 1 All E.R. 373).
- (5) *Stringer v. Stringer*, [1952] 1 All E.R. 373; [1952] P. 171; 116 J.P. 102; 3rd Digest Supp.
- (6) *National Assistance Board v. Parkes*, [1955] 1 All E.R. 700; *affd.* C.A., [1955] 3 All E.R. 1; [1955] 2 Q.B. 507; 3rd Digest Supp.
- (7) *Price v. Price*, [1951] 2 All E.R. 580, n.; [1951] P. 413; 115 J.P. 486, n.; 27 Digest (Repl.) 85, 636.
- (8) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest (Repl.) 82, 627.
- (9) *Thomas v. Thomas*, [1946] 1 All E.R. 170; 115 L.J.P. 75; 110 J.P. 203; 27 Digest (Repl.) 697, 6660.

I

Appeal.

The husband appealed against an order of the Southampton justices dated July 13, 1956, whereby they found him guilty of wilful neglect to provide reasonable maintenance for the wife and ordered him to pay to her the sum of £4 a week. The facts appear in the judgment.

A. S. Trapnell for the husband.

A. J. Jenkins for the wife.

Cur. adv. vult.

Feb. 27. **LORD MERRIMAN, P.**, read the following judgment of the court: The parties were married on July 26, 1952, the husband then being thirty-six and the wife twenty-two years of age. There are no children. They lived with the wife's mother, having a sitting room and a bedroom for their exclusive use. The marriage was not a happy one from an early stage. The wife said that they had always been rowing and quarrelling over different things in the course of which they got to shouting at one another. The main cause of trouble between them was money matters. The wife was continually asking him for money, saying that she could not manage on the £6 10s. which he allowed her for housekeeping generally. The husband said that he could not give her any more. At the time of the parting in March, 1956, they had ceased to have intercourse for between twelve and eighteen months, and it is clear, as the justices found, that they had lost whatever affection they may have had for one another. On the night of Sunday, Mar. 25, 1956, a quarrel arose, in the course of which the wife reproached him with having neglected to give presents to herself and her mother some time previously; and he, therefore, told her that as she was always thinking about her mother she had better go and live with her. She went straight to her mother and never returned to live with her husband. The husband said that when he told her to go he just felt "down and out", and did not mean it to be for ever. The wife herself says in her evidence in chief:

"My husband last gave me money on the Thursday before this Sunday. That was Mar. 22. Since then I have not had anything from him. He has only been paying my insurances which are 11s. After Mar. 25 I got his meals from the Sunday to the Thursday, because I had been paid the housekeeping. From then onwards he kept himself. There was nothing said about it. All he said was that he was not going to keep me for the rest of my life. I asked him about money for my own food and maintenance and he said I had to go out to work and get my own money. I gave up my work two years ago."

She also said in cross-examination:

"He offered me the full housekeeping money if I went back with him in our room. He said I could have that money he had in his hands if I would come back to his room. I refused."

The husband says that after that date he asked her two or three times to come back. The wife said that he approached her only once, when he said that he had been to see a solicitor, and that he "had to ask her" to come back. At the hearing before the justices the husband stated that he wished his wife to come back despite all she said in court. The wife, however, said she would not return, because it would mean a life of misery were she to do so.

The justices' reasons for their decision were as follows:

"*In General.* Neither party cut a very impressive figure in the witness-box and it did appear to us that it was doubtful whether either had ever had very much affection for the other and we were quite certain that what affection there had been had disappeared. The complainant appeared to be attempting, within the rather narrow limits of her intelligence, to give

A the court an honest and truthful account of the events leading up to these
proceedings but we felt that the respondent, although not attempting to be
deliberately untruthful, experienced great difficulty in seeing himself in other
than a favourable light. When considering the evidence placed before us and
the arguments addressed to us by the respective solicitors, we came to the
B conclusion that in fact the parting between husband and wife had been of a
consensual nature and that the husband had been guilty of wilful neglect to
maintain for the reasons we now state.

"*In Particular.* (i) It was agreed by both parties that on the evening of
Sunday, Mar. 25, 1956, the date of the original parting, there was a quarrel
between husband and wife which culminated in the husband telling the wife
to go to her mother's part of the house, which she did. This quarrel was
C clearly the last of a series which had occurred from time to time for one
reason or another and it appeared to us that both parties had reached a
state where they found the continuance of cohabitation burdensome and
they were quite ready to part, although neither was very capable of express-
ing their thoughts and feelings in words. However, as far as we could
D judge from the somewhat self-contradictory evidence of both parties, the
husband wanted his wife to go and she was very willing to part from him.
It did appear to us, however, that it was unlikely that at that time the
husband realised that he might still be under a liability to maintain his wife.

"(ii) There was clear evidence that on two or more occasions subsequent
to the parting there had been some discussion between the parties regarding
maintenance for the wife, when the husband stated that he would keep her
E if she returned to him and it was suggested on behalf of the husband that
this should be looked on as an invitation by the husband to the wife to
return to him and that a refusal by her thereby placed her in desertion and
put an end to any liability on the husband to provide maintenance. We
took the view, however, that there was in effect, no invitation by the husband
to the wife to return but that rather he was merely stating his viewpoint
F that whereas he could keep his wife if they were together he saw no reason to
do so while they were apart. We found support for this view in the wife's
evidence in chief, which we accepted, that her husband had said that he was
not going to keep her for the rest of her life and that when she asked about
money for her maintenance he said that she should go out to work and get
her own money.

G "(iii) Having come to the decision as fact that the parting was a consensual one, we were forced to the conclusion that the husband was still
under a liability to maintain his wife unless and until she came to be in a
state of desertion or committed some other matrimonial offence. We were
of opinion that there had not in fact been any actual invitation by the hus-
band to the wife to resume cohabitation or any other act which could
H properly be construed as putting an end to the agreement to live apart and
we could not but decide that as the husband had adequate means to maintain
his wife his failure to do so was wilful. We therefore made the order under
the terms which, having regard to the means and status of the parties,
appeared to us to be reasonable."

I Counsel on both sides accepted that the justices' finding that the separation
was consensual was correct. [His LORDSHIP then considered the conten-
tion on behalf of the husband that the justices' finding in (ii) above that there
had been, in effect, no invitation by him to the wife to return was wrong. His
LORDSHIP concluded that in the circumstances it would not be right for the
court to reject the justices' finding on this point, and continued:] For these
reasons we feel obliged to reject the contention that the wife had disentitled
herself to claim maintenance by the fact that she had become a deserter.

The position then is that the parties had separated by mutual consent on the night of Mar. 25, 1956, and that nothing had supervened to put an end to that consensual separation at the date of the hearing before the justices. It is clear that the justices directed themselves that because the parting was originally a consensual one, and so remained, the husband was still under a liability to maintain the wife, and that having adequate means for that purpose his failure to do so was wilful. They arrived at this conclusion without considering as a separate question whether there was any agreement on the part of the husband, expressed or implied, to maintain the wife in a state of separation.

This raises acutely the question on what financial terms, expressed or implied, the consensual separation had taken place; and the further question whether, subsequently to the agreed separation, any change of circumstances had occurred so as to give the wife the right to complain of wilful neglect to provide reasonable maintenance for her. In substance the question is whether *Baker v. Baker* (1) ((1949), 66 (pt. 1) T.L.R. 81), correctly states the principles of law applicable to such a situation. If so there is no finding by the justices of any change of circumstances since the agreement to part. That, if there is such a change of circumstances, the jurisdiction of the court is not ousted by the terms on which a separation is agreed, or by the punctual performance of those terms, is settled by the decision of the Court of Appeal in *Tulip v. Tulip* (2) ([1951] 2 All E.R. 91). It is, of course, open to this court, under r. 71 (6) of the Matrimonial Causes Rules, 1950*, to draw all inferences of fact which might have been drawn in the court below.

In our opinion it is impossible to extract from the evidence any express agreement on the part of the husband to pay maintenance to the wife as a separated wife. As to an implied agreement, it was urged that the separation, though in the result consensual, was brought about by the husband's telling his wife to go; that though not living as man and wife they still continued to live under the same roof, though not in that part of the house which had been the matrimonial home; that though he had refused to contribute to her maintenance in other respects, he had recognised his liability to the extent of continuing to pay her insurance to the amount of 11s. weekly up to the date of the hearing. In addition to this the wife had, to his knowledge, given up her work two years previously, and he agreed that she was a sick woman, and suffered from an ulcer; and clearly in default of maintenance from him she would be dependent on her widowed mother. All those considerations, it was submitted, indicated that when the husband told her to go to her mother—admittedly not as a permanent arrangement—he must have contemplated paying for her maintenance, and not leaving her to her own resources.

Moreover, it was argued that the justices were right in holding that in the case of a consensual separation the husband was liable to maintain his wife unless and until she came to be in a state of desertion or committed some other matrimonial offence. It is common ground that either on the Thursday, or, as we think, on the next day, Friday, the husband said (it may be on the advice of his solicitor) that she could have all the usual housekeeping money if she would return. Assuming that the justices are right in holding that this cannot be regarded as an invitation to the wife to return, but only as a statement of the husband's own point of view, it is plain that this point of view was that he was willing to maintain his wife in the matrimonial home, but not as a separated wife, and that the justices so found. That being so, it seems to us that it is impossible to imply any agreement to maintain her as a separated wife unless the liability to do so is implicit in a consensual separation.

This brings us to the consideration of *Baker v. Baker* (1). The headnote reads as follows:

“Summary jurisdiction—Summons for wilful neglect to maintain—

* 10 HALSBURY'S STATUTORY INSTRUMENTS 231.

A Liability of husband where separation consensual. Unless some grave and weighty matter justifies a wife in leaving home she is not entitled to maintenance save in the exceptional case of a consensual separation with an agreement attached to it that the husband will maintain her."

In his judgment LORD MERRIMAN, P., said (66 (pt. 1) T.L.R. at p. 82):

B "There is no law involved in this case; it is merely an application of the principle that, if a wife is living separate and apart from her husband, it is not enough for her to give evidence that her husband had money and that she needed maintenance. The question is: What was the nature of the parting? If the wife can prove desertion, she is, of course, entitled to a maintenance order on that ground. If the separation was consensual,

C then, if she can prove—and Mr. Crispin [counsel for the wife] accepted that the onus was on the wife—that this was on the basis, express or implied, that the husband undertook to be responsible for her maintenance, she is entitled either to the agreed amount (if there was an agreed amount), or to a reasonable amount under the section, although she is living apart from her husband. But unless she can show, where the separation was consensual,

D that the husband had accepted a liability, expressed or implied, to maintain her, she has no case at all."

PEARCE, J., said (*ibid.*):

E "In this case desertion has been negatived and the wife's evidence makes it clear that there was here a separation by consent. If by her evidence she could establish that there was expressed or implied in that separation a continuing liability on the husband's part to support her, this order could stand, but her evidence has not done this, and therefore, in my opinion, there has not been wilful neglect to maintain, and the appeal should be allowed."

F *Baker v. Baker* (1) has been consistently followed in the Divisional Court, particularly in *Starkie v. Starkie* (No. 2) (3) ([1953] 2 All E.R. 1519) where the history of the approval of *Baker v. Baker* (1) in *Chapman v. Chapman* (4) (Apr. 4, 1951) and in *Stringer v. Stringer* (5) ([1952] 1 All E.R. 373) is summarised shortly.

If that statement of the law is correct it applies directly to the present case; but DENNING, L.J., in delivering the leading judgment in *National Assistance Board v. Parkes* (6) ([1955] 3 All E.R. 1), after giving examples, to which there

G is no parallel in the present case, of new circumstances which might arise to alter the situation where there was an actual agreement by the wife never to claim maintenance, said (*ibid.*, at p. 4):

"If these facts are brought to the husband's notice and he has the means to pay, then he is under a duty to maintain her, notwithstanding the prior agreement that he should pay nothing. The principle of *Tulip v. Tulip* (2) applies, I think, just as much when there is an agreement to pay nothing as when a fixed sum is to be paid, and it overrides anything said previously in *Baker v. Baker* (1) and *Chapman v. Chapman* (4) (cited in *Stringer v. Stringer* (5)). So long as the husband is ignorant of the new situation he is under no such duty, and is not guilty of wilful neglect to maintain her. That is, I think, the effect of the decision in *Stringer v. Stringer* (5)."

I It does not seem to us that there was any subsequent change of circumstances in the present case, since all the factors which were put forward in that behalf, such as the wife's state of health and her not having worked for two years, were already known at the time of the parting. At this point we would observe that it is necessary to keep clearly in mind that the question of the financial terms on which a consensual parting takes place, and the question whether some fresh need of the wife and notice thereof to the husband has occurred so as to entitle the court to find wilful neglect to maintain in spite of those terms,

appear to be two separate and distinct questions. If so, there is no inherent conflict between *Baker v. Baker* (1) and *Tulip v. Tulip* (2). A

Chapman v. Chapman (4), unlike *Baker v. Baker* (1), *Stringer v. Stringer* (5) and *Starkie v. Starkie* (3), was a decision of the Court of Appeal itself. It is referred to in the judgment given in this court by LORD MERRIMAN, P., in *Stringer v. Stringer* (5) ([1952] 1 All E.R. 373). On the present occasion, however, we think that it is worth while to give more detailed consideration to what was said by members of the Court of Appeal in *Chapman v. Chapman* (4), and to state the source of the quotations. The case was unreported but, in accordance with practice, a copy of the official shorthand note of the judgments vouched by the presiding lord justice was sent to LORD MERRIMAN, P., since a decision in which he was involved was being reversed. The judgment of ASQUITH, L.J., begins as follows: B

“This is a husband’s appeal from a judgment of the Divisional Court of the Probate, Divorce and Admiralty Division, consisting of LORD MERRIMAN, P., and WALLINGTON, J. That judgment varied a decision of the Dartford magistrates, whereby they dismissed a wife’s two summonses, one on the ground of desertion and the other on the ground of wilful neglect to maintain. The Divisional Court varied that order by allowing the appeal so far as concerns the wilful failure to maintain, while dismissing the appeal in relation to desertion. The husband appeals from the first limb of this decision. The learned President gave the leading judgment, with which WALLINGTON, J., concurred. The way he dealt with the matter was this. He first of all pointed out that the two summonses do not necessarily stand or fall together. Often two such summonses do so, and if the wife fails on desertion she substantially fails on wilful neglect to maintain, but that is not necessary and inevitable. Sometimes, where, for instance, the evidence is that the separation was consensual, she may fail on desertion and win on maintenance; in cases, that is, where the consensus impliedly includes a term that the wife should be entitled to some support from the husband. If this is the right inference from the evidence, the learned President considered that he was bound to draw it.” C

After a full review of the evidence the learned lord justice stated his conclusion that the inference drawn by the Divisional Court that the separation was consensual was wrong, in the following words: D

“In those circumstances, with great respect, I am of opinion that the inference of consensus cannot be supported; and, if it cannot, then there can be no possible claim to maintenance. There is, indeed, authority which has been cited to us, a case called *Baker v. Baker* (1), which decides very clearly that, even where a separation is admittedly consensual, it has to be shown either that there was an expressed agreement to pay maintenance or that such an agreement must be implied from the circumstances. In this case I think that the conclusion that there was a consensus at all cannot be supported, and therefore the other point does not really arise.” E

BIRKETT, L.J., came to the same conclusion on a review of the evidence, but added: F

“I agree with what ASQUITH, L.J., has said, and I do not think for my own part that, on the evidence before the justices and the evidence before the Divisional Court, this inference of consensus can really be supported; but I would just like to add a final word. Assuming for the moment that there had been, in the circumstances of this case, a consensual separation I do not think it by any means follows that an inference is to be drawn that it was upon the basis that attached to it should be an undertaking to provide maintenance. I think, on the contrary, almost everything in the case would appear to be against it . . . It does not look, as I say, upon the face G

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- A of it, that any such inference could be drawn, even if there had been anything in the nature of an agreement to separate, that it should be upon the terms that he would provide maintenance."

But he was content to rest his decision on the view that there was no ground for the Divisional Court's drawing the inference of consensus. HARMAN, J., agreed with ASQUITH, L.J.'s decision and the reasons therefor and had nothing to add.

- B It is of course true, as is recognised in *Stringer v. Stringer* (5), that the approval of *Baker v. Baker* (1) in *Chapman v. Chapman* (4) was obiter in the sense that the Court of Appeal did not agree with the inference of fact drawn by this court that the separation was consensual. Nevertheless, the approval of *Baker v. Baker* (1) appears to be an integral part of the reasoning not only of ASQUITH, L.J., but of
- C BIRKETT, L.J. Next, it is important to appreciate the context in which DENNING, L.J., held that *Baker v. Baker* (1) was overruled. *National Assistance Board v. Parkes* (6) was an appeal from a decision of the Queen's Bench Divisional Court ([1955] 1 All E.R. 700) that unless a wife has committed adultery or is in a state of desertion, the National Assistance Board are entitled under s. 42 and s. 43 of the National Assistance Act, 1948*, to recover contributions from her
- D husband in respect of assistance given under the Act to the wife, even if there has been a consensual separation which would provide the husband with a good defence to a claim by the wife for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. In the argument in the Divisional Court the attention of the court was called to *Baker v. Baker* (1), *Stringer v. Stringer* (5) and *Chapman v. Chapman* (4). At the conclusion of his
- E judgment LORD GODDARD, C.J., said ([1955] 1 All E.R. at p. 707):

- "The decisions of the Probate, Divorce and Admiralty Division which were cited to us dealt with an entirely different state of things. It is laid down that, if there is a consensual separation, a wife cannot avail herself of the provisions of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, to apply to justices for maintenance. She has made her
- F bargain and she cannot take advantage of the provisions of those statutes, and her only remedy is to go to the National Assistance Board. If the board, coming to the conclusion that she is destitute, relieve her, the husband would have to repay the board under the National Assistance Act, 1948, even though he could not be made to pay under the Summary Jurisdiction Acts."

- G ORMEROD, J., agreed, for the reasons given by LORD GODDARD, C.J. GORMAN, J., also agreed, but added that it was important to realise that they were concerned in these cases only with the rights given to public assistance in the National Assistance Act, 1948.

- H It is not clear to us why in affirming, as they did, the independent right of the board to recover from the husband a sum (limited, be it noted, by the amount of the assistance paid by the board under the National Assistance Act), it was necessary for the Court of Appeal to enlarge on the rights inter se of the wife and the husband. In dealing with this broader question and arriving at the conclusion that *Baker v. Baker* (1) had been overruled, DENNING, L.J., said ([1955] 3 All E.R. at p. 3):

- I "Separation by consent is not itself a bar to maintenance. The husband's duty to maintain his wife continues: see *Price v. Price* (7) ([1951] P. 413)."

Now the point at issue in the latter case was whether in the somewhat peculiar circumstances the finding of the trial judge that the wife was genuine in her offer to return to the husband should be supported. In referring to *Price v. Price* (7) ([1951] P. 413) in connection with *Baker v. Baker* (1) DENNING, L.J., is manifestly

referring to that part of his judgment which is conveniently summarised in the headnote as follows:

"Per DENNING, L.J. The offer made by the wife did not turn the husband into a deserter, and at the present day she would not be granted a decree for the restitution of conjugal rights, for her motive in offering to return was not a sincere desire to re-establish a home but to get maintenance, and it would be wrong that, impelled by that motive, she should be able to make him a deserter, contrary to the real truth of the case. But a husband is bound to maintain his wife if she is ready to live under his roof, whatever her motive may be, so long as she has not been guilty of some grave fault, such as adultery or cruelty, for the husband's duty to maintain her depends on the fact that she is his wife, not on the fact that he has deserted her."

HODSON, L.J., who followed, took exception to this statement of the law. After referring, as DENNING, L.J., had done, to the judgment of LORD READING, C.J., in *Jones v. Newtown & Llanidloes Guardians* (8) ([1920] 3 K.B. 381), HODSON, L.J., said ([1951] P. at p. 420):

"That passage draws attention to something which, I think, is perhaps not always clearly remembered, namely, that the husband's obligation to maintain his wife is prima facie complied with by providing a home for her. A wife has no right to separate maintenance in a different home unless she can justify the fact that she is living apart from her husband. If a woman, as the wife in this case has done, leaves her husband, the right to separate maintenance is not destroyed but suspended, and as soon as she expresses her willingness to go back, if that offer is rejected, that suspension comes to an end. It seems to me to follow from that that, although the question does not directly arise, in that case, on the bare facts, as I have stated them, from that moment onwards the boot is on the other leg and the party who is approached and rejects the approach becomes a deserter, and that that is the effect of the decision of the Divisional Court in *Thomas v. Thomas* (9) ([1946] 1 All E.R. 170). I should not have mentioned that point had not DENNING, L.J., mentioned that proceedings for restitution of conjugal rights might differ in their result from proceedings under this section. For my part I think that the proceedings under s. 23 of the [Matrimonial Causes Act, 1950] are on the same footing as proceedings for restitution of conjugal rights: if a wife becomes a deserter she would not be entitled to maintenance just because she is a wife, that is to say, to separate maintenance. The question of her right to maintenance may depend on whether she is a deserter or whether she is deserted or whether there is a contract between them. I do not think that the law recognises a sort of undefined condition where parties are living apart in conditions which may be described as of drift, or in some not very clearly defined condition in so far as rights to maintenance are concerned. It is necessary that those conditions should be clearly defined, and I think that they were clearly defined by LORD READING, C.J., in *Jones v. Newtown & Llanidloes Guardians* (8)."

In this passage HODSON, L.J., was in effect reiterating the identical principle stated in *Baker v. Baker* (1). SOMERVELL, L.J., who had given the leading judgment and had held that the trial judge's finding about the genuineness of the wife's offer was in the circumstances conclusive, gave a supplementary judgment ([1951] P. at p. 422) in which he agreed with the observations made by HODSON, L.J.

It would appear, therefore, that on this particular issue, though not on the main subject-matter of the appeal, the judgment of DENNING, L.J., was a minority or dissenting judgment. If this is the true view, it may be doubted whether it affords authority for the conclusion that *Baker v. Baker* (1) and

A *Chapman v. Chapman* (4) are overruled. In his judgment in *National Assistance Board v. Parkes* (6) BIRKETT, L.J., said ([1955] 3 All E.R. at p. 7):

B "I am satisfied that ASQUITH, L.J., in the passage from his judgment (in *Chapman v. Chapman* (4) cited in *Stringer v. Stringer* (5), [1952] 1 All E.R. at p. 377) which was so strenuously relied on, was not contemplating the kind of situation which has arisen in this case for this reason: *Chapman v. Chapman* (4) was heard on Apr. 4, 1951. *Tulip v. Tulip* (2) was heard the next day and the following day. The court reserved judgment and delivered it on May 10. ASQUITH, L.J., had then become LORD ASQUITH, but he was a member of the court which decided *Tulip v. Tulip* (2) and, although he did not deliver a judgment of his own, he expressly empowered me in delivering my judgment to say that he had read it and expressly agreed with it."

C With the greatest respect, it does not seem to us that the mere fact that *Chapman v. Chapman* (4) and *Tulip v. Tulip* (2) were heard on consecutive days, and that ASQUITH, L.J., BIRKETT, L.J., and HARMAN, J., were party to both decisions detracts in any way from the authority of what was said about *Baker v. Baker* (1) by ASQUITH, L.J., and impliedly by BIRKETT, L.J., himself, in *Chapman v. Chapman* (4). Indeed, BIRKETT, L.J., himself seems to provide the reason for the distinction to which we have already referred between the two cases by saying, as he does, that in *Chapman v. Chapman* (4) ASQUITH, L.J., was not contemplating the kind of situation which had arisen in *National Assistance Board v. Parkes* (6)—namely, that a wife who had actually covenanted not to claim maintenance had fallen on evil days, had had to seek national assistance, and the National Assistance Board had paid 39s. 6d. a week to the wife, which sum they were seeking to recover from the husband; whereas in *Chapman v. Chapman* (4) what was being considered was the legal effect of a consensual separation on the assumption that there was no agreement expressed or implied to pay maintenance to a separated wife, and in which there was no suggestion of a subsequent change of circumstances of which the husband had knowledge.

F It seems to us that in view of this distinction between *Baker v. Baker* (1) and *Tulip v. Tulip* (2), and between both cases and *National Assistance Board v. Parkes* (6) which decided that the National Assistance Board had an independent statutory right to recover from the husband maintenance in the form of national assistance actually disbursed by the board to the wife, it is our duty to follow what was said by the Court of Appeal in *Chapman v. Chapman* (4) and by the majority of the Court of Appeal in *Price v. Price* (7). We recognise, of course, that these divergent views can only be reconciled, if not by the Court of Appeal itself, by the House of Lords, unless in the meantime they are resolved by legislation, if the Maintenance Agreements Bill, which was given a second reading in the House of Commons on Feb. 15, 1957, becomes law. We have already called attention to the careful way in which this case was tried. Nothing could have been clearer than the way in which the evidence is recorded and the reasons for the decision stated. As regards the law, the justices can hardly be blamed if they found some difficulty in directing themselves correctly in view of the circumstances to which we have called attention. For these reasons we think that the appeal must be allowed, and the order of the justices set aside.

I *Appeal allowed.*

Solicitors: Maltz, Mitchell & Co., agents for Bernard Chill & Axtell, Southampton (for the husband); White & Leonard, agents for Wells, Woodford & Ackroyd, Southampton (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

CHIVERS & SONS, LTD. v. CAMBRIDGE COUNTY COUNCIL.
 TRUSTEES OF THE NATIONAL INSTITUTE OF AGRICUL-
 TURAL BOTANY REGISTERED v. CAMBRIDGE COUNTY
 COUNCIL.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Ormerod, L.JJ.), February 11, 12, March 13, 1957.]

Case Stated—Appeal from quarter sessions—Inference of fact—Right of appellate court to draw such inferences—Necessity of showing error of law—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5 c. 49), s. 25 (2).

Pursuant to their duty under the National Parks and Access to the Countryside Act, 1949, a local authority prepared and published a provisional map which showed a public footpath running over the land belonging to the applicants. The applicants applied to quarter sessions under s. 31 (1) (a) of the Act of 1949 for declarations that at the relevant date, i.e., Oct. 5, 1952, there was no public right of way over their land. Quarter sessions refused the declaration and the applicants requested that a Case be stated pursuant to s. 31 (7) of the Act of 1949. After stating the "primary" facts proved or admitted, quarter sessions stated in the Case that they came to the conclusion that the local authority had on the evidence satisfied them that the footpath had been dedicated as a highway at common law at some time before 1899. The question of law for the opinion of the High Court was whether on the facts found the court of quarter sessions was entitled in law to come to that conclusion. The applicants submitted that by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25 (2), on an appeal from quarter sessions the appellate court might draw any inference of fact which might have been drawn in the court of quarter sessions, that the inference of the necessary intention to dedicate was an inference of fact and that the Court of Appeal was free to draw a different inference from that drawn by quarter sessions and thus to review the conclusion reached by quarter sessions even if there were no error of law.

Held: the conclusion reached by quarter sessions should stand and s. 25 (2) of the Act of 1925 did not avail the applicants for the following reasons—

(i) the inferring of the intention to dedicate a highway from the primary facts found by quarter sessions was an inference which could not be shown to involve an error in law, and therefore was not comprehended in the question stated for the opinion of the court; moreover, even if the inference of the intention could be shown to involve an error in law, it would be unnecessary to invoke s. 25 (2) (see p. 887, letter I, to p. 888, letter A, post), and

(ii) assuming that a Case Stated under the Act of 1949 was an appeal within s. 25 (2) of the Act of 1925 and that the effect of the predecessor of the latter enactment was as expressed by AVORY, J., in the cases cited below, the drawing of a fresh inference of fact by an appellate court under s. 25 (2) was justified only where it was first shown that the conclusion reached by quarter sessions, by a route which did not require that particular inference to be drawn, was in law erroneous (see p. 887, letter E, post).

Dicta of AVORY, J., in *Hickton v. Hodgson* ((1913), 78 J.P. at p. 95) and *Mitchell v. Croydon JJ.* ((1914), 111 L.T. at p. 635), approved by SCRUTTON, L.J., in *Bailey v. Potteries Electric Traction Co., Ltd.* ([1931] 1 K.B. at p. 481) accepted for the purposes of the decision at (ii) above.

Appeals dismissed.

A [As to the drawing of inferences of fact by the High Court on a Case Stated by quarter sessions, see 21 HALSBURY'S LAWS (2nd Edn.) 744, para. 1289; and for cases on the subject, see 33 DIGEST 452-454, 1646-1662.]

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25, see 5 HALSBURY'S STATUTES (2nd Edn.) 353.]

B Cases referred to:

(1) *Dairy Supply Co., Ltd. v. Houghton*, (1911), 106 L.T. 220; 76 J.P. 43; 33 Digest 452, 1643.

(2) *Hickton v. Hodgson*, (1913), 110 L.T. 380; 78 J.P. 93; 33 Digest 453, 1656.

(3) *Mitchell v. Croydon JJ.*, (1914), 111 L.T. 632; 78 J.P. 385; 33 Digest 300, 145.

C (4) *Davis (D.) & Sons, Ltd. v. Pontypridd &c. Committee etc.*, (1916), 85 L.J.K.B. 1545; 115 L.T. 259; 80 J.P. 377; 33 Digest 452, 1645.

(5) *Bailey v. Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; *on appeal*, [1931] A.C. 151; Digest Supp.

(6) *Cababé v. Walton-on-Thames Urban Council*, [1914] A.C. 102; 83 L.J.K.B. 243; 110 L.T. 674; 78 J.P. 129; 26 Digest 363, 876.

D (7) *British Launderers' Research Assocn. v. Central Middlesex Assessment Committee & Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; [1949] 1 K.B. 434, 462; [1949] L.J.R. 416, 646; 113 J.P. 72; 2nd Digest Supp.

(8) *Bracegirdle v. Oxley*, *Bracegirdle v. Cobley*, [1947] 1 All E.R. 126; [1947] K.B. 349; [1947] L.J.R. 815; 176 L.T. 187; 111 J.P. 131; 2nd Digest Supp.

E

Appeals.

These were two appeals, one by Chivers & Sons, Ltd. and the other by the Trustees of the National Institute of Agricultural Botany Registered (together called "the applicants"), from orders of the Divisional Court of the Queen's Bench Division both dated June 7, 1956, dismissing the applicants' appeals by way of Cases Stated by the Appeal Committee of the Court of Quarter Sessions for the County of Cambridge. The applicants had separately applied under s. 31 of the National Parks and Access to the Countryside Act, 1949, to the appeal committee for declarations that at the relevant date (Oct. 5, 1952) there was no public right of way over certain lands respectively owned by them.

G The public right of way in question was over a path shown on the provisional map prepared by the respondents, the County Council of the Administrative County of Cambridge, under the Act of 1949. The appeal committee heard the applications on Sept. 29 and Sept. 30, 1955, when they refused the declarations. The applicants requested that cases be stated for the opinion of the High Court. The facts appear in the judgment of the Court of Appeal.

H

G. D. Squibb, Q.C., and *David Hirst* for the first applicants, Chivers & Sons, Ltd. *David Hirst* for the second applicants, the Trustees of the National Institute of Agricultural Botany Registered.

F. Donald McIntyre, Q.C., and *W. H. Hughes* for the respondents, the County Council of the Administrative County of Cambridge.

I

Cur. adv. vult.

Mar. 13. LORD EVERSHERD, M.R., read the following judgment of the court: Pursuant to their duties under the National Parks and Access to the Countryside Act, 1949, the Cambridge County Council carried out a survey of lands in their area over which rights of way were alleged to subsist. They prepared a provisional map and statement which they published on Feb. 1, 1955. The map showed a path which ran from Cambridge Road to Huntingdon Road on the north-west side of the City of Cambridge. The path lay in part across

certain land known as Nos. 293, 235, 234 and 211 on the ordnance survey map for the County of Cambridge (1926 edition). That land is owned and occupied by Chivers & Sons, Ltd. The path also lay in part across land known as No. 214 on the same ordnance survey map, which land is owned and occupied by the Trustees of the National Institute of Agricultural Botany Registered. The path was described in the provisional statement. It was stated to be 1,170 yards in length and to have been created by usage. The "relevant date" mentioned in the provisional statement was Oct. 5, 1952. The two landowners named applied to quarter sessions pursuant to s. 31 (1) (a) of the Act of 1949 for declarations that at the relevant date mentioned in the provisional statement there was no public right of way over the land. The applications were heard by the appeal committee of quarter sessions on Sept. 29 and 30, 1955, when the parties were represented by counsel. The court of quarter sessions, finding it proved to their satisfaction that there was at the relevant date a public right of way over the land, refused to make the declarations. The actual conclusion of the court was "that the respondents had on the evidence satisfied us that the footpath had been dedicated as a highway at common law at some time before 1899". The landowners, by notice dated Oct. 5, 1955, requested the court of quarter sessions to state a case. It is provided by s. 31 (7) of the Act of 1949 as follows:

"Section 20 of the Criminal Justice Act, 1925 (which provides for appeal to the High Court by way of Case Stated on a point of law) shall with the necessary modifications apply in relation to applications under this section."

Section 20 (1) of the Criminal Justice Act, 1925, so far as relevant, is as follows:

"After the determination by a court of quarter sessions of any appeal against a conviction by a court of summary jurisdiction or the sentence imposed on such a conviction, either party to the proceedings may, if dissatisfied with the determination of the court of quarter sessions as being erroneous in point of law, make an application in writing to the court of quarter sessions at any time within seven days after the date of the determination of the appeal to have a Case Stated for the opinion of the High Court on the point of law."

I need not read the final paragraph of the sub-section or the rest of the section, which have no relevance for present purposes. The court of quarter sessions was informed that the point of law on which the landowners (the appellants) wished to have a Case stated was whether there was any evidence on which the court could find as it did. Cases were accordingly stated. The orders of quarter sessions were affirmed by the Queen's Bench Division and appeals are now brought to this court.

The question of law actually stated in each of the Cases appears to be somewhat more extensive than was requested. Indeed two questions of law are stated. They are:

"[1] Whether there was any evidence to support our conclusion, and [2] whether on the facts as found by us (being the aforesaid facts which were proved or admitted) regarded as a whole we were entitled in law to find that there was at the relevant date a public right of way over the said land and if not what should be done in the premises."

The Stated Cases record the facts which were proved or admitted. Subject to considerations which can be later mentioned, the facts are of equal significance in the two Cases. There is no need to recite them at length. There were certain inclosure awards in 1806 and 1840, and their contents, so far as relevant, are set out. Reference is made to the 1888 and 1903 editions of the ordnance survey maps. There was a very important finding that from 1890 until 1898

- A many members of the public used to walk openly and frequently and without interruption over the path and that the path was unobstructed. In 1899 the then predecessor in title of Chivers & Sons, Ltd., placed an obstruction across the path at a point approximately half-way along its course. There followed a memorial from twenty-six inhabitants of the district addressed to the chairman of the Chesterton Urban District Council (within whose area part of the path was situate) calling attention to what had happened and asserting that the use of the path had been enjoyed by the general public for many years. Meetings of the Chesterton Urban District Council took place and they requested the Impington Parish Council (within whose area another part of the path was situate) to co-operate in opposing the obstruction. The parish council declined to do so and the Chesterton Urban District Council took no proceedings to enforce a public right of way over the path. But notwithstanding the obstruction, members of the public used until 1916 to walk over the path openly and without interruption. That was done with the knowledge of workmen employed by Chivers & Sons, Ltd., or their predecessors in title. Then in 1916 Chivers & Sons, Ltd. placed barbed wire across the path at the point where the obstruction had been placed in 1899; this barbed wire has since remained and has made it impossible for members of the public to walk along the path.

- D The first question which arises is whether there was "any evidence" to support the conclusion that the footpath had been dedicated as a highway at common law at some time before 1899. [The court considered this question* and answered it in the affirmative. The judgment continued:] The second question raised, though differently worded, may not when examined pose any substantially different issue. The wording is

"whether on the facts as found by us (being the aforesaid facts which were proved or admitted) regarded as a whole we were entitled in law to find that there was at the relevant date a public right of way over the said land."

- F This second question can be stated as follows: "On an application of the law, do the facts 'entitle' us to decide as we did". That is but another way of asking whether the facts as found can support the conclusion reached. Arguments on a somewhat more extended basis were, however, presented to us.

- G Counsel for the applicants based one part of their argument on the effect of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25 (2). The establishment by the respondents of their claim to the existence of the alleged public right of footway depends (counsel said) on the justification of the inference of dedication, i.e., of the intention to dedicate, by the several owners of the way in question; and though, if the inference was properly made by quarter sessions, the legal result would be in accordance with the conclusion reached, the essential intermediate step is not a matter, like the matters tabulated in para. 6† of the Case, of fact strictly so called—what has been variously called, of "primary" or
- H "fundamental" fact—but inference from the facts; and that by virtue of s. 25 the Divisional Court and this court, addressing themselves to the legal question posed by the Case Stated, are as free themselves as were quarter sessions to draw inferences of fact—and particularly are free to draw, at the essential intermediate stage, an inference of fact different from that drawn by quarter sessions. We hope we have fairly stated the argument as it was fully and
- I forcefully presented to us.

Section 25 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, is as follows:

"Every Case Stated by a court of quarter sessions otherwise than under

* The authorities cited included *Poole v. Huskinson* (1843), 11 M. & W. 827; *Folkestone Corpn. v. Brockman*, [1914] A.C. 338; *Williams-Ellis v. Cobb*, [1935] 1 K.B. 310; *Edwards v. Bairstow*, [1955] 3 All E.R. 48.

† This paragraph tabulated the facts summarised at p. 884, letter I, ante to letter D, supra.

the Crown Cases Act, 1848, or the Quarter Sessions Act, 1849, for the consideration of the High Court shall be deemed to be an appeal, and shall be heard and determined accordingly."

It is conceded that the present case is not within the stated exceptions. The Case has been stated pursuant to the National Parks and Access to the Countryside Act, 1949, s. 31 (7), by reference to the Criminal Justice Act, 1925, s. 20. It is, therefore, according to the argument, within the scope of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25 (2), which reads:

"On the hearing of an appeal from a court of quarter sessions the appellate court may draw any inference of fact which might have been drawn in the court of quarter sessions, and may give any judgment or make any order which ought to have been given or made by that court, or may remit the order . . ."

We will assume (without deciding) that the argument is so far right, that the present case is an "appeal" within s. 25 (1) and (2). Sub-section (2) of s. 25 is itself a re-enactment of s. 2 of the Supreme Court of Judicature (Procedure) Act, 1894, and we were referred to a number of cases under that section, namely, *Dairy Supply Co., Ltd. v. Houghton* (1) ((1911), 106 L.T. 220); *Hickton v. Hodgson* (2) ((1913), 110 L.T. 380); *Mitchell v. Croydon JJ.* (3) ((1914), 111 L.T. 632); *D. Davis & Sons, Ltd. v. Pontypridd &c. Committee etc.* (4) ((1916), 115 L.T. 259); and *Bailey v. Potteries Electric Traction Co., Ltd.* (5) ([1931] 1 K.B. 385). Counsel for the first applicant also drew attention to a passage in the speech of LORD DUNEDIN in *Cababé v. Walton-on-Thames Urban Council* (6) ([1914] A.C. 102) (a case under the Highway Act, 1835), where the noble Lord referred (*ibid.*, at p. 114) to the fact that appeals from quarter sessions differed from appeals from justices in that (by reason no doubt of s. 2 of the Act of 1894) in the former, but not the latter, inferences of fact may be drawn by the appellate courts.

The language in the several judgments in the five cases first above mentioned is not perhaps in all respects entirely easy to reconcile. All that the decided cases establish, in our judgment, on their facts is that, where a quarter sessions court has been shown to have misdirected itself so as to disable the conclusion which it has reached, then the High Court (and this court) can and will, by virtue of the section, and in order to reach the proper conclusion in the case, draw any necessary inference of fact, i.e., an inference which the quarter sessions court did not draw, but should have drawn.

Counsel for the first applicant was indeed prepared to agree with counsel for the respondents that s. 2 of the Act of 1894 had been correctly interpreted by AVORY, J., in the second of the cases cited, *Hickton v. Hodgson* (2), when the learned judge said (78 J.P. at p. 95):

"I wish first of all to deal with the point that was taken under the Judicature Act of 1894. As to that I go a little farther than my Lord with regard to the effect of that statute on these appeals from quarter sessions. I do not at all accept the contention that the provision that this court may draw any necessary inference entitles this court to reverse the findings of the quarter sessions upon questions of fact. I think that it only means that upon the facts which are either proved or admitted the court may draw any inference necessary to enable it to determine the question of law which arises upon it, and it is on that view that I propose to deal with the case which is now before us."

AVORY, J., repeated this view in the next case, *Mitchell v. Croydon JJ.* (3) where he said (111 L.T. at p. 635):

"I expressed my views upon the effect of this statute in the case of *Hickton v. Hodgson* (2) and I am still of the same mind—namely, that s. 2 of the Act only means that upon the facts which are either proved or admitted, the court may draw any inference necessary to enable it to

A determine the question of law which arises upon them, but that it does not entitle this court to reverse the findings of the court of quarter sessions upon questions of fact."

It may be added that SCRUTTON, L.J., in the last of the cases cited, *Bailey v. Potteries Electric Traction Co., Ltd.* (5), approved the view which AVORY, J., had expressed, when he said ([1931] 1 K.B. at p. 481):

B "I agree with the view taken by AVORY, J., in *Hickton v. Hodgson* (2), where he says: 'I wish first of all to deal with the point that was taken under the Judicature Act, 1894' (now 1925). 'As to that I go a little farther . . .'"

C and then SCRUTTON, L.J., cites the passage which I have already quoted. He continues (*ibid.*):

"The court can set aside a finding of fact on the ground that there is no evidence on which such a finding can be made, or on the ground that the tribunal has proceeded on a wrong principle of law in the consideration or exclusion of evidence. It cannot alter a finding of fact found below except on these grounds . . ."

D Counsel for the first applicant claimed that this view of the scope of the section sufficed for his purpose and enabled the court to draw an inference of fact opposite to that drawn by the quarter sessions as incidental, as it were, to arriving at the final conclusion whether a right in law of public footway had been established. Assuming, as we are for present purposes content to do, that AVORY, J.'s exposition was correct, we are, however, far from agreeing with counsel that it suffices for the purposes of his argument. For as we read AVORY, J.'s language (in the two cases) it seems to do no more than justify the drawing of inferences of fact in order, as it were, to fill the gap left where the conclusion of quarter sessions reached by a route which did not require the relevant inference to be drawn, is shown to have been wrong in law. In other words, counsel can at best only invoke AVORY, J.'s exposition if he first shows or assumes that on some other ground the conclusion in favour of the right of way is, in law, erroneous. But, in our judgment, counsel's argument breaks down at an earlier stage. The relevant question of law submitted by the Case Stated under the Act of 1949 is, by the terms of the case,

G "whether on the facts as found by us (being the aforesaid facts which were proved or admitted) regarded as a whole we were entitled in law to find that there was at the relevant date a public right of way . . ."

H The "facts" there referred to are the facts in para. 6* of the case—the facts which counsel concedes to be "primary" facts of which the quarter sessions are admittedly the final judges. We have not seen (and are not entitled to see) the evidence actually given. We must, therefore, interpret the findings as meaning what, on the face of it, they plainly say. The question for the court then is, whether on the basis of those facts quarter sessions were entitled in law to reach their final conclusion; i.e., not whether they were entitled to draw further inferences of fact, but whether the conclusion proceeding from and founded on the unchallenged and unchallengeable findings of "primary" fact can be said at some point to have involved some misdirection, some error, of law.

I An inference of fact properly so called, such as was the implicit inference of dedication or intention to dedicate, and such alone as is contemplated by the sub-section under consideration [s. 25 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925], is not and does not per se involve an error of law and is, therefore, not comprehended by the Case as it is stated. We may add that if the inference of fact in question could be called, or could be shown to involve, an error of law (as we think it cannot), it would be then unnecessary to invoke

* A summary of these is given at p. 884, letter I, to p. 885, letter D, ante.

the terms of s. 25 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925. In any event, therefore, the sub-section cannot, in our judgment, in the present case avail counsel and we need not say anything further on it. A

We should perhaps add that counsel explained to us that he had not felt able before the Divisional Court to develop his point on the sub-section as he has developed it before us, having regard to certain language of DENNING, L.J., in *British Launderers' Research Assn. v. Central Middlesex Assessment Committee* (7) ([1949] 1 All E.R. 21), which counsel thought would be regarded as binding the Divisional Court, but the correctness of which he challenged before us. B

The passage from DENNING, L.J.'s judgment is (*ibid.*, at p. 25):

"On this point it is important to distinguish between primary facts and the conclusions from them. Primary facts are facts which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself, such as an original document. Their determination is essentially a question of fact for the tribunal of fact, and the only question of law that can arise on them is whether there was any evidence to support the finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If and in so far as those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact and the only questions of law which can arise on them are whether there was a proper direction in point of law and whether the conclusion is one which could reasonably be drawn from the primary facts: see *Bracegirdle v. Oxley* (8) ([1947] 1 All E.R. 126). If and in so far, however, as the correct conclusion to be drawn from primary facts requires, for its correctness, determination by a trained lawyer—as, for instance, because it involves the interpretation of documents, or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer—the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as the tribunal of first instance." C D E F

It was said that the distinction between inferences which could be drawn by a layman and inferences which required a lawyer's training was unreal and unsound; and that *Bracegirdle v. Oxley* (8) cited by DENNING, L.J., was unhappily chosen since it was one of a Case stated by justices. As the argument has in the end turned out and on the view of this part of the argument which we have formed, we do not find it necessary to express any view on the validity or general applicability of DENNING, L.J.'s view; though we must not be taken to be indicating any present disagreement with it. In our judgment the appeals fail and should be dismissed. G

Appeals dismissed.

Solicitors: *Blythe, Dutton, Wright & Bennett*, agents for *King, Metters & Harrison*, Cambridge (for the first applicants); *Blythe, Dutton, Wright & Bennett*, agents for *Few & Kester*, Cambridge (for the second applicants); *Clerk to Cambridge County Council* (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

CRUICKSHANKS v. CRUICKSHANKS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), October 11, 1956, March 4, 1957.]

Divorce—Domicil—Domicil of choice—Serving soldier—Scotsman posted to England—Evidence as to voluntary residence—Factum and animus.

B

A soldier does not and cannot acquire a domicile in the place where he is stationed if there is nothing more to qualify his residence there than the mere fact that he is present in it under orders (principle stated by LORD NORMAND in *Sellars v. Sellars*, 1942 S.C. at p. 211, adopted) but a soldier compulsorily posted to England can be shown to have acquired an English domicile of choice if sufficiently cogent evidence of his state of mind is put before the court (see p. 892, letters A to F, post).

C

The husband was a Scot born and brought up in Scotland. He joined a Scottish army regiment in 1945 and was stationed in Scotland. In 1949 he transferred to the Royal Army Ordnance Corps and was posted to England. While in England he met and married the wife, an Englishwoman, and they lived together in England. In 1952 the husband deserted the wife and committed adultery and in 1953 he was posted overseas. The wife now petitioned for divorce alleging that the husband was domiciled in England, alternatively that immediately before he deserted her he was domiciled in England (for the purpose of s. 18 (1) (a) of the Matrimonial Causes Act, 1950).

D

Held: the wife's petition failed for want of jurisdiction as she had not proved that the husband had at any time acquired a voluntary residence in England, superimposed on the involuntary posting to this country in the course of his military duties.

E

Observations of LORD NORMAND in *Sellars v. Sellars* (1942 S.C. at p. 211) applied.

F

[As to the change of domicile by persons in military service, see 7 HALSBURY'S LAWS (3rd Edn.) 22, para. 41, note (g); and for cases on the subject, see 11 DIGEST (Repl.) 341, 342, 122-129.]

Cases referred to:

G

- (1) *Udny v. Udny*, (1869), L.R. 1 Sc. & Div. 441; 11 Digest (Repl.) 326, 22.
- (2) *King v. Foxwell*, (1876), 3 Ch.D. 518; 45 L.J.Ch. 693; 11 Digest (Repl.) 330, 48.
- (3) *Re Macreight, Paxton v. Macreight*, (1885), 30 Ch.D. 165; 55 L.J.Ch. 28; 53 L.T. 146; 11 Digest (Repl.) 342, 128.
- (4) *Re Mitchell, Ex p. Cunningham*, (1884), 13 Q.B.D. 418; 53 L.J.Ch. 1067; 51 L.T. 447; 11 Digest (Repl.) 342, 126.
- (5) *Yelverton v. Yelverton*, (1859), 1 Sw. & Tr. 574; 29 L.J.P. & M. 34; 1 L.T. 194; 164 E.R. 866; 11 Digest (Repl.) 471, 1025.
- (6) *Brown v. Smith*, (1852), 15 Beav. 444; 21 L.J.Ch. 356; 51 E.R. 609; 11 Digest (Repl.) 340, 114.
- (7) *Donaldson (or Nichols) v. Donaldson*, [1949] P. 363; [1949] L.J.R. 762; 2nd Digest Supp.
- (8) *Sellars v. Sellars*, 1942 S.C. 206; 2nd Digest Supp.
- (9) *Clarke v. Newmarsh*, (1836), 14 Sh. (Ct. of Sess.) 488; 32 Fac. Coll. 395; 11 Digest (Repl.) 343, 112.

H

I

Petition.

The husband was born in Scotland of Scottish parents and lived in Scotland all his life until he joined the army in 1945. He joined a Scottish regiment and was stationed in Edinburgh. At the beginning of 1949 he transferred to the Royal Army Ordnance Corps and was posted to England. It was the husband's intention then to make the army his career. In May, 1949, while in

England, he met the wife who was an Englishwoman domiciled in England. A
They were married in England on Dec. 19, 1949, and lived together in married
quarters in England. There were two children of the marriage. In June, 1952,
the husband began an adulterous association with one L.G., also an English-
woman and in about December, 1952, he deserted the wife. He spent his
leaves with L.G. in England and in January, 1953, he was posted overseas. B
The husband had never since the marriage resided in Scotland.

On Feb. 17, 1956, the wife presented a petition for divorce on the grounds of
the husband's desertion and adultery, and alleged:

"That the [wife] and the [husband] are domiciled in England, or alter-
natively that immediately before the [husband] deserted the [wife] as set
out in (the petition) the [wife] and the [husband] were domiciled in England." C

The suit was undefended and came before WILLMER, J., on Oct. 11, 1956, when
HIS LORDSHIP found the desertion and adultery proved and adjourned the case
for argument on the question of domicile and for the assistance of the Queen's
Proctor.

A. B. Hollis for the wife. D

Colin Duncan for the Queen's Proctor.

WILLMER, J., stated the facts and continued: In giving evidence in
support of her petition the wife could say little of her own knowledge as to the
intentions of her husband. She agreed that her husband was a Scot, and said
that she met him at Chilwell in Nottingham; he was then in the R.A.O.C. She E
was then asked:

"Was it discussed between you at all, either before the marriage or just
after, where you would live?"

Her answer was:

"Well, we did talk about living in England but I mean no definite plans
were made." F

The examination continued for another page and a half of the transcript, during
which the witness was questioned by her own counsel, and then a certain number
of questions were interposed by myself. But I think that I can fairly say that at
the end of it all the wife did not say anything more specific than that. There was G
some further evidence given at the previous hearing, which showed that even
after the husband had withdrawn from cohabitation with the wife he continued,
whilst still serving in England, to reside in England, on leave as well as on duty,
with the woman named in the petition, who was also an Englishwoman.

It was not contested on behalf of the wife that the husband's domicile of
origin was Scottish, and that in those circumstances the burden was on her to H
satisfy me that there had been an acquisition of a domicile of choice in England
on the part of the husband, and that, failing satisfactory proof of that, she
could not show that the court had the necessary jurisdiction to deal with the case.
It was at that point that I adjourned the matter and asked for the assistance
of the Queen's Proctor. I should like to take this opportunity of expressing I
my appreciation of the extremely lucid and helpful argument which I have heard
today from counsel for the Queen's Proctor. The result of his argument has
been to leave little doubt as to the law to be applied. Certainly counsel for the
wife has not sought in his reply to quarrel with the submissions made on behalf
of the Queen's Proctor. It became apparent as counsel for the Queen's Proctor
traced the history of the law on the subject that there has, over the years, been
some degree of what I might call relaxation of the strict view which the law took
half a century and more ago with regard to the acquisition of a domicile of choice.

A For instance, if I may refer to the often cited passage in the speech of LORD WESTBURY in *Udny v. Udny* (1) ((1869), L.R. 1 Sc. & Div. 441 at p. 458), it was there stated:

“ There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office . . . ”

B It may seem at first sight that those words, strictly applied, exclude the case of residence prescribed by such duties, for instance, as military service, such as we have in the present case. Similarly, in *King v. Foxwell* (2) ((1876), 3 Ch.D. 518 at p. 520) SIR GEORGE JESSEL, M.R., stressed this aspect of the matter and said:

C “ I have had before me a great number of authorities, and the conclusion I draw is this; that in order that a man may change his domicile of origin he must choose a new domicile—the word ‘choose’ indicates that the act is voluntary on his part—he must choose a new domicile by fixing his sole or principal residence in a new country . . . with the intention of residing there for a period not limited as to time.”

D The question of domicile arose, following those cases, in relation to a serving soldier in *Re Macreight, Paxton v. Macreight* (3) ((1885), 30 Ch.D. 165 at p. 168) where PEARSON, J., expressed his view as follows:

E “ As I understand the rule of law it is this: A British subject does not by merely entering into the British army abandon his domicile, and his remaining in the army is no evidence of an intention to abandon the domicile which he had at the time when he entered it, but, so long as he remains in the army, he retains that domicile which he had when he entered it.”

F If I applied that view strictly, it would be conclusive, I apprehend, against the wife in the present case. A similar view in relation to a serving officer was expressed in *Re Mitchell, Ex p. Cunningham* (4) ((1884), 13 Q.B.D. 418), and I would like to refer to what was said by LINDLEY, L.J. (*ibid.*, at p. 425):

G “ It is said that, whether his domicile of origin was Scotch or Irish, it became English by his entering into the English army, and in particular by his entering the Royal Engineers whose head quarters are at Chatham. I think that this is not a correct view of the law. This depends on whether that which Mr. DICEY says in his book correctly represents the result of the authorities. He says, p. 139: ‘A soldier or sailor in the service of his own Sovereign retains the domicile which he had on entering the service, wherever he may be stationed,’ and he refers to *Yelverton v. Yelverton* (5) ((1859), 1 Sw. & Tr. 574) and *Brown v. Smith* (6) ((1852), 15 Beav. 444). I think that his statement is fully borne out by those authorities. The point appears to me perfectly plain.”

H Perhaps it is due to the fact that, as a matter of history, questions relating to serving soldiers have bulked recently rather larger than they did in those far off Victorian days, but, whether for that cause or any other, there is no doubt that in the more recent authorities a more liberal attitude towards the question of the acquisition by serving soldiers of a domicile of choice has developed. I have been referred, for instance, to a recent decision of ORMEROD, J., in *Donaldson (or Nichols) v. Donaldson* (7) ([1949] P. 363), a case of a serving officer in the Royal Air Force, who was found on the facts of the case to have acquired a domicile of choice in Florida, so as to give jurisdiction to the court in that state in matrimonial proceedings. Perhaps the most illuminating modern authority on the development of the law is the Scottish case, to which counsel for the Queen’s Proctor referred me, of *Sellars v. Sellars* (8) (1942 S.C. 206). That was actually the converse case of that which we have to consider here, namely, the case of an Englishman whose war service took him to Scotland, where he resided with his

wife. It was sought to set up a Scottish domicile, and the matter came before the court on that point. The Lord President (LORD NORMAND) said this (*ibid.*, at p. 211):

"*Clarke v. Newmarsh* (9) ((1836), 14 Sh. (Ct. of Sess.) 488), in fact, shows that the proposition that a soldier cannot acquire a domicile in the place where he is stationed is not universally true. In that case it was held that Governor Trapaud, an Englishman by origin who was resident as Military Governor in Fort Augustus, had acquired a Scottish domicile. But it was proved that he had taken a lease of land in Scotland, which he cultivated, and that he had become a magistrate in Scotland and had formed other Scottish connexions. In order to acquire a domicile of choice two things are necessary—first, the actual fact of residence in the new country; and, second, an intention *remanendi*. Now, in my opinion, the requirement of residence is not satisfied merely by proof of a residence imposed upon a soldier by the order of his military superiors. But, then, there may co-exist with a residence, which has begun and is continued under military orders, facts and circumstances which establish a residence voluntary in character and chosen by the soldier, although it is a residence in the place in which he is stationed by the order of his military superiors. Such facts and circumstances were present in the case of Governor Trapaud, and they played their due part in the decision that he had acquired a Scottish domicile and had abandoned his English domicile. Accordingly, I think that the proposition as stated by the Lord Ordinary [LORD KEITH] should be modified to the effect that a soldier does not and cannot acquire a domicile in the place where he is stationed if there is nothing more to qualify his residence there than the mere fact that he is present in it under orders."

It seems to me—and I know of no authority to the contrary—that that statement of the law, which was applied by ORMEROD, J., in *Donaldson v. Donaldson* (7), is a correct statement of the law of England as well as of the law of Scotland as it stands today, and I should be happy to adopt those words of LORD NORMAND as my own. Agreeing with him, I hold that, although mere residence in England as a result of posting for the purpose of military duty is not enough, it is possible nevertheless, even in the case of a soldier compulsorily posted to England, to show the acquisition of an English domicile of choice, if sufficiently cogent evidence is put before the court to show his state of mind.

That brings me to the final submission on behalf of the Queen's Proctor which, in my judgment, sums the matter up correctly, namely, that when you are dealing with cases of this character it is no longer possible to keep the question of the factum of residence separate from the question of animus. They cannot be considered wholly in isolation when one comes to apply the law in practice, for the animus must be an important element to be taken into consideration when considering whether the residence on which reliance is placed is or is not voluntary. At any rate, that is the view of the law which I now seek to apply to the facts of the present case. Is it proved to my satisfaction, the onus of proof being on the wife, that the husband in the present case did acquire a voluntary residence in this country, superimposed, as it were, on the involuntary posting to this country which he got in the course of his military duties? I have already referred to the evidence which was given by the wife and her witness on the previous hearing. The only other evidence before the court on the matter is, first, an affidavit which has now been obtained from the husband's mother, which has been admitted without too strenuous objection on the part of the Queen's Proctor before me today, and secondly a draft affidavit, which was submitted by the wife's solicitors to the husband but never sworn to by him. The importance of the latter lies not so much in what was submitted to him, but in what was crossed out from the draft when he returned it to show what he

A was prepared to swear, and also in the substituted passages which he inserted to take the place of those parts which he had crossed out.

The evidence of the husband's mother, one must agree straight away is, so far as it goes, wholly in favour of the wife. I have no reason to suppose that this lady has said in her affidavit anything other than what she believes to be the truth; and she says that her son had told her that, when he was married, he intended permanently to reside in England and to settle there with his wife, and that after he had finished in the services he still intended to settle in England. She concludes her affidavit by saying:

C ". . . throughout the time that my son lived with his wife, the matrimonial home was always in England to the best of my knowledge, and he has from time to time told me that he intended to reside in England permanently."

D That, so far as it goes, is of course wholly in favour of the submission made on behalf of the wife, but it is rightly observed on behalf of the Queen's Proctor that this is not really very cogent evidence; at best it is second-hand. Some comment was made on the fact that the wife had not apparently either sought to, or been able to, obtain the attendance of the husband himself to give evidence about his own intentions. It is perfectly true, of course, that evidence given by the person himself—at any rate, in a case in which he has an interest in the result—as to his intentions must be scrutinized very carefully, but in the present case, even without having had the benefit of hearing evidence from the husband, I have material for inferring what were his intentions with some degree of confidence. [His LORDSHIP referred to the draft affidavit and the husband's alteration of it and continued:] From all that it appears to me to be reasonably clear that when the husband, whose intentions are in question in the present case, was asked to say in black and white that he had abandoned an intention of continuing to live in Scotland, and had formed a voluntary intention of remaining permanently in England and founding a permanent home in England, he withdrew from any such proposition and refused to set his signature to it.

G In those circumstances, the burden being on the wife to establish to my satisfaction the acquisition of a domicile of choice in England, I can only say that in my judgment the evidence adduced in an attempt to discharge that burden falls far short of having the cogency required. I am not satisfied on the facts that the husband in fact acquired a domicile of choice in England, either at the date of the petition or at the date when he is alleged to have been guilty of desertion, and in those circumstances I cannot find that this court has jurisdiction to grant relief. The result is that I have to dismiss the petition.

Petition dismissed.

Solicitors: *R. H. Marcus* (for the wife); *Queen's Proctor*.

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

ATTORNEY-GENERAL (on the relation of
GLAMORGAN COUNTY COUNCIL AND PONTARDAWE
RURAL DISTRICT COUNCIL) v. P.Y.A. QUARRIES, LTD.

[COURT OF APPEAL (Denning, Romer and Parker, L.JJ.), January 30, 31, February 1, 6, 7, 8, 11, March 15, 1957.]

Nuisance—Public nuisance—Public and private nuisance distinguished—Who must be affected to constitute public nuisance—Whether isolated act can constitute public nuisance—Dust and vibration from quarry affecting adjoining householders—Evidence—Injunction—Remedial measures taken since action begun—Whether injunction should be granted.

Injunction—Nuisance—Public nuisance—Dust and vibration from quarry affecting adjoining householders—Remedial measures taken since action begun—Relevance of defendants' attitude to complaints—Whether injunction should be granted—Whether isolated acts would amount to a public nuisance and thus constitute a breach of an injunction against committing one.

A nuisance is a public nuisance if, within its sphere, which is the neighbourhood, it materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects, and the question whether the number of persons affected is sufficient to constitute a class is one of fact (see p. 902, letter D, post).

Quarry owners so conducted their operations that neighbouring householders were discomfited by vibration from explosions and by the dust emanating from the quarry in dry weather, which frequently resulted in a film of dust being deposited on their homes and gardens. The vibration caused personal discomfort, but structural damage to houses from it was not established. Since the issue of the writ the quarry owners had taken steps which much reduced the causes of complaint, but did not entirely remove them. Expert evidence showed that nuisance from vibration and dust could be avoided by the exercise of proper care. In an action brought by the Attorney-General on the relation of the local authority, an injunction was granted restraining the defendants, the quarry owners, "from carrying on the business of quarrying . . . in such a manner as . . . to occasion a nuisance to Her Majesty's subjects by dust or by vibration". On appeal by the defendants they contended, among other contentions, (i) that the nuisance, if any, caused by vibration was insufficiently widespread to constitute a public nuisance, (ii) that in view of the steps taken by them since the issue of the writ the injunction should not have been granted.

Held: the injunction was rightly granted for the following reasons—

(i) although public nuisance from vibration should be approached on a footing different from that of public nuisance from noise or smell, since discomfort from vibration was largely a matter of individual susceptibility and accordingly the fact that one person suffered discomfort from vibration did not necessarily establish that his neighbour was similarly affected, yet on the evidence a nuisance from vibration causing personal discomfort existed when the writ was issued and was sufficiently widespread to amount to a public nuisance (see p. 904, letter D, post); moreover, there was ample evidence to justify a finding that a public nuisance from dust existed at the time of the issue of the writ.

(ii) the nuisances from vibration or dust had not been wholly abated at the time of the trial (see p. 906, letter D, post); on the expert evidence the nuisances were not inevitable (see p. 907, letter A, post), and the defendants' indifference to complaint tended to show irresponsibility (p. 907, letter C, post).

Per DENNING, L.J.: a private nuisance always involves some degree of repetition or continuance . . . but an isolated act may amount to a public

A nuisance if it is done in such circumstances that the public right to condemn it should be vindicated (see p. 909, letter B, post).

Observations on evidence and proof in actions for public nuisance (see p. 902, letter E, and p. 906, letter A, post).

Appeal dismissed.

B [Editorial Note. In the observations on evidence and proof, referred to above, it is intimated that a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances, though it is not necessary to follow this method in every case; and that allegations of damage to individuals and their land may properly be pleaded and proved at the trial.

C As to the distinction between public and private nuisances, see 24 HALSBURY'S LAWS (2nd Edn.) 24, para. 42; and for cases on the subject, see 36 DIGEST (Repl.) 256, 68-71.

As to nuisance by vibration, see 24 HALSBURY'S LAWS (2nd Edn.) 51, para. 88; and for cases on the subject, see 36 DIGEST (Repl.) 258-260, 82-108.

D As to the remedy by injunction where a nuisance ceases after action begun, see 24 HALSBURY'S LAWS (2nd Edn.) 93, para. 167; and for cases on the subject, see 36 DIGEST (Repl.) 332, 755, 756.

As to evidence of damage in nuisance cases, see 24 HALSBURY'S LAWS (2nd Edn.) 23, para. 40; and for cases on the subject, see 36 DIGEST (Repl.) 332, 757-759.]

Cases referred to:

- E (1) *Soltau v. De Held*, (1851), 2 Sim. N.S. 133; 21 L.J.Ch. 153; 61 E.R. 291; 36 Digest (Repl.) 256, 68.
- (2) *R. v. White & Ward*, (1757), 1 Burr. 333; 97 E.R. 338; 36 Digest (Repl.) 267, 195.
- (3) *R. v. Lloyd*, (1802), 4 Esp. 200; 170 E.R. 691; 36 Digest (Repl.) 256, 69.
- F (4) *A.-G. v. Sheffield Gas Consumers Co.*, (1853), 3 De G.M. & G. 304; 22 L.J.Ch. 811; 21 L.T.O.S. 49; 43 E.R. 119; 36 Digest (Repl.) 251, 28.
- (5) *R. v. Price*, (1884), 12 Q.B.D. 247; 53 L.J.M.C. 51; 7 Digest 563, 380.
- (6) *A.-G. v. Keymer Brick & Tile Co., Ltd.*, (1903), 67 J.P. 434; 36 Digest (Repl.) 248, 3.
- (7) *A.-G. v. Stone*, (1895), 60 J.P. 168; 36 Digest (Repl.) 271, 234.
- (8) *A.-G. v. Cole & Son*, [1901] 1 Ch. 205; 70 L.J.Ch. 148; 83 L.T. 725; 65 J.P. 88; 36 Digest (Repl.) 264, 130.
- G (9) *A.-G. v. Corke*, [1933] Ch. 89; 148 L.T. 95; sub nom. *A.-G. & Bromley Rural Council v. Corke*, 102 L.J.Ch. 30; 36 Digest (Repl.) 286, 351.
- (10) *A.-G. v. Bastow*, ante, p. 497.
- (11) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, 334.
- H (12) *Read v. Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 2nd Digest Supp.
- (13) *Southport Corpn. v. Esso Petroleum Co., Ltd.*, [1954] 2 All E.R. 561; [1954] 2 Q.B. 182; 118 J.P. 411; reversed in part sub nom. *Esso Petroleum Co., Ltd. v. Southport Corpn.*, [1955] 3 All E.R. 864; 3rd Digest Supp.

I Appeal.

This was an appeal by the defendants against that part of an order of OLIVER, J., dated Apr. 25, 1956, and made at Swansea Assizes, whereby he granted an injunction restraining the defendants "from carrying on . . . the business of quarrying . . . in such a manner as . . . to occasion a nuisance to Her Majesty's subjects by dust or by vibration". The injunction was granted in a relator action brought by the Attorney-General on the relation of the Glamorgan County Council, as the highway authority for the County of Glamorgan, and of the

Pontardawe Rural District Council as the health authority for the rural district. A
The facts appear in the judgment of ROMER, L.J.

F. W. Beney, Q.C., D. C. Roberts and H. H. Maddocks for the defendants.

H. Edmund Davies, Q.C., D. Morgan Evans and Michael Evans for the Attorney-General.

Cur. adv. vult.

Mar. 15. The following judgments were read.

DENNING, L.J.: I will ask ROMER, L.J., to deliver the first judgment.

ROMER, L.J.: This is an appeal from an order of OLIVER, J., dated Apr. 25, 1956, whereby he granted an injunction restraining the defendants

“from carrying on . . . the business of quarrying at Penyralltwen Quarry, near Pontardawe, in the County of Glamorgan, in such a manner as to cause stones or splinters to be projected from the confines of the said quarry or to occasion a nuisance to Her Majesty’s subjects by dust or by vibration.” C

It will be observed that whereas the injunction is unqualified as to the stones and splinters therein mentioned it is confined so far as dust and vibration are concerned to occasioning a nuisance to Her Majesty’s subjects. The defendants are only challenging the second part of the order, namely, the injunction with regard to dust and vibration. D

The action has been brought by the Attorney-General on the relation of the Glamorgan County Council and the Pontardawe Rural District Council, and it is founded on a public nuisance under the three broad headings which were dealt with by the order of the learned judge. The statement of claim alleges that the nuisances complained of have existed since about 1947. E

The defendant company was incorporated in 1929 but apparently carried on its activities on a somewhat modest scale for some years. In 1947 the Pontardawe Rural District Council granted permission to the defendants under the Town and Country Planning Acts for the further working of the then existing quarry, subject to certain conditions, one of which was that the council should be satisfied that the utmost precautions would be taken to prevent nuisance from dust. In 1949 Mr. Bryndley Thomas became a director of the defendant company: there were then three other directors, namely, Mr. Wyndham Thomas, Mr. Jim Morris and Mr. Iltyd Williams, the last named gentleman being also the manager. From 1951 onwards Mr. Bryndley Thomas and Mr. Wyndham Thomas took over the management of the business, and Mr. Iltyd Williams left in the same year. F G

The defendants’ quarry adjoins a highway called the Alltwn-Brynllewellyn highway, which runs roughly east and west. Immediately east of the quarry is a footpath which leads in a northerly direction from the highway. To the east of this footpath are eight dwelling-houses abutting on to the highway and on the north side of it. The nearest of these houses is about fifty yards from the nearest point of the quarry. Close to the quarry on the west side of it, and also abutting on to the highway on the north side, are some twenty houses, of which the nearest is thirty-five yards from the quarry and the furthest about 260 yards. About 250 yards to the south of the quarry is a farm called Alltwenganol, which is surrounded by fields. To the north-west of the quarry is another highway, called Dyffryn Road, which, at its closest proximity to the quarry (a matter of some 360 yards) is used for residential purposes. The locality is shown in detail in a plan which was put in evidence at the trial, and the learned judge gave the following general description of it. H

“Round the quarry on both sides of it can be seen groups of houses. The quarry, according to the evidence, is not more than about thirty-five or thirty-six years old; that is to say, it has not been an open quarry for longer than that; that is, it has not been worked. But many of these little houses I

A have been built much longer than that. They form a little colony. One does not see any particular reason for their existence at that place; certainly nothing to do with the quarry. But one assumes that people who found Pontardawe—which is away to the left of the plan—not a particularly charming place to live in, came to move out to these little houses, where they have, certainly on three sides, some very beautiful Welsh scenery, with fine hills and valleys. That, I take it, was the reason these houses were built, and that is the nature of the people who occupy them; people who are not interested in the quarry at all, who have other occupations, who follow all sorts of occupations. Some work in steel; there is a lady, Mrs. Davies, who is a justice of the peace; there is a schoolmaster or two, and one with academic distinction, a bachelor of science; and there are all sorts of mixed people.”

C Some time before the year 1949 the activities of the defendants in their quarrying operations considerably increased, and some of the householders living in the vicinity of the quarry began to complain to the local authorities.

D In June of 1949 thirty local residents presented a petition to the Pontardawe Rural District Council in which, after stating that innumerable complaints had been made to the managing director of the defendant company over a long period, they stated:

E “On a number of occasions damage by flying stones has been done to houses in the vicinity of the quarry and recently a pane of a kitchen window was blown in by blast littering a breakfast table with jagged pieces of glass, the wife in the home narrowly escaping injury. We sincerely believe that your authority cannot fail to realise the seriousness of the position and the earnestness of our protest against: 1. The manner in which blasting operations are carried out regardless of the risk of damage to our homes. 2. The flying pieces of rock on occasions following blasting operations landing some distance from the quarry constitute a very serious menace to life inside and outside the home and to users of the public highway. 3. The dust nuisance caused by stone crushing the dust penetrating the houses and having injurious effects. The dust on occasions makes the use of the main road for some distance unpleasant and unhealthy. We appeal to the members of your authority responsible for the interests of the ratepayers to take immediately whatever action may be necessary to remove the causes of our protest.”

G Following the receipt by the council of this petition, their public health committee held a number of meetings at which they considered the position, and after a meeting which took place on Dec. 13, 1949, between the committee and representatives of the defendants and a deputation from the residents, a sub-committee of the council which had been appointed visited the quarries and watched the defendants' operations and, as a result, reported that the dust nuisance at the quarries was negligible, and further that no splinters fell outside the perimeter of the quarry during blasting operations. As a result, however, of further complaints from local residents further trials were carried out, and on Apr. 27, 1950, a vibration test was conducted at the quarry. As the result partly of this test the committee still appeared to be of the opinion that no action could be taken against the defendants, as appears from some minutes which were put in evidence. Complaints from the residents continued to be made, and on July 8, 1950, the clerk of the Glamorgan County Council wrote to the defendants, calling their attention to the fact that stones and splinters were falling on or being blasted across the highway which adjoined the quarry and asking them for an assurance that adequate steps would be taken forthwith to ensure that such a practice should cease. That letter remained unanswered. The clerk of the county council wrote again on July 20, 1950, and on July 26, 1950, he received a letter from the defendants to the effect that the defendants were “taking extraordinary precautions” during the blasting operations. A

meeting took place between the Pontardawe Rural District Council and the defendants, and on Mar. 15, 1951, the clerk to the council wrote to the defendants saying that the nuisance resulting from their quarrying operations had not been abated and was unlikely to be abated for a substantial period if at all, and that the council had decided to take appropriate proceedings to secure the abatement of the nuisance. In fact, however, the writ in this action was not issued until July 4, 1952. In the meantime, however, and indeed from the early summer of 1950, letters of complaint had been arriving in a steady stream at the offices of the relator councils from persons who lived in the neighbourhood of the quarry. It will be necessary to refer in greater detail to these complaints later on in this judgment, but it is enough for the moment to say that, although most of them related to the projection of stones from the quarry (a natural emphasis having regard to the potential danger to property and personal safety arising from the bombardment), some of the complaints referred also to vibration and dust.

During the last few years certain changes and developments have taken place in the quarrying plant on the defendants' premises and in their operational methods. Up to 1950 the defendants drilled twelve foot holes of one and one eighth inches diameter. The holes, four to six in number, were drilled three feet to four feet back from the face of the quarry and about six pounds of explosive were used in each hole. These charges were fired simultaneously and produced a fall of eighty to one hundred tons of stone. This material was then lifted by crane from the base of the quarry, put on to skips and taken to a crusher, which was in the open. This crusher was only capable of dealing with stones of about ten inches by six inches. In order to reduce large stones to the capacity of the crusher they were drilled to about half of their depth, stemmed with one ounce or two ounce cartridges and detonated. This process was known as "popping", and it was the practice to explode twelve to fifteen stones in this manner by simultaneous detonation. At this time there were four or five main explosions every week, and "popping" took place up to three times a day.

In 1950 the defendants obtained planning permission to instal vibratory screens and a new crusher, with a view to reducing the dust which emanated from the plant. In the same year the defendants began the installation of these units and also the construction of a new road leading to the quarry base. The object of this road, which came into use towards the end of 1951 and was completed in 1952, was to enable an excavator to be taken to the face of the quarry so as to save men from having to load stone on to the skips. The construction of this road involved a good deal of blasting near the highway. The defendants obtained the new crusher in April, 1951, and it was capable of taking stones up to twenty inches by ten inches. At the end of 1952 the defendants bought an additional crusher, known as a "skull breaker", which could take stones of four feet by sixteen inches thick. The object of this piece of plant was to reduce "popping", and since its acquisition this procedure has been reduced to some three times a month. Mr. Bryndley Thomas said in evidence that the defendants have been able to go for four or five weeks without having to "pop" at all. The system of major blasting, already referred to, continued up to 1953, when the defendants obtained drills capable of drilling down to twenty-four feet. These drills had the same bore as the previous ones but the holes were drilled four feet to six feet back from the face and twelve pounds of powder were used in each hole. The charges, usually four to six in number, were fired simultaneously, as before, and a fall of three hundred to four hundred tons of rock was obtained from each explosion.

In June, 1952, the defendants had consulted a Mr. F. C. Rosling, who is an associate member of the Institute of British Engineers and a member of the Institute of Quarrying, and is in private practice as a consultant in quarry blasting, etc. This gentleman, who gave evidence at the trial, advised the defendants to procure what is called a "wagon drill" which, in his view, would

- A eliminate all further cause for complaint arising from their operations at the quarry. This apparatus drills to a depth of forty feet with a diameter of two and a half inches, and the defendants somewhat belatedly bought one. It was installed in their quarry towards the end of 1953 and the defendants have used it ever since. With it the defendants drill up to twelve holes, twelve feet to fourteen feet back from the face, and put a charge of thirty to thirty-five pounds of explosive in each hole. The charges are fired by what are called delayed detonators. This involves an almost infinitesimal time lag between each detonation. The effect of this procedure is that, although a bystander is only conscious of one explosion, each charge is in fact detonated separately. The object of installing the wagon drill was not only to prevent the ejection of stones outside the quarry but also to obviate vibration from the main explosions. As each of these
- C explosions brings down three thousand to four thousand tons of stone they only have to be effected once every five or six weeks.

On Aug. 26, 1952, a second vibration test was carried out by a Mr. D. Stenhouse. This gentleman, who is a B.Sc. in mining, furnished the defendants with a report on this test and also gave evidence about it at the trial. I refer further to this hereafter.

- D The action came on for hearing before OLIVER, J., on Apr. 11, 1956, and the trial occupied nine or ten* days. In addition, the judge devoted a day to a view of the premises, and blasting operations were carried out in his presence. In the course of his judgment the learned judge arrived (in brief) at the following findings. So far as the flying stones were concerned, he said that there was really no defence at all, that the case was absolutely proved at the time the writ was issued; and that, notwithstanding the installation of the wagon drill, he was quite satisfied that the nuisance had not been wholly abated and that he should grant an injunction. As to vibration, the judge came to the conclusion
- E

“that for some reason—I cannot tell what it is—there is on occasion such vibration as to frighten people, to shake their houses and to make them thoroughly uncomfortable, and that such vibration as that, when it is caused,

F is a nuisance and must cease.”

With regard to dust, the judge said that it would not be right to base an injunction on the explosions, having regard to their comparative rarity since the end of 1953, but that excessive dust emanated from the secondary crusher when the door leading into it was left open, as was frequently the case. Finally, he said:

- G “I have no doubt that there is dust nuisance from this place—of course, only in dry weather. I have no doubt that they have not done anything to cope with it and I am going to order them to do so by injunction.”

- H Counsel for the defendants, in challenging the injunction which the learned judge granted in relation to vibration and dust, based his criticisms of the judgment on the following general grounds. He first submitted that the judge approached the matter as though it was a private, and not a public, nuisance which was in issue; and that he applied tests and followed lines of inquiry which are apt and relevant in cases of private nuisance, but which are to some extent irrelevant, and are certainly indecisive, where a public nuisance is alleged.
- I Counsel's second submission (which is to some extent associated with the first) was that the learned judge paid insufficient attention to the expert evidence which was called before him. The third criticism of the judgment is that the learned judge failed to address his mind to the position as it existed at the date of the writ, but primarily founded his decision to grant the injunctions now complained of on incidents which had occurred between the writ and the trial.

Before considering these contentions in any detail it would, I think, be convenient to consider the nature of a public nuisance as distinct from nuisances

* The hearing occupied nine days, and judgment was given on the tenth day.

which are customarily described as "private". At p. 1392 of ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (33rd Edn.) there is given a precedent of an indictment for carrying on an offensive trade; so far as material, it is in the following form:

"A.B. (on such and such a day), in the county of London, caused a nuisance to the public by allowing offensive or unwholesome smells to be emitted from furnaces or boilers in which tripe was being burnt or boiled by the said A.B., which nuisance the said A.B. still continues."

We were told that that form and the notes which follow it have appeared substantially unchanged in each successive edition since earliest times. It is stated in these notes (*inter alia*):

"Prove that the smoke or smell arising from (the boiler) was either injurious to health or so offensive as to detract sensibly from the enjoyment of life and property in its neighbourhood . . . It is not necessary that the smells produced by it should be injurious to health; it is sufficient if they are offensive to the senses . . . Prove also that it is in a populous neighbourhood, or near a highway . . . for its being a nuisance depends in a great measure upon the number of houses and the concourse of people in its vicinity, which is a matter of fact to be determined by the jury."

In STEPHEN'S DIGEST OF THE CRIMINAL LAW (9th Edn.), p. 179, it is stated that

"A common nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects."

The following definition of nuisance appears in 3 BLACKSTONE'S COMMENTARIES (ch. 13, p. 262):

"Nuisance, *nocumentum*, or annoyance, signifies any thing that works hurt, inconvenience, or damage. And nuisances are of two kinds: *public* and *common* nuisances, which affect the public, and are an annoyance to *all* the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanors; and *private* nuisances, which are the objects of our present consideration, and may be defined as anything done to the hurt or annoyance of the lands, tenements or hereditaments of another."

This passage from BLACKSTONE is cited in PEARCE & MESTON'S LAW OF NUISANCES, p. 1, and the learned authors point out that "anything that works hurt, inconvenience or damage" is too broad as including many things which are not nuisances, being *damna sine injuria*.

Finally, in a form of indictment for a public nuisance by smells given in 3 CHITTY ON CRIMINAL LAW (2nd Edn.), pp. 652-654, the relevant allegation is that the air

"was corrupted and rendered wholly insalubrious to the great damage and common nuisance of all the liege subjects of our said Lord the King, not only there inhabiting and residing, but also going, returning, and passing through the said streets and highways, and against the peace, etc."

It is difficult to ascertain with any precision from these citations how widely spread the effect of a nuisance must be for it to qualify as a public nuisance and to become the subject of a criminal prosecution or of a *relator* action by the Attorney-General. It is obvious, notwithstanding BLACKSTONE'S definition, that it is not a prerequisite of a public nuisance that all of Her Majesty's subjects should be affected by it; for otherwise no public nuisance could ever be established at all.

A In *Soltau v. De Held* (1) ((1851), 2 Sim. N.S. 133) KINDERSLEY, V.-C., said (*ibid.*, at p. 142):

"I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance—an injury or a damage, to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others."

B In *R. v. White & Ward* (2) ((1757), 1 Burr. 333) the defendants had been convicted of a public nuisance on an indictment which charged that

"at the parish of Twickenham, etc. near the king's common highway there, and near the dwelling-houses, of several of the inhabitants, the defendants erected twenty buildings for making noisome, stinking and offensive liquors."

C Objection was made that the indictment was only laid generally "in the parish of Twickenham". LORD MANSFIELD rejected the objection, saying (*ibid.*, at p. 337):

"It is sufficiently laid, and in the accustomed manner. The very existence of the nuisance depends upon the number of houses and concourse of people; and this is a matter of fact, to be judged of by the jury."

D In *R. v. Lloyd* (3) ((1802), 4 Esp. 200) an indictment for a nuisance by noise was preferred by the Society of Clifford's Inn. It appeared in evidence that the noise complained of affected only three houses in the Inn. LORD ELLENBOROUGH said that on that evidence the indictment could not be sustained; and that it was, if anything, a private nuisance. It was confined to the inhabitants of three numbers of Clifford's Inn only; it did not extend to the rest of the society and could be avoided by shutting the windows; it was therefore not sufficiently general to support an indictment.

E In *A.-G. v. Sheffield Gas Consumers Co.* (4) ((1853), 3 De G.M. & G. 304) it was submitted in argument that it was the duty of the Court of Chancery to interfere by way of injunction in all cases of public nuisance whatever might be the position in the case of private nuisances. In the course of his judgment, TURNER, L.J., said (*ibid.*, at p. 320):

"It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this court must rest; and taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public nuisance and private nuisance is this—that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind."

H In *R. v. Price* (5) ((1884), 12 Q.B.D. 247), a question arose whether the burning of a dead body, instead of burying it, amounted to a public nuisance. In the course of his charge to the jury, STEPHEN, J., said (*ibid.*, at p. 256):

"The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having been done in such a situation and manner as to be offensive to any considerable number of persons, you should find a true bill."*

I In *A.-G. v. Keymer Brick & Tile Co., Ltd.* (6) ((1903), 67 J.P. 434), JOYCE, J., said (*ibid.*, at p. 435):

"The only question I have to decide is purely one of fact, namely, whether or not what the defendants have done has created or occasioned a public nuisance within the neighbourhood of their brickfields. Now, in law, a

* STEPHEN, J., was repeating his charge to the grand jury.

public nuisance need not be injurious to health. It is not necessary to show that people have been made ill by what has been done. It is sufficient to show that there has been what is called injury to their comfort, a material interference with the comfort and convenience of life of the persons residing in or coming within the sphere of the influence of that which has been done by the defendants on their works . . . The conclusion I have arrived at is that . . . a serious and disgusting public nuisance has been occasioned by the defendants in the neighbourhood of their brickworks . . . ”

The form of injunction granted in that case was (so far as relevant) to restrain the defendants from performing specified acts

“so as by noxious or offensive odours or vapours arising therefrom or otherwise to be, or occasion a nuisance to the annoyance of persons in the neighbourhood of the defendants’ brickfields and lands, or so as to be or become injurious to the public health.”

The expression “the neighbourhood” has been regarded as sufficiently defining the area affected by a public nuisance in other cases also (see, for example, *A.-G. v. Stone* (7) (1895), 60 J.P. 168; *A.-G. v. Cole & Son* (8), [1901] 1 Ch. 205; and *A.-G. v. Corke* (9), [1933] Ch. 89).

I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the text-books and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is “public” which materially affects the reasonable comfort and convenience of life of a class of Her Majesty’s subjects. The sphere of the nuisance may be described generally as “the neighbourhood”; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue.

It is convenient now to turn to the evidence which was called before the learned judge as to the state of affairs with regard to vibration and to dust as it existed in the summer of 1952. The criticisms of the judgment to which I have already referred must, of course, be considered, but it is on the evidence, when related to the legal principles just mentioned, that this appeal falls to be determined. [His Lordship reviewed the evidence of residents who had complained of vibration and dust, and continued:] Mr. Ieuan Lewis, who is the senior sanitary inspector of the Pontardawe Rural District Council, had visited the quarry between the years 1950 and 1956 in order to ascertain the degree of dust control which was being exercised. He had made certain reports on the matter which he was asked about in evidence. The first of Mr. Lewis’s reports was dated July 4, 1952. He reported “Some degrees of dust blown by wind”. In his remarks at the foot of the report he said:

“Greater part of dust blown by wind due to an open door at bottom of plant. Floor and surrounding exterior is covered to inches depth with fine dust. Great improvement when door was closed. Mr. Wyndham Thomas asked to remove accumulated dust and water surrounding but refused, stating that rain would do the job for him.”

The door to which Mr. Lewis referred, and which is described in subsequent reports as “Door to conveyor belt”, is a double door at the bottom of the secondary crusher from which dust accumulated by gravity in the course of operations is removed and access is obtained to the machinery. As appears from the learned judge’s judgment, this door has led to constant trouble, and continued to do so down to the time of the trial. Mr. Lewis’s further reports for July and August, 1952, are moderate in tone, but in the report of Sept. 1, 1952, the degree of dust was described as “appreciable” and it was stated that

- A "dust deposits were found on bushes and fruit (blackberries)". Mr. Lewis was asked in evidence whether in his view the defendants had taken the steps they could have taken to control the dust, and his answer was that they had not; and that the dust which he had found exceeded the normal dust expected to be found in the area. He attributed the dust to three causes, viz.: the dust which arises from disturbance of rock and earth during blasting; that which arises
- B when the stone is crushed to chipping in the crushers; and that which accumulates on the site from the two previous sources. He said (as indeed the reports themselves show) that he was constantly urging on the defendants the necessity of keeping the doors to the crusher closed, and that he asked them to see to it that they should be made so that they could not be opened accidentally; but apparently the difficulty about this was that the doors became jammed open
- C from stones coming from the internal plant. At all events very little improvement was effected. Mr. Lewis said in cross-examination:

"Whatever was done was certainly not effective in requiring the door to close. On every occasion that I called . . . there was a cloud of dust coming from the accumulation within due to the through draught."

- D He was asked in cross-examination why he had not carried out a test for dust, and the Petri test was mentioned. He answered:

"There was sufficient evidence equal to the Petri test available in the houses inspected by the film of dust on furniture, roofs and windows."

- E Mr. Rosling gave evidence on behalf of the defendants with regard (inter alia) to vibration. As I have stated previously, he was consulted by the defendants in June, 1952, and it was as a result of his advice that the defendants belatedly installed the wagon drill towards the end of the following year. Mr. Rosling's view was that there should have been no reason at all for considerable vibration from blasting since 1953; and that in 1952 he had told the defendants that he would let them have details of a much better, more progressive, method of
- F operating their quarry. Apart from the above summary Mr. Rosling gave no evidence as to vibration in 1952.

- Mr. David Stenhouse, to whom I have previously referred, who is on the staff of I.C.I., carried out a vibrograph test at the defendants' premises on Aug. 26, 1952. This had been arranged by Mr. Rosling. The reason for the test, as stated in Mr. Stenhouse's subsequent report, was "complaints of possible
- G damage by vibrations from blasting to nearby property". In his "Remarks" to the report Mr. Stenhouse stated:

- "The results obtained . . . indicate that the maximum amplitude of the ground movement . . . is well below that which, in our opinion, could cause damage to the houses concerned . . . It should be noted, however, that a much lower amplitude of ground movement is perceptible to the
- H human body."

Mr. Stenhouse gave evidence at the trial on the issue of vibration, and in the course of it he reverted to the distinction between the effect of vibration on houses on the one hand and on the human body on the other. He was asked:

- I "Is the fact that people are conscious of vibration and speak about it being very substantial any guide as to whether or not it is causing damage to property? A.—In my opinion it is no guide."

He was then asked as to the test which he had carried out in August, 1952, and, without going into detail, it is sufficient to say that the explosions which were registered (and which were comparable to those generally effected at that time) could not, in his view, have caused damage to any of the adjoining houses. He also expressed the view that the method of staggered explosions, or "short delayed blasting", which the defendants have adopted since the end of 1953

results in considerably less vibration than the system of simultaneous detonation which had prevailed previously. A

On that evidence the question has to be resolved whether the plaintiffs succeeded in establishing that a public nuisance from (a) vibration and (b) dust was being caused by the defendants' quarrying operations at the date of the writ; and, if so, whether in view of the remedial measures which the defendants have taken since July, 1952, the court should interfere with the injunctions which the learned judge thought it right to grant. B

Counsel for the defendants' main submission with regard to vibration was that, even on the assumption (which he did not admit) that one or more individuals might have successfully instituted proceedings for private nuisance in 1952, the evidence does not show that a sufficient number of persons were affected by vibration to justify the nuisance (if any) being regarded as a public nuisance. C He said that vibration differs fundamentally from such things as noise or the pollution of the atmosphere. In nuisances such as those, he said, the court might well infer from the evidence of some of the affected class an injury to the class as a whole; but that no such inference can fairly be drawn in the case of vibration, which is largely a matter of individual susceptibility. I agree with counsel for the defendants that vibration is in some respects to be approached D on a different footing from noise and smell; and the fact that one person reasonably suffers discomfort from vibration does not necessarily establish that his neighbour has been similarly affected. I am in the present case satisfied, however, that a nuisance from vibration existed in 1952 and that it was sufficiently widespread to amount to a common, or public, nuisance.

As I have earlier indicated, this question is one of fact, and the judge decided E it adversely to the defendants, and it appears to me to be impossible to say that in view of the 1949 petition, the letters of complaint and the oral evidence, the judge arrived at a wrong decision. It is true that the complaints as to vibration (and indeed as to dust) were fewer and less emphatic than the complaints as to flying stones; they came, however, from a number of persons living to the east and south of the quarry; and the judge, who saw the witnesses, was satisfied F that the complaints were genuine. Counsel for the defendants' complaint that the judge paid no or insufficient attention to the vibration tests and to the evidence of Mr. Stenhouse is, in my opinion, ill-founded. It seems clear to me that he had these matters in mind when he considered, in the course of his judgment, whether the plaintiffs had established that the vibration has caused G structural damage to houses and came to the conclusion that they had not.

By reason of the judge's finding on this point I omitted in my review of the evidence most of the complaints (and they were many) of damage, both structural and otherwise, to the complainants' houses. The principal ground on which the judge gave relief was that

"if reasonable people on reasonable grounds do believe that their H houses are being shaken to pieces, they will be just as much harassed and distressed, and just as much unjustly harassed and distressed, as if the damage was in fact being so caused."

I see no reason to quarrel with that view. Moreover, there was a body of evidence as to personal discomfort, apart from fear of damage to houses. It is true, as counsel for the defendants pointed out, that the judge was particularly impressed I by three incidents which occurred on July 1, 1955, Aug. 30, 1955, and Jan. 3, 1956; and that all of these occurred a considerable time after the issue of the writ. It is clear from the judgment, however, that he was mindful of past history; for example, he said:

"The question is, do I accept the evidence of these witnesses that this vibration has existed for so long and has recently been intensified in degree, though lessened in frequency",

- A which shows beyond doubt that he was not confining his attention to the current or recent position. It is also to be observed that the principal interest at the trial centred not so much on whether the various nuisances which were complained of had existed in 1952, but whether they still continued to exist notwithstanding the efforts which the defendants had made (and successfully made according to them) to stop them. In these circumstances it is not surprising that the emphasis of
- B much of the evidence, as of the judgment also, was rather on recent than on former events. It is, however, clear to me that the judge was intending to find, and did find, that a public nuisance existed before action brought in relation to vibration as well as to flying stones; and there is, in my judgment, no ground for disturbing his decision.

- The observations which I have made with reference to vibration apply in the
- C main also to the question of dust. Counsel for the defendants' submissions as to the local effect of vibration do not, of course, apply to dust, which pollutes the air just as much as smoke or smells pollute it; and subject, of course, to such considerations as the direction of the prevailing wind, it is a legitimate inference that if one householder is affected by the emanation and deposits of dust then his neighbour will be affected likewise. On the other hand, a dust nuisance such
- D as that of which residents complained in the 1949 petition and in their letters is seasonal in that, generally speaking, it only exists in the summer. It could hardly be suggested, however, on that score that a dust nuisance could not be actionable; nor was it suggested in the present case. What was suggested on behalf of the defendants was that the inconvenience from dust, of which witnesses gave evidence at the trial, arose from the doors to the crusher being left
- E open, and that this causation did not arise until after these proceedings had been commenced. This, however, is not so, as is shown by Mr. Lewis's reports on dust in 1952. The evidence of Mr. Lewis, and the 1949 petition and the complaints of the residents to which I have earlier referred, leaves me in no doubt that the learned judge was amply justified in the view that a nuisance from dust existed in 1952, and that a sufficient number of people were affected by it to
- F constitute, for relevant purposes, a class of Her Majesty's subjects. It is true that the judge does not seem to hold in so many words that the nuisance existed in 1952, but I need not repeat on this subject what I said with regard to it in relation to vibration. It is quite clear that the judge was fully alive to the importance of the position as it existed at the date of the writ, notwithstanding that his judgment on this, as well as on the other issues, was directed more to
- G later events.

- Before proceeding to the final question which has to be considered, namely, whether, although a nuisance from vibration and dust existed when the action was started, the position has so improved since then that no injunction should issue, I should like to say a word or two on a question which resulted in the amendment of the statement of claim in these proceedings, and on which there
- H was some discussion before us. In the statement of claim as originally delivered, allegations were made to the effect that the nuisances complained of caused damage to the occupiers of the adjacent houses and land; that the vibrations were a source of danger to the houses, and that the dust settled on them and made them dirty and uncomfortable to live in. The statement of claim was subsequently amended by striking out* these allegations, because it was thought
- I that they were irrelevant in an action founded on public nuisance (though, rather curiously, they substantially re-appeared in some very detailed particulars of the statement of claim which were given later). The reasons underlying these amendments were supported before us by counsel for the defendants, and it was suggested, as I followed the argument, that in a public nuisance action evidence of individual experiences should not be received, although such evidence would be highly relevant in cases of alleged private nuisance. I cannot for myself accept

* These allegations were struck out by order of the district registrar.

this contention. Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances. I am therefore of opinion that there was nothing improper or irregular in the statement of claim as originally delivered, or in the reception at the trial of evidence of the local residents' experiences.

Finally, then, comes the question already mentioned. Is the Attorney-General entitled to an injunction, or ought some more limited form of relief to be granted in view of the various steps which the defendants have taken since 1952? The defendants contend that these measures have been so effectual that the proper order is to give the plaintiffs liberty to apply for injunctions with regard to vibration and dust; and that the injunctions granted by the learned judge should accordingly be discharged. *Prima facie*, if a nuisance, whether public or private, is shown to have existed at the time the writ was issued the plaintiff is entitled to an injunction. If, however, between the writ and the trial the nuisance has been abated the court will usually stay its hand and merely give the plaintiff leave to apply in the action for an injunction if the trouble should recur. It seems to me, however, that it is quite impossible to say that the nuisance from vibration or dust had been wholly abated at the time when this action came to trial. As a result of installing the wagon drill towards the end of 1953 blasting had undoubtedly become far less frequent; on the other hand, its effects had become far more violent.

Dealing with this aspect of the matter [i.e., vibration] the learned judge said:

"There are three main dates complained of, but there are a number of other occasions when tremendous vibration is complained of. The three main dates, as I call them, are July 1, 1955, Aug. 20, 1955, and Jan. 3, 1956, and there is a mass of evidence to the effect that, whilst in recent times the explosions have been far fewer, and therefore the incidents far fewer . . . they have been far more violent, at least on occasions, and those three dates I have given are three occasions. Each of them resulted in a petition signed by many people in the neighbourhood and presented to the local authority, complaining of this frightful shattering vibration."

The judge then referred to some of the evidence which had been called before him as to these recent explosions and which left him in no doubt as to their violence. There is obviously therefore still ground for serious complaint of vibration, and in my judgment the learned judge was quite right in granting an injunction.

With regard to dust, the learned judge relied to some extent on what he saw when he visited the quarry premises towards the end of the trial. The main thing which impressed him was the amount of dust which resulted from the crushing operations. He said that he saw the door into the secondary crusher both open and shut

"and no one who saw it open could avoid seeing the cloud of stuff that came pouring out from inside into the air."

Apart altogether, however, from the judge's own observations there was ample evidence from local residents to show that they were still being troubled by dust from the quarry during dry weather. [His LORDSHIP then referred to the evidence showing that the dust nuisance still existed at the date of the trial and continued:] There is no ground, therefore, in my opinion, on which this court should interfere with regard to the injunction which the judge granted to restrain this nuisance.

A Apart from the fact that the defendants had not abated (or, at all events, had not wholly abated) the nuisances by vibration and dust when the action came on for hearing, there are certain additional considerations which support the granting of the injunctions. In the first place, there is expert evidence to show that these nuisances are not inevitable; they can be avoided by the exercise of proper care. As to vibration Mr. Rosling* said in evidence that if the defendants are ordered
B not to vibrate people's houses they will not have the least difficulty in doing that. As to dust Mr. Lewis† said that if the doors to the crusher were kept permanently shut he did not think that there would be anything to complain of from the crusher; and it is from the crusher, as it appeared to the learned judge, that the dust complained of principally proceeds. The second
C consideration arises from the past conduct of the defendants and their attitude from the outset to the very reasonable complaints which were brought to their attention. This element affords no ground in itself, of course, for any penal order being made; but it seems to me that an attitude of indifference to complaints tends to show irresponsibility and that, I think, is not an irrelevant consideration where the granting of an injunction is concerned. The judge expressed strongly
D his view that the defendants in the present case paid scant attention to the complaints of the residents or to the representations of the local authorities before (somewhat belatedly) the writ was issued; that they were dilatory in adopting Mr. Rosling's suggestion as to the wagon drill; and that they never really exerted themselves to ensuring that the door to the crusher was kept shut (as Mr. Lewis was constantly pressing them to do) or to take other steps by the use of water or otherwise to prevent the escape of dust from the crushing plant.
E I do not propose to add to this already lengthy judgment by referring further than I have already done to the material on which the learned judge based his view as to the defendants' conduct in the past, but it is obvious to me that the view was amply justified.

In my judgment, accordingly, the injunctions against which this appeal has been brought were rightly granted and the appeal fails. Counsel for the
F defendants expressed some concern as to the future if the injunctions were not discharged. He said that, even though Mr. Rosling and Mr. Lewis expressed views (as to vibration and dust respectively) that the quarry can be operated without occasioning a nuisance, an occasional incident may from time to time arise, unpredictable and unavoidable, which would or might lead to applications based on contempt of court. Counsel had especially in mind the fact that for
G no apparent reason some particular explosion might be far more violent than those which normally occur. Such an explosion in fact occurred, for example, on Jan. 3, 1956. Mr. Wyndham Thomas, amongst other witnesses, gave evidence as to these particularly heavy explosions and said they may occur when blasting for what he described as a "tight corner". He said:

H "It is a very unusual shot, a freak blast which you get sometimes, that might not happen in another ten years."

The defendants fear that this kind of thing, if and when it happens again, may be regarded by the inhabitants as a breach of the injunction as to vibration, and may be followed by an application for sequestration or attachment. I would
I point out, however, that none of the inhabitants could make such an application. The Attorney-General alone could make it, and presumably he would not apply unless, in his view, the circumstances warranted it. It may well be that he would not found an application on some isolated incident if he were satisfied that no reasonable care on the part of the defendants could have avoided it. The

* Mr. Rosling was the expert witness called on behalf of the defendants; he was a consultant (see p. 898, letter I, ante).

† Mr. Lewis was the senior sanitary inspector of the Pontardawe Rural District Council, one of the relators.

defendants will doubtless adopt such expert advice as may be given to them with somewhat greater energy than they have shown at times in the past.

Counsel for the defendants' final submission was that the injunction as to dust should at all events be confined to such as proceeds from the crushing plant. This is undoubtedly the main, and very possibly the sole, source of complaint now, but I can see no reason for such a limitation, which might indeed be relied on by the defendants as an implied permission to disseminate dust, as they used to do, from other sources.

I would dismiss the appeal.

DENNING, L.J.: I entirely agree with the judgment of ROMER, L.J., and have little to add. Counsel for the defendants raised at the outset this question: What is the difference between a public nuisance and a private nuisance? He is right to raise it because it affects his clients greatly. The order against them restrains them from committing a public nuisance, not a private one. The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much. The question: when do a number of individuals become Her Majesty's subjects generally? is as difficult to answer as the question: when does a group of people become a crowd? Everyone has his own views. Even the answer "Two's company, three's a crowd" will not command the assent of those present unless they first agree on "which two". So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large. Take the blocking up of a public highway or the non-repair of it: it may be a footpath very little used except by one or two householders; nevertheless the obstruction affects everyone indiscriminately who may wish to walk along it. Take next a landowner who collects pestilential rubbish near a village or permits gypsies with filthy habits to encamp on the edge of a residential neighbourhood. The householders nearest to it suffer the most, but everyone in the neighbourhood suffers too. In such cases the Attorney-General can take proceedings for an injunction to restrain the nuisance: and when he does so he acts in defence of the public right, not for any sectional interest: see *A.-G. v. Bastow* (10) (ante, p. 497). When, however, the nuisance is so concentrated that only two or three property owners are affected by it, such as the three attorneys in Clifford's Inn, then they ought to take proceedings on their own account to stop it and not expect the community to do it for them: see *R. v. Lloyd* (3) ((1802), 4 Esp. 200) and the precedent in 3 CHITTY ON CRIMINAL LAW (1826), pp. 664, 665. Applying this test, I am clearly of opinion that the nuisance by stones, vibration and dust in this case was at the date of the writ so widespread in its range and so indiscriminate in its effect that it was a public nuisance.

The defendants, however, have now taken such good remedial measures that objectionable incidents take place only rarely and then by accident. So far as stones are concerned, the injunction is absolute: but so far as dust and vibration are concerned it is dependent on it being a nuisance "to Her Majesty's subjects", that is, a public nuisance. The question then arises whether every rare incident is a public nuisance. Suppose six months went by without any excessive vibration and then there was by some mischance a violent explosion on an isolated occasion terrifying many people. Would that be a public nuisance? Would it subject the defendants to proceedings for contempt? I should have thought that it might, but the punishment would be measured according to the degree to which the defendants were at fault. I quite agree that a private

- A nuisance always involves some degree of repetition or continuance. An isolated act which is over and done with, once and for all, may give rise to an action for negligence or an action under the rule in *Rylands v. Fletcher* (11), ((1868), L.R. 3 H.L. 330) but not an action for nuisance. A good example is an explosion in a factory which breaks windows for miles around. It gives rise to an action under *Rylands v. Fletcher* (11), but no other action if there was no negligence: see *Read v. J. Lyons & Co., Ltd.* (12) ([1946] 2 All E.R. 471). But an isolated act may amount to a public nuisance if it is done in such circumstances that the public right to condemn it should be vindicated. I referred to some authorities on this point in *Southport Corp'n. v. Esso Petroleum Co., Ltd.* (13) ([1954] 2 All E.R. 561 at p. 571). In the present case, in view of the long history of stones, vibrations and dust, I should think it incumbent on the defendants to see that nothing of the kind happens again such as to be injurious to the neighbourhood at large, even on an isolated occasion.

I too would dismiss the appeal.

PARKER, L.J.: I entirely agree with both judgments, and have nothing to add.

D *Appeal dismissed.*

Solicitors: *Waterhouse & Co.*, agents for *T. W. James & Co.*, Swansea (for the defendants); *Lewin, Gregory, Mead & Sons*, agents for *Richard John*, Cardiff (for the Attorney-General).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

E

POSTLETHWAITE v. POSTLETHWAITE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 25, 26, 27, 1957.]

- F *Divorce—Desertion—Misconduct conducing—Misconduct not amounting to just cause—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (2), proviso (iv).*

Misconduct conducing to desertion within the meaning of s. 4 (2), proviso (iv)*, of the Matrimonial Causes Act, 1950, means conduct which is not sufficiently bad to constitute just cause, but which is something worse than the ordinary wear and tear of married life; such misconduct is, in other words, conduct which falls short of justifying the separation but which may, in part at least, excuse it (see p. 912, letter A, post).

G

[As to conduct conducing to desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 309, para. 618.

For the Matrimonial Causes Act, 1950, s. 4 (2), proviso (iv), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

H **Petition.**

In this case the husband petitioned for divorce on the ground of the wife's desertion. The wife by her answer denied that she had been guilty of desertion and pleaded, in the alternative, that if her conduct amounted to desertion it was conduced to by the wilful neglect and misconduct of the husband.

I

The parties were married on Aug. 25, 1942, and there were no children of the marriage. At the time of the marriage the husband was serving in the Royal Air Force. The wife was living with her mother at a house in Leicester where the parties cohabitated when the husband was on leave. The husband was demobilised in 1946 and the parties continued to live at the wife's mother's house in Leicester. The husband returned to his pre-war job with a bank in Leicester; the wife had a business of her own in Leicester. In October, 1952, the husband was posted to London and on Nov. 8, 1952, he left Leicester. The

* The relevant terms of the proviso are printed in the footnote at p. 911, post.

wife refused to accompany him to London. The husband spent Christmas, 1952, with the wife at Leicester, staying with her until Dec. 29, 1952. He then returned to London and wrote several letters to the wife asking her to come to London to help him look for a house; she refused to do so. In September, 1953, the husband acquired a bungalow in a London suburb but the wife refused to join him there. On Nov. 22, 1953, the husband wrote specifically inviting the wife to come to the bungalow and settle there as their home. The wife replied on Nov. 30, 1953, in terms amounting to a final refusal to live with the husband. On Jan. 2, 1956, the husband filed the present petition for divorce. By her answer the wife asked that the petition be dismissed and did not herself pray for relief.

I for Lloyd, Q.C., and C. A. Marshall-Reynolds for the husband.

R. J. A. Temple, Q.C., and R. C. C. J. Binney for the wife.

WILLMER, J., stated the facts and continued: I entertain no doubt that during the three years preceding the presentation of the petition the parties were living separate and apart, the wife having brought to an end the previous state of things by refusing to join her husband in London. In those circumstances, it is necessary to inquire whether the wife had any just cause for that behaviour. Just cause was not specifically alleged in the wife's answer. However, I intimated to the wife's counsel in argument that I thought that that contention was open on the pleadings, and it would in any case be my duty to consider whether the circumstances of the separation would warrant a finding of desertion.

I am abundantly satisfied that the wife in the present case has not shown anything in the nature of just cause for absenting herself from her husband. The only matters that could be relied on are those which have been alleged in detail in support of her alternative plea of conduct conducing, and I can best deal with the detailed criticisms of the husband that have been made when I deal with that aspect of the case. To constitute just cause for one spouse living apart from the other spouse there must be a grave and weighty matter, i.e., conduct of such a kind as, in effect, makes the continuance of married life together impossible. Clearly, in my judgment, nothing that has been alleged by the wife in the present case goes anything like that distance. The things of which she complains in her husband may have caused unhappiness in the home, and may have made him difficult to live with, but in my judgment they fall far short of anything which could amount to just cause, within the interpretation which, as I understand it, has to be put on that phrase. The only other element necessary to constitute the offence of desertion is absence of consent on the part of the husband. As to that, I am abundantly satisfied. I do not say that the husband throughout the whole statutory period of three years was desperately anxious to have his wife join him, but I am satisfied on the evidence that he was at all times willing that she should do so and I am satisfied that he made every reasonable endeavour to get her to do so. In those circumstances, I am satisfied that for the three years preceding the presentation of the petition the parties were living separate and apart, due to the conduct of the wife—conduct inspired by an animus deserendi on her part, which is only too easily to be inferred from her actions and her letters. I further find that such separation was without the consent of the husband and that, in those circumstances, the matrimonial offence of desertion is complete.

I pause there only to remark that I rest my conclusion on the basis of a factum of separation, which was induced by the act of the wife and has existed for the necessary time. That, I think, is the correct approach. It was strenuously argued on behalf of the wife that the husband could in no event obtain relief since he had not actually made a specific offer of a matrimonial home for the wife until the autumn of 1953, when he acquired a bungalow. That, if I may say so with the greatest respect to learned counsel who argued it, seems to me to be the wrong approach. It cannot be right that a husband, in circumstances

- A such as these, should not be entitled to say that desertion began to run until such time as he had provided and furnished a matrimonial home and put it in a state of readiness to receive the wife. That seems to me to be a negation of the mutual matrimonial obligation which husband and wife must equally accept. When it becomes necessary, whether because of the husband's work or for any other reason, for the parties to move from one place to another, it is
- B no part of the duty of one spouse to go on ahead and prepare everything for the other. It should be a mutual operation, and in the present case I have paid a good deal of attention to the letters by the husband from London, in which he pleaded with his wife to come to London and help him to find accommodation. It seems to me that the proper approach is to recognise that the duties of the spouses are mutual. In those circumstances, I do not think that the argument
- C based on the fact that there was no specific matrimonial home offered until the autumn of 1953 commands any weight. I am satisfied that the state of desertion existed for the necessary period of three years.

- Accordingly desertion for the necessary period having been found, I must next consider whether or not it is right to say that it was conduced to by wilful neglect or misconduct on the part of the husband, so as to call for the exercise of the discretion of the court. I am bound to say that I have not found this aspect of the case at all easy. So far as I know, and apparently so far as the knowledge and researches of the experienced counsel who have appeared before me go, this is the first case in which a plea of wilful neglect and misconduct conducing has been raised in answer to an allegation of desertion. At first sight it struck me as being difficult to see exactly what the Matrimonial Causes Act, 1950, s. 4 (2), proviso (iv)* means by that phrase in relation to a charge of desertion. If there were misconduct on the part of one spouse which in fact conduced to, that is to say, was a cause of, the other spouse leaving, it seemed to me that, prima facie, that amounted to saying that there was just cause; and if that were so, there would be no offence of desertion.

- In other words, prima facie it seemed to me difficult to envisage anything which
- F could amount to misconduct conducing to desertion which would not automatically put an end to the charge of desertion. However, it has been submitted on behalf of the wife, and counsel for the husband did not dissent from the proposition, that some meaning must be attributed to this phrase as incorporated in the statute. The proposition was put forward by counsel for the wife, and I think that it is not disputed by counsel for the husband, that there is an
- G area, which he described as "a no man's land", between that which is a grave and weighty matter, such as would amount to just cause, on the one hand, and that which, on the other hand falls within the well-known phrase "the ordinary wear and tear of married life". Small and trivial matters, if they fall within the ordinary wear and tear of married life, have on the authorities no legal significance. On the other hand matters such as are of a sufficiently
- H grave and weighty character as to amount to just cause, would make it impossible to allege desertion at all. It is said, however, that there are degrees of conduct open to criticism between those two extremes, and that the court is required by the statute to examine the conduct of the deserted spouse to see whether it is of such a nature. Counsel for the wife submitted that the phrase "conjugal unkindness", much used in connexion with the doctrine of revival after con-
- I donation, might be a fair way of expressing the sort of misconduct at which the statute is aiming when it talks of misconduct conducing to desertion.

Having given the matter some consideration, I have come to the conclusion that counsel's submission is broadly right. One must attribute some meaning

* Matrimonial Causes Act, 1950, s. 4 (2), proviso, reads: "Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition . . . if, in the opinion of the court, the petitioner has been guilty— . . . (iv) where the ground of the petition is . . . desertion, of such wilful neglect or misconduct as has conduced to the . . . desertion."

to the statute. The only meaning which I can attribute to it is that it refers to conduct which is not sufficiently bad to constitute just cause, but which is something worse than the ordinary wear and tear of married life, such as either spouse must be prepared to accept when he or she takes the other for better, for worse. In other words, as counsel for the wife put it, one must see if there has been conduct which falls short of justifying the separation, but which may, in part at least, excuse it. That seems to me very much a question of fact and of degree in the particular circumstances of any particular case, or if I may so express it, very much a jury question. I have, therefore, tried to approach the facts in the present case as a jury would approach them, and consider how they would appeal to the minds of ordinary people. A

That makes it necessary to consider the wife's complaints in detail, because it is on her complaints that the question arises whether the husband has been guilty of such conduct as would go part of the way, at any rate, to excuse the wife's desertion. The wife's complaints are set out very fully in the answer filed on her behalf, and are further developed in the voluminous further and better particulars of the answer which were subsequently delivered. First, complaint is made that from 1946 onwards the husband made no attempt to obtain a house for the parties to reside in. That I think refers particularly to the period when they were residing together in Leicester during the time when, as I have already said, they in fact continued to reside at the house of the wife's mother. B C
Next it is said that the husband moved to London, notwithstanding that the wife had frequently informed him that she did not desire to reside in London. Then it is said that from 1949 onwards, at any rate, the husband habitually went out drinking several nights a week and did not return sometimes until midnight or later. It is complained that he would come in smelling of drink, a circumstance to which the wife took exception. D

Next, reliance is placed on an incident, said to have taken place about May, 1950, when the wife apparently looked in a trunk of the husband's and discovered some magazines and pictures there, and the husband came in and caught her at it and told her to clear out. It is said that after that he kept his trunks and cases locked. It is complained that he behaved in a secretive manner; when he was writing, if she came into the room, he would cover up what he was writing; and it is said that he arranged that letters arriving for him should be enclosed in sheets of blank paper, so that the contents would not show through the outside of the envelope. It is further complained that the husband habitually made wounding and insulting remarks to the wife, of which a selection of samples is set out in the answer; the one which the wife herself described in evidence as the worst thing he ever did was that he said he wanted to get rid of her and would be willing to pay the costs of divorcing her. Other wounding and insulting remarks of the same sort and character are alleged. Then it is complained that the husband habitually ignored and neglected the wife, and a number of occasions are referred to when he went off to social functions without taking her. In particular there was one social function, which took place just before his removal to London, which was in fact a party given by himself for his colleagues at the bank. The wife apparently complains that she was not invited to this farewell party of the husband's. It appears that no other wives were invited either. I should also mention that on the very day before the husband left for London the parties had a chance meeting in the street, and the wife complains that the husband, in effect, cut her dead. As I understand it, the husband does not really controvert that statement, but he seeks to excuse himself, on the ground that, being a man normally rather slow in the uptake, he was taken very much by surprise at suddenly seeing his wife at close quarters in a crowded street. There is another allegation of a wounding remark—a remark made on the occasion of a holiday, when the husband is alleged to have said he had only taken the wife for the holiday so as to keep up appearances. F G H I

- A There were also certain allegations relating to the period after the husband had gone to London. It is said that he made no real effort to induce the wife to accompany him or join him there. Reference is made to an interview on Sept. 23, 1953, when the wife came to visit the bungalow; it is said that the husband treated her like a stranger, and reliance is placed on the use of the word "rubbish", a word which the wife, at any rate, took to be referring to her own property and possessions. Lastly, reliance is placed on the fact that after the husband received the final letter of Nov. 30, 1953—a letter, which as I have already said, I would construe as a final refusal of his offer, and which the husband himself so construed—he never answered it or made any further approach to her.

- I have considered these allegations, and so far as most of them are concerned, I am bound to say that I regard them as of an extremely trivial nature, such as could fairly be described as part of the ordinary wear and tear of marriage. Certainly that applies to most of them. As to the others, their importance depends on my view of the credibility of the parties. [HIS LORDSHIP considered the evidence and continued:] I do not think that the matters of which the wife complains go outside the ambit of the ordinary wear and tear of married life. Consequently, I am unable to find that the husband's conduct amounted to wilful neglect or misconduct conducing to her desertion.

- I think it is important to remember that it is not the function of this court to try one party or the other for failing to make the other happy. That is not an issue for any court of law. Nor is the husband on trial whether he was a good or a bad husband. One of the risks one takes in contracting a marriage is that one takes one's spouse for better or for worse. It does not take the matter any further, in my judgment, to say that it was this or that party's fault that the quarrel developed which finally led to the end of the matrimonial cohabitation. My judgment does not necessarily mean, and it is not intended to mean, that I acquit the husband in this case of all blame. He is not a perfect man. Who is? No doubt, morally, he must bear his share of the responsibility for the break up of the marriage. But it is the duty of spouses, even when they do quarrel, to try to make it up and continue their cohabitation.

- What I do find in favour of the husband is that, despite the bad terms on which he got with his wife, he did go on trying to persuade her to live with him. My finding against the wife is that when the quarrels came and when this marriage came under strain, she did not respond to the husband's overtures; in that, I think, she was guilty of desertion and accordingly has no defence to this charge. For these reasons, in my judgment, the husband is entitled to the relief which he seeks.

Decree nisi.

Solicitors: *E. G. & J. W. Chester* (for the husband); *Adam Burn & Son*, agents for *L. E. Hutchinson*, Leicester (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

N. v. N. and L.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), March 11, 1957.]

Divorce—Defence—Covenant not to take proceedings in respect of matrimonial offences committed before date of deed of separation—Petition by husband on ground of wife's subsequent adultery—Allegations of husband's matrimonial offences before date of deed struck out of wife's and co-respondent's answers—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 16 (1).

Divorce—Discretion—Petition alleging adultery after the date of a deed of separation containing a covenant not to sue for prior matrimonial offences—Petitioner asking for exercise of court's discretion—Duty to disclose prior matrimonial offences—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 28.

On May 1, 1956, the parties, who were married in 1953, entered into a deed of separation. The husband thereby undertook to pay certain sums for the wife's benefit and they agreed (by cl. 4) "that no proceedings shall be commenced or prosecuted by or on behalf of either the husband or the wife against the other in respect of any cause or complaint which now exists or has arisen before the date of these presents and every offence (if any) which has been committed by either party against the other shall be considered as hereby forgiven and condoned and in case hereafter either party shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise no offence or misconduct which has been committed before the execution of these presents and no act deed neglect or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence". In September, 1956, the husband petitioned for divorce on the ground of the wife's adultery with the co-respondent after the date of the deed of separation, and prayed for the exercise of the court's discretion in respect of his own adultery. By his petition as amended the husband claimed neither damages nor costs against the co-respondent. By her answer the wife charged the husband with cruelty between October, 1954, and February, 1956, and with adultery with a named woman in 1955; the wife further alleged that the husband had committed adultery with another named woman in July, 1956. The wife cross-prayed for a decree of divorce and also asked for the exercise of the court's discretion in respect of her own adultery. The co-respondent, by his answer, made charges of cruelty and adultery identical with those made by the wife. The husband contended (i) that the wife was precluded from relying on any matters prior to May 1, 1956, by virtue of cl. 4 of the deed of separation and (ii) that the co-respondent was precluded from pleading any matter in his answer except a denial of adultery.

Held: (i) the wife was precluded from relying, as between herself and the husband, on his matrimonial conduct before the date of the deed of separation for the purposes either of obtaining relief (*Rowley v. Rowley* (1864), 3 Sw. & Tr. 337 and *Rose v. Rose* (1883), 8 P.D. 98, applied) or of setting up discretionary bars (*L. v. L.*, [1931] P. 63, applied), and accordingly allegations in her answer relative to that conduct would be struck out; but the court's right (under s. 4 of the Matrimonial Causes Act, 1950, and r. 28 of the Matrimonial Causes Rules, 1950) to be afforded disclosure of the husband's matrimonial conduct before the date of the deed for the purpose of the exercise of discretion in relation to matrimonial offences after that date was not excluded by the deed, and therefore the husband, who was seeking the exercise of the court's discretion, was bound to make full disclosure of such conduct before the date of the deed (*Russell v. Russell*, [1935] P. 39, followed).

(ii) the co-respondent was entitled to plead in answer to the petition (under r. 16 of the Rules of 1950) matters which, as between the husband and

- A the wife, would afford a defence to the petition notwithstanding that no claim for damages or costs was made against the co-respondent (*Seddon v. Seddon & Doyle* (1860), 30 L.J.P.M. & A. 12, applied); and therefore the co-respondent could plead the husband's adultery after the date of the deed of separation, but the allegations of the husband's conduct before the date of the deed would be struck out since, if they were established, they could
- B not provide a defence to the petition.

[As to covenants not to take proceedings in respect of offences already committed, see 12 HALSBURY'S LAWS (3rd Edn.) 295, 296, para. 587; and for a case on the subject, see 27 DIGEST (Repl.) 377, 3105.]

As to defences by a co-respondent, see 12 HALSBURY'S LAWS (3rd Edn.) 341, para. 712; and for cases on the subject, see 27 DIGEST (Repl.) 481, 4189, 4190.

- C For the Matrimonial Causes Rules, 1950, r. 16 (1), r. 28, see 10 HALSBURY'S STATUTORY INSTRUMENTS 206, 210.]

Cases referred to:

- (1) *Rose v. Rose*, (1883), 8 P.D. 98; 52 L.J.P. 25; 48 L.T. 378; 27 Digest (Repl.) 433, 3616.
- D (2) *Russell v. Russell*, [1935] P. 39; 104 L.J.P. 10; 152 L.T. 283; 27 Digest (Repl.) 584, 5443.
- (3) *Plumer v. Plumer & Bygrave*, (1859), Sea. & Sm. 147; 29 L.J.P.M. & A. 63; 164 E.R. 1514; 27 Digest (Repl.) 454, 3874.
- (4) *Rowley v. Rowley*, (1864), 3 Sw. & Tr. 337; 164 E.R. 1305; (1865), 4 Sw. & Tr. 137; 34 L.J.P.M. & A. 97; 12 L.T. 505; 164 E.R. 1468; *affd.* H.L., (1866), L.R. 1 Sc. & Div. 63; 27 Digest (Repl.) 537, 4836.
- E (5) *Gooch v. Gooch*, [1893] P. 99; 62 L.J.P. 73; 68 L.T. 462; 27 Digest (Repl.) 440, 3698.
- (6) *L. v. L.*, [1931] P. 63; 100 L.J.P. 76; 144 L.T. 723; 27 Digest (Repl.) 377, 3105.
- (7) *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; 34 Digest 99, 739.
- F (8) *K. C. Sethia (1944), Ltd. v. Partabmull Rameshwar*, [1950] 1 All E.R. 51; *affd.* H.L., sub nom. *Partabmull Rameshwar v. K. C. Sethia (1944), Ltd.*, [1951] 2 All E.R. 352, n.; 2nd Digest Supp.
- (9) *Seddon v. Seddon & Doyle*, (1860), 30 L.J.P.M. & A. 12; 27 Digest (Repl.) 481, 4189.

G Appeal; by consent treated as trial of issues.

In this case the husband petitioned for divorce on the ground of the wife's adultery with the co-respondent in May and June, 1956, and prayed for the exercise of the court's discretion in his favour in respect of his own adultery and that the co-respondent might be condemned in the costs. By her answer the wife pleaded:

- H "1. She does not admit that she is guilty of adultery as in the petition alleged or at all. 2. The [husband] has since the celebration of the marriage treated the [wife] with cruelty."

Paragraphs 3 to 18 set out incidents of cruelty alleged to have occurred between October, 1954, and February, 1956. In paras. 19 and 20 the wife alleged that the husband had committed adultery with a named woman in 1955. In I paras. 21 and 22 she alleged that the husband had committed adultery with another named woman in July, 1956. The wife prayed that the prayer of the petition might be rejected and the petition dismissed, that the discretion of the court might be exercised in her favour and that the marriage might be dissolved. By his answer the co-respondent said:

"1. He does not admit that he is guilty of adultery as in the . . . petition alleged or at all. 2. Alternatively, the co-respondent will rely on the matters set out in the succeeding paragraphs hereof."

The co-respondent then set out in paras. 3 to 23 inclusive the same allegations as the wife had set out in paras. 2 to 22 inclusive of her answer. On Dec. 14, 1956, Mr. Registrar KINSLEY, on the husband's application, gave the husband leave to amend the petition by deleting from the prayer the claim for costs against the co-respondent. On Jan. 10, 1957, the husband issued a summons against the wife and the co-respondent to show cause why an order should not be made (a) striking out paras. 2 to 20 inclusive of the wife's answer and (b) striking out paras. 3 to 23 inclusive of the co-respondent's answer. The husband's applications were made on the grounds (i) that the allegations made by the wife in paras. 2 to 20 related to a period prior to May 1, 1956, the date when the parties entered into a deed of separation, one of the provisions of which was that the wife should not plead or allege any offence or misconduct committed by him prior to that date and (ii) that all the allegations made by the co-respondent in his answer offended against the Rules of the Supreme Court as to pleadings. On Feb. 6, 1957, Mr. Registrar TOWNLEY MILLERS made the order sought and the wife and the co-respondent appealed to SACHS, J., in chambers. The appeal was adjourned into open court for judgment. By consent the decision of the court was given on the footing that all further pleadings had been delivered and that the decision should take effect as if given on the trial of an issue.

Geoffrey Lawrence, Q.C., and *D. Loudoun* for the husband.

R. J. A. Temple, Q.C., and *Colin Duncan* for the wife and the co-respondent.

Cur. adv. vult.

Mar. 11. SACHS, J., read the following judgment: The parties to this cause were married in June, 1953. On May 1, 1956, the husband and wife entered into a deed of separation, by the financial provisions of which the husband agreed first to transfer to the wife absolutely the sum of £22,000, secondly to transfer to trustees certain investments of which the income, estimated at £1,000 per annum, was to go to the wife for life or until the marriage was dissolved (whichever be the shorter period) and was then to revert to the husband, and thirdly to pay her during their joint lives, so long as the said marriage subsisted, an annuity of £2,000 less income tax. It contained a number of other common form clauses and also a *Rose v. Rose* clause of a full nature [see *Rose v. Rose* (1) ((1883), 8 P.D. 98)]. This clause reads:

"4. It is hereby expressly agreed between the husband and the wife that no proceedings shall be commenced or prosecuted by or on behalf of either the husband or the wife against the other in respect of any cause or complaint which now exists or has arisen before the date of these presents and every offence (if any) which has been committed by either party against the other shall be considered as hereby forgiven and condoned and in case hereafter either party shall commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise no offence or misconduct which has been committed before the execution of these presents and no act deed neglect or default of either party in relation to any such offence or misconduct shall be pleaded or alleged by either party or be admissible in evidence."

On Sept. 3, 1956, the husband commenced the present proceedings by a petition in which he sought a decree of divorce on the grounds of his wife's alleged adultery in May and June, 1956—i.e., on account of post-deed adultery. If he succeeds he recovers the capital from which the £1,000 per annum is derived and ceases to have to pay the further £2,000 per annum. In his prayer he asked for the court to exercise its discretion in his favour and also that the co-respondent be condemned in costs.

On Nov. 8 the wife filed an answer of which para. 1 states that she does not admit the adultery alleged, paras. 2 to 18 allege cruelty against the husband from October, 1954, to February, 1956, paras. 19 and 20 allege adultery with a

- A woman named in August, 1955, and paras. 21 and 22 allege adultery with another woman in July, 1956. Thus paras. 2 to 20 inclusive relate to pre-deed matters, and paras. 21 and 22 to post-deed matters. By her cross-prayer the wife asked that the prayer of the husband's petition be rejected and the petition be dismissed, but that the discretion of the court be exercised in her favour so that the marriage might be dissolved by her being granted a decree. On Nov. 8, also,
- B the co-respondent filed an answer of which para. 1 states that he does not admit the adultery alleged, paras. 3 to 19 allege the same pre-deed cruelty in terms identical with the allegations made by the wife in her answer; paras. 20 and 21 allege the same pre-deed adultery as the wife has set out, and paras. 22 and 23 allege the same post-deed adultery as paras. 21 and 22 of the wife's answer. In his prayer he asks that he may be dismissed from the suit with costs. On
- C Nov. 22 the husband's solicitors notified the solicitors to the wife and the co-respondent that it was proposed to take such steps as were necessary to have removed from the record all allegations, whether made by the wife or the co-respondent, which came within the terms of cl. 4 of the deed of separation. On Dec. 14 the husband obtained leave to amend his petition by striking out so much of his prayer as asked for the co-respondent to be condemned in costs.
- D On Dec. 20 the petition was amended accordingly. On Jan. 10, 1957, the husband took out a summons asking that paras. 2 to 20, i.e., all pre-deed allegations, be struck out of the wife's answer, and further that all the affirmative allegations in the co-respondent's answer, relating both to pre-deed and post-deed matters, be also struck out. This summons did not specify on what grounds the above striking out was sought: but by an affidavit dated Jan. 11, 1957,
- E the husband exhibited a copy of the deed of May 1, 1956, and relied thereon. No affidavit was filed in answer to that of the husband and on the application coming before Mr. Registrar TOWNLEY MILLERS on Feb. 5 an order was made striking out from the wife's answer paras. 2 to 20 inclusive (i.e., all pre-deed allegations) as offending against the *Rose v. Rose* clause; and from the co-respondent's answer paras. 3 to 23 inclusive (all affirmative allegations both pre-deed and post-deed) on the ground that as the husband was seeking neither damages nor costs against the co-respondent the latter was not entitled to plead anything in the present case beyond a denial of the adultery alleged against him. From that order the wife and co-respondent now appeal.
- F

[HIS LORDSHIP referred to the improbability that the procedure to strike out would be found to be a correct method of procedure, and continued:] In those

G circumstances it was agreed by counsel that the decision of this court should be given on the footing that, so far as concerned the points under discussion before the registrar and before myself, all further pleadings had been delivered and no further evidence was desired to be admitted.

The substance of the pleadings was deemed to be as follows:

- H " (i) As regards the wife's allegations—the husband to have delivered a reply alleging that the deed of separation dated May 1, 1956, had been entered into between husband and wife and that by reason of cl. 4 thereof the wife was precluded from relying at trial on the matters alleged in paras. 2 to 20 of her answer. The wife then to have delivered a rejoinder to the effect that the deed was admitted, but that as a matter of interpretation the provisions of cl. 4 did not apply to matters on which the exercise of the discretion of the court was sought; that alternatively the deed had as regards the matters pleaded in paras. 2 to 20 no greater effect than condonation by conduct; and in the further alternative that the act of the husband in asking for the exercise of the court's discretion in this cause of itself debarred him as regards the present cause from relying on the said cl. 4 to preclude the wife in the manner alleged in the reply. Any surrejoinder to be deemed merely to join issue.
- I

“(ii) As regards the co-respondent’s allegations—the husband to have delivered a reply to the effect, (a) that as no order for costs or damages was sought against the co-respondent he was not entitled to rely on any of the matters set out in paras. 2 to 23 of his answer, (b) further and in the alternative that the husband and the wife had entered into the above deed, setting out the terms of cl. 4; and that by reason thereof the co-respondent was precluded from relying on any matter in his answer which the wife was, by reason of that cl. 4, precluded from relying on in her answer. The co-respondent then to have delivered a rejoinder as to (a) joining issue and as to (b) admitting the deed, denying that he was bound thereby, and relying in the alternative on parallel pleas to that of the wife in her above rejoinder. The surrejoinder, if any, again to be deemed to be simply a joinder of issue.”

On that basis I was invited to come to a decision which was to have the same effect between the parties as if there had been tried as a preliminary issue whether or not the wife and the co-respondent were respectively precluded as alleged by the husband in the above replies. The decision which I am about to give is accordingly by consent intended to take effect as if it were made on a preliminary issue under r. 27 of the Matrimonial Causes Rules, 1950*, and this will be recited in any order drawn up.

Before turning to the main points which were the subject of detailed arguments of clarity and cogency by counsel, I would first refer to certain matters as to which there is no controversy, either because they were stated to be common ground or because there exist authorities which, it was conceded, I am in practice bound to follow, whatever may be the position of higher courts. First, the wife’s answer as pleaded relies on the alleged pre-deed matrimonial offences as constituting both grounds on which she seeks a decree of divorce and also as constituting discretionary bars which she is entitled as of right to plead by way of defence. Secondly, *Russell v. Russell* (2) ([1935] P. 39), a decision of SIR BOYD MERRIMAN, P., after hearing the argument of the King’s Proctor, makes it clear that a *Rose v. Rose* clause does not absolve a party seeking the exercise of the court’s discretion from fully disclosing to the court the whole story of the marriage, including pre-deed matrimonial offences. Next, if both husband and wife in the present cause establish the respective post-deed matrimonial offences alleged by them, then the dominant issue before the court might come to be: “On which side should the discretion of the court be exercised?”; and on this issue the court may be faced with conflicting stories from the husband and wife respectively. Next, there is nothing before the court at present to show that the discretion statement filed on behalf of the husband refers to any pre-deed matrimonial offence of his, nor is it established that it necessarily either will or ought to refer to any. The same applies to the wife’s discretion statement. If and in so far as either the wife or the co-respondent is entitled to allege facts constituting a discretionary bar to the husband’s prayer for relief, such facts must be pleaded. (See the judgment of the full court in *Plumer v. Plumer & Bygrave* (3) (1859), *Sea. & Sm.* 147). Finally, if in relation to any matrimonial offence which the wife has to disclose to the court she seeks to excuse herself by alleging a matrimonial offence on the part of the husband, be it cruelty or be it adultery, she must give notice of this under Matrimonial Causes Rules, 1950, r. 28 (4).

I now turn to the points argued by counsel in support of the wife’s right to plead pre-deed offences of the husband. As regards her reliance on them as grounds for being granted a decree, his first contention was that the effect of cl. 4 was no more than that of condonation by conduct—e.g., by sexual intercourse—and that accordingly the husband’s post-deed matrimonial offences, if established, revived any pre-deed offences. As long ago, however, as *Rowley*

* 10 HALSBURY’S STATUTORY INSTRUMENTS 210.

- A v. *Rowley* (4) ((1864), 3 Sw. & Tr. 337) it was stated in relation to full clauses of this type (*ibid.*, at p. 346):

"Now, condonation is that species of forgiveness or reconciliation . . . which, in the interest of justice, the law has also declared to be only conditional on future good conduct. This has nothing in common with a direct and positive bargain not to resort to the powers of this court, made between husband and wife, and reduced into writing."

That was also the view of LORD CHELMSFORD, L.C., on the appeal to the House of Lords (L.R. 1 Sc. & Div. 63 at p. 68), as appears from the following passage in his speech:

- C "The learned judge ordinary very properly rejected the supposed analogy between this case and a case of condonation. In the latter case there is a conditional forgiveness; here there was an absolute release."

- D Later the Court of Appeal in *Rose v. Rose* (1) itself followed the same line. SIR GEORGE JESSEL, M.R., referred (8 P.D. at p. 99) to the effect of an appropriately drawn clause as "final condonation", and LINDLEY, L.J., referred to it (*ibid.*, at p. 100) as "not a case of mere condonation; it is a matter of express bargain." As regards full clauses of the *Rose v. Rose* type—a phrase which I use by way of precaution to distinguish them from the narrower types such as that considered in *Gooch v. Gooch* (5) ([1893] P. 99)—counsel's first contention on behalf of the wife cannot succeed. Accordingly the wife is not entitled to rely on anything in paras. 2 to 20 as affording her grounds for being granted a decree of divorce, even if she proves post-deed misconduct on the part of the husband.

- E The second contention put forward for the wife was that even if she could not found a prayer for relief on pre-deed matrimonial offences, she had a right to set them up as discretionary bars to any relief claimed by the husband. When, however, one reads the concluding part of cl. 4, as a matter of construction it applies no less to recrimination than to a prayer for relief; and if the bargain is valid as regards the latter it is *prima facie* no less good as regards the former.
- F More importantly *L. v. L.* (6) ([1931] P. 63), a decision of LORD MERRIVALE, decides this precise matter, adversely to counsel's contention. The pleadings in *L. v. L.* (6) (which were called for by me during the argument) show that there the wife's petition dated Aug. 13, 1930, alleged post-deed adultery and prayed a decree of divorce, whilst the husband's answer of Nov. 6, 1930, denied the adultery alleged against him, counter-charged the wife with pre-deed adultery and in his turn prayed (contrary to the assumption made ([1935] P. at pp. 52, 53) in *Russell v. Russell* (2)) for relief. Neither party in *L. v. L.* (6) asked for the exercise of the court's discretion. From the argument of Mr. Norman Birkett it is clear that the husband was there seeking to rely on the pre-deed adultery as a discretionary bar as well as a ground for relief, and also that the arguments today pressed by counsel were, subject only to one point to which I will return, put forward in 1931 with equal cogency. It is no less plain that they were rejected by LORD MERRIVALE. The husband was held to have neither right (see, for instance, [1931] P. at p. 71) nor duty to recriminate. The sole point of difference between *L. v. L.* (6) and the present cause is that in 1931 the petitioning spouse had not prayed for the exercise of the court's discretion, whilst in the present cause there is that prayer in the petition. By virtue of that fact counsel contended that *L. v. L.* (6) did not apply here. In my view, however, that fact makes no difference either on the true construction of cl. 4 or on the position *vis-à-vis* the court's discretion under what is now s. 4 (2) of the Matrimonial Causes Act, 1950. That a respondent spouse should be disentitled to recriminate when the petitioner is not candid enough to ask for discretion, but should be entitled to recriminate when the petitioner shows signs of being candid in that respect, would be odd.

On the "bargain" aspect of the matter it is of some importance, as regards both his first and his second contentions, to add that counsel specifically refrained

from arguing that the husband had by seeking the court's discretion, or in any other way, repudiated the deed of separation. He was careful to assert his submission that it still remained binding on both parties. Nor was any implied term of or condition or proviso to cl. 4 either pleaded or formulated in argument which would or could, after skating neatly between *L. v. L.* (6) and *Russell v. Russell* (2), arrive at the precise result now desired by the wife. Even if such a term were drafted I cannot see how it could pass the tests for certainty of mutual intention propounded, amongst others, by SCRUTTON, L.J., in *Reigate v. Union Manufacturing Co. (Ramsbottom)* (7) ([1918] 1 K.B. 592 at p. 605) so as to show that "it is clear beyond a peradventure" (I take the words from the judgment of JENKINS, L.J., in *K. C. Sethia (1944), Ltd. v. Partabmull Rameshwar* (8) ([1950] 1 All E.R. 51 at p. 59)) that both parties were of the same mind on the subject. Indeed, had SCRUTTON, L.J.'s question been put at some round table conference at the time when the deed was executed, the least likely of the various results would have been for either the spouses or their lawyers respectively or collectively to have answered unanimously "It is too clear". Thus on the contractual side of the matter the husband is unable to find any release from cl. 4 either through accepted repudiation or through the terms of some implied condition or proviso, and the established construction of full *Rose v. Rose* clauses prevails.

The difficulty, however, which gave me considerable concern, and which provided counsel with his most forcible argument, was as to how from a practical angle a court can give effect both to *L. v. L.* (6), under which here the wife has no right to recriminate, and to *Russell v. Russell* (2), under which the court may in the course of its duty have to investigate the very matters which the wife has here pleaded by way of recrimination. It was on this aspect of the case that counsel for the husband referred to "conflicting elements that have to be reconciled". To my mind, the solution which he propounded was logical, and though it may not appear familiar in its statement as applied to the present case, it is practicable and founded on authority. I accordingly accept his submission that in cases such as the present where there is a *Rose v. Rose* clause in its full form, and where a party to it has, when later seeking a decree for a post-deed offence, a duty to disclose pre-deed offences to secure the exercise of the court's discretion, it is necessary to distinguish sharply between that part of the proceedings which concerns the inter partes rights of the spouse and that later part which concerns the court's right under s. 4 of the Matrimonial Causes Act, 1950* to be given full disclosure on pre-deed matters. That distinction seems to be explicitly recognised in *Russell v. Russell* (2) ([1935] P. at p. 51 et seq.), where the contrast between the rights of the court and the inter partes position is more than once referred to, and it is clearly implicit in the judgment as a whole. The phrase in the headnote,

"Parties can contract themselves out of their rights, but it is not competent for them to contract the court out of its duty",

to my mind accurately summarises the effect of the President's judgment as regards recriminatory material. Accordingly I hold that the wife is precluded from relying inter partes on any of the matters pleaded in paras. 2 to 20† of her answer.

The machinery for the court in the present cause to investigate, should occasion arise, all pre-deed facts to such extent as may be thought fit is, be it noted, provided, inter alia, by Matrimonial Causes Rules, 1950, r. 28. This enjoins the party seeking discretion to make full disclosure of his or her own conduct and to give notice to the opposing spouse of any matrimonial offence alleged in

* 29 HALSBURY'S STATUTES (2nd Edn.) 394.

† These paragraphs related to alleged cruelty and adultery before the date of the deed of separation, see p. 915, letter H, ante.

- A excuse of that conduct. Further, in every cause the court can ask the Queen's Proctor to intervene at the trial itself. Alternatively, the court could, presumably, to save expense, ask counsel opposing the exercise of discretion to cross-examine or to lead evidence on relevant matters; but that would be a matter for the court and not something which was the right of a party to the proceedings. Further, any lack of frankness at trial by the husband could bring in its train
- B some later intervention of the Queen's Proctor. The court does not lack means for informing its conscience. When using the phrase "to such extent as may be thought fit", I expressly desired to leave open a further question which may arise when there is a contest as to discretion prayed for in a case where the parties are bound by a full *Rose v. Rose* clause. Is the court in each and every such instance, in the exercise of its powers and rights, bound to or, alternatively,
- C will it necessarily, if it has a discretion, choose to open up and investigate fully all those pre-deed disputed matters which, from the angle of public policy, it has held to have been inter partes beneficially buried in a "charter of oblivion"? It may be that this is a matter for the trial judge in his discretion to decide in each case on the particular facts before him, and thus, that is a further reason why such an investigation cannot at this stage be taken for granted when con-
- D sidering the inter partes position.

Turning now to the pleading of the co-respondent, the first point for decision is the submission on behalf of the husband that as no order for costs was now sought against the co-respondent, the latter is not entitled to plead in his answer any matter which, if established, would operate as a discretionary bar to the wife's claim for relief. Counsel for the husband went so far as to urge, as,

E indeed, he was logically forced to do, that a co-respondent against whom costs are not sought may not plead conduct conducing, or indeed any matter except a denial of adultery. That argument flies in the face of the present wording of Matrimonial Causes Rules, 1950, r. 16 (1), which gives a co-respondent a right to file an answer to the petition—and not merely an answer to the direct claim made against him: a right that will as a matter of construction appear

F even more plainly when there comes into force on Apr. 30, that clarifying amendment of this rule* which had become necessary consequentially on the 1954 amendment to r. 33 [by S.I. 1954 No. 1026]. Indeed, the right of a co-respondent to attempt to get the petition dismissed by reason of any absolute or discretionary bar available to the wife, irrespective of the success or otherwise of any denial of the adultery charged against him, had already been recognised before

G reference to it was made by the judge ordinary in *Seddon v. Seddon & Doyle* (9) ((1860), 30 L.J.P.M. & A. 12 at p. 14). The defences open to a respondent or co-respondent were treated as being identical in the 1864 edition of BROWNE'S PRINCIPLES AND PRACTICE OF THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES at p. 30, and the Divorce Rules of 1865 provide for "each respondent" filing "an answer to the petition". Thus, since their inception, the rules of

H this Division have been continuously regarded as giving co-respondents an unqualified right to plead against husband petitioners matters which, if the wife had pleaded them, might operate as absolute or discretionary bars and I am not prepared to accede to the submission that now on its true construction the effect of r. 16 varies according to whether or not the husband's prayer asks for costs against the co-respondent. It is incidentally to be noted that if that submission

I were correct, collusion between husband and wife could expose co-respondents to an undeserved measure of obloquy, and also that the co-respondents' own claim to costs might be affected. It follows that the co-respondent is entitled to plead the post-deed adultery of the husband and to seek to get the prayer in the petition rejected on that ground. The device of trying to preclude the co-respondent from so doing by deleting, after answer delivered, the prayer in the petition for costs fails.

* See the Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957 No. 176).

The position as regards the co-respondent's right to plead and rely on pre-deed matrimonial offences in a case such as the present is apparently also one which has not so far been the subject of any reported decision. Counsel has on behalf of the co-respondent pressed the points that the co-respondent is no party to the deed with its *Rose v. Rose* clause, is not suggested to have had any knowledge of it at the date of the alleged adultery, and cannot be bound by it. As a member of the public, it was further urged, the co-respondent could intervene after decree nisi to urge on the court that the facts which he has pleaded should be taken into account—so why not now? As against these points, counsel for the husband submits that the right of the co-respondent to file an answer to the petition is limited to alleging matters which inter partes may afford a defence to the petition; and that once it is clear that inter partes the allegations relied on in the co-respondent's pleading would, even if established, afford no such defence, the co-respondent cannot pursue them further. This, to my mind, is the right view of the matter. Any other view would almost inevitably result in an abuse of the process of the court, for wives could evade the effect of a *Rose v. Rose* clause wherever a friendly co-respondent was available to raise pre-deed charges against a husband. To put it another way, if I am right in deciding that the wife is precluded from relying inter partes on the pre-deed matters under discussion, it seems a little difficult on general principles to see why a co-respondent should be permitted at trial to set up facts that can provide neither the wife with an inter partes answer to her petition nor himself with an answer to the charge of adultery. Any contrary submission tends to equate unduly closely the co-respondent with the conscience of the court. It is, of course, just conceivable that one day a co-respondent might so frame his pleading as to allege that in an exceptional set of circumstances a *Rose v. Rose* clause had been agreed with a view to operating some sort of fraud on him. That, however, is not the position in the present case, and if it arose and were pleaded this judgment would not apply. Save for some such case it is a little difficult to see what legitimate complaint can be made by a wrongdoer in the shape of an adulterous co-respondent if he finds that the woman with whom he has committed adultery has previously entered into an honest agreement with her husband containing a clause held by the courts to be beneficial from the angle of public policy. I may perhaps add that co-respondents prepared to swear that they would not have committed adultery had they known the wife had previously signed a deed with a *Rose v. Rose* clause must be extremely few in number, and those who would be believed even rarer.

In the present case the co-respondent is accordingly precluded from relying on paras. 3 to 21 inclusive of his answer because the facts therein alleged cannot, even if established, provide a defence inter partes to the petition. If a stage in the proceedings is reached where the court desires, in the performance of that duty to which *Russell v. Russell* (2) refers, to investigate pre-deed matters affecting the exercise of its discretion and wishes in that behalf to consider anything which the co-respondent can say as to those questions, nothing in any order I am making hinders the court from taking whatever steps it may deem appropriate. The present order only precludes the co-respondent from raising those matters inter partes.

The preliminary issue is thus determined as follows: The wife is precluded from relying at trial inter partes on the allegations set out in paras. 2 to 20 inclusive of her answer; and the co-respondent is similarly precluded from relying on the allegations set out in paras. 3 to 21 inclusive of his answer. I do not consider it necessary to add to that determination any words to the effect "without prejudice to any duty of the wife or co-respondent respectively to give evidence on the matters alleged if and in so far as they or either of them may be called on so to do by virtue of the Matrimonial Causes Rules, 1950, or

A by any other power of the court " because that point is implicit in the words "inter partes" in the order.

One further point remains. It may be that the wife may yet give notice under Matrimonial Causes Rules, 1950, r. 28 (4), of her reliance on the matters now alleged in paras. 2 to 20 of her answer, or some of them, in an endeavour to exculpate herself on some matter relied on in her discretion statement. In that event, I understand that counsel for the husband would desire an opportunity to consider whether to apply to the court before trial for some direction which could enable him to avoid the expense of bringing witnesses to the court on these matters until it is clear that they would necessarily arise. To ensure that he has a right to make such application as he may think fit on such a matter, I give him liberty to apply thereon, without, of course, indicating whether or not any such application could be or would be successful.

Order accordingly.

Solicitors: *Withers & Co.* (for the husband); *Theodore Goddard & Co.* (for the wife and for the co-respondent).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

D

CHARLES MARSHALL PROPRIETARY, LTD. v. COLLINS.

[PRIVY COUNCIL (Viscount Simonds, Lord Morton of Henryton, Lord Cohen and Lord Somervell of Harrow), February 18, 19, 20, March 19, 1957.]

E *Privy Council—Australia—Victoria—Validity of Factories and Shops (Long Service Leave) Act, 1953 (Victoria)—Whether inconsistent with Metal Trades Award, 1952, made under Commonwealth Conciliation and Arbitration Act, 1904-1952—Factories and Shops (Long Service Leave) Act, 1953 (Victoria) (1953 No. 5706), s. 7 (2) (c)—Commonwealth Conciliation and Arbitration Act, 1904-1952, s. 13, s. 25—Constitution of the Commonwealth of Australia, 1900 (63 & 64 Vict. c. 12, s. 9), s. 109.*

F By s. 7 of the Factories and Shops (Long Service Leave) Act, 1953, of the State of Victoria, every worker was entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer, and by s. 7 (2) (c)*, a worker who had completed at least ten but less than twenty years of continuous employment with his employer and whose employment was terminated (otherwise than for misconduct) was entitled to long service leave for a specified period. The appellants were prosecuted on an information alleging that, in breach of the Act of 1953, they had failed to grant K., an employee in their employ from 1940 to 1954, pay for the period of long service leave to which he was entitled under the Act of 1953. The appellants contended that the State Act was inconsistent with the Commonwealth Conciliation and Arbitration Act, 1904-1952, and the Metal Trades Award, 1952, made under that Act and, therefore, invalid to the extent of the inconsistency under s. 109† of the Constitution of the Commonwealth of Australia. The award which applied to the appellants and to K., dealt with basic wages, hours of work, overtime, holidays and Sunday work, annual and sick leave and other miscellaneous matters but not with long service leave. The Conciliation and Arbitration Acts, 1904-1952, s. 13 and s. 25, specified long service leave as a separate item. It was agreed that no "inter se" issue within s. 74 of the Constitution arose.

H Held: the State Act of 1953 was not inconsistent with the Commonwealth Act and award since long service leave was an entirely distinct subject-matter

* The terms of s. 7 (2) (c) are set out at p. 925, letter C, post.

† Section 109 of the Constitution provides: "When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

from those matters which were determined and regulated by the award and was a separate item in industrial relations. A

Appeal dismissed.

[As to a state law being inoperative so far as it is inconsistent with a law of the Commonwealth of Australia, see 5 HALSBURY'S LAWS (3rd Edn.) 512, para. 1122, text and notes (f)-(h).]

Cases referred to:

- (1) *Ex p. McLean*, (1930), 43 C.L.R. 472; Digest Supp.
- (2) *O'Sullivan v. Noarlunga Meat, Ltd.*, [1956] 3 All E.R. 177.
- (3) *R. v. Galvin, Ex p. Amalgamated Engineering Union, Australian Section*, (1952), 86 C.L.R. 34.
- (4) *Clyde Engineering Co., Ltd. v. Cowburn, Metters, Ltd. & Lever Bros., Ltd. v. Pickard*, (1926), 37 C.L.R. 466; [1926] Argus L.R. 214; Digest Supp.
- (5) *Colvin v. Bradley Bros. Pty., Ltd.*, (1943), 68 C.L.R. 151; [1944] A.L.R. 35; 17 A.L.J. 337; Digest Supp.

Appeal.

Appeal by special leave by Charles Marshall Proprietary, Ltd., from an order of the High Court of Australia (SIR OWEN DIXON, C.J., McTIERNAN, WILLIAMS, WEBB, FULLAGAR, KITTO and TAYLOR, J.J.), dated Aug. 11, 1955, allowing an appeal by the respondent, Gerald Alexander Collins, an inspector of factories and shops, against an order of a stipendiary magistrate constituting the Metropolitan Industrial Court of the State of Victoria, dated Feb. 28, 1955, dismissing an information of the respondent against the appellants with respect to an offence against the Factories and Shops (Long Service Leave) Act, 1953 (Victoria). The information alleged that the appellants failed to grant to one of their employees, Cyril Kemp, for a period beginning Sept. 23, 1940, and ending Feb. 12, 1954, the amount of ordinary pay in respect of the long service leave to which he was entitled, and the Metropolitan Industrial Court dismissed it on the ground that the provisions of the Victoria Act of 1953 were inconsistent with the Metal Trades Award, 1952, made under the Commonwealth Conciliation and Arbitration Act, 1904-1952, and, therefore, pro tanto invalid by reason of s. 109 of the Constitution of the Commonwealth of Australia. D

D. I. Menzies, Q.C., R. M. Eggleston, Q.C. (both of the Australian Bar), and *R. A. Gatehouse* for the appellants. E

Gregory Gowans, Q.C. (of the Australian Bar), and *J. G. Le Quesne* for the respondent. F

LORD SOMERVELL OF HARROW: This is an appeal from the High Court of Australia by special leave granted by Her Majesty in Council on June 1, 1956. The issue in the appeal is whether an Act of the State of Victoria, the Factories and Shops (Long Service Leave) Act, 1953 (hereinafter called the State Act), is inconsistent with a law of the Commonwealth and, therefore, invalid to the extent of the inconsistency under s. 109 of the Constitution. The provisions of the Commonwealth law which are alleged to create the inconsistency are contained in the Metal Trades Award, 1952, made by a Conciliation Commissioner under the Commonwealth Conciliation and Arbitration Act, 1904-1952. Both parties accept the position as found by the High Court that the provisions of the award are, by the terms of the Conciliation and Arbitration Act, brought into force as part of the law of the Commonwealth for the purposes of s. 109. I

Section 7 and s. 9 which are the main operative sections of the State Act are as follows:

"7. (1) Subject to this Act every worker shall be entitled to long service leave on ordinary pay in respect of continuous employment with one and the same employer.

"(2) The amount of such entitlement shall be—(a) on the completion by a worker of twenty years continuous employment with his employer—

A thirteen weeks long service leave and thereafter an additional three and
a quarter weeks long service leave on the completion of each additional
five years in continuous employment with such employer; (b) in addition, in
the case of a worker who has completed more than twenty years continuous
employment with his employer and whose employment is terminated—
B (i) by the employer for any cause other than serious and wilful misconduct;
or (ii) by the worker on account of illness incapacity or domestic or any
other pressing necessity where such illness incapacity or necessity is of such
nature as to justify such termination—such amount of long service leave as
equals one-eightieth of the period of his continuous employment since the
last accrual of entitlement to long service leave under para. (a) of this
C sub-section; (c) in the case of a worker who has completed at least ten but
less than twenty years of continuous employment with his employer and
whose employment is terminated—(i) by the employer for any cause other
than serious and wilful misconduct; or (ii) by the worker on account of illness
incapacity or domestic or any other pressing necessity where such illness
incapacity or necessity is of such nature as to justify such termination—
such amount of long service leave as equals one-eightieth of the period of
D his continuous employment.

" 9. (1) When a worker becomes entitled to long service leave under this
Act such leave shall be granted by the employer as soon as practicable
(but save as otherwise expressly provided in this section not before Dec.
31, 1954) having regard to the needs of his establishment; but subject to this
Act—(a) the taking of such leave may be postponed to such date as is
E mutually agreed or in default of agreement as the Industrial Appeals Court
having regard to the problems involved directs but no such direction shall
require such long service leave to commence before the expiry of six months
from the date of such direction; (b) the taking of such leave may (if the
entitlement has accrued) be advanced to such date before Dec. 31, 1954,
as is mutually agreed; (c) in no case shall any entitlement to long service
F leave be lost or in any way affected by the foregoing provisions of this
sub-section or by failure or refusal of the employer to grant the leave.

" (2) Notwithstanding anything in the last preceding sub-section where
the employment of a worker is for any reason terminated before he takes
any long service leave to which he is entitled or where any long service
leave entitlement accrues to a worker because of the termination of his
G employment the worker shall be deemed to have commenced to take his
leave on the date of such termination of employment and he shall be en-
titled to be paid by his employer ordinary pay in respect of such leave
accordingly.

" (3) The employer and worker may agree that any accrued entitlement of
long service leave will be taken in two periods; but save as aforesaid long
H service leave shall be taken in one period.

" (4) The ordinary pay of a worker on long service leave shall be paid to
him by the employer when the leave is taken and shall be paid in one of
the following ways:—(a) In full when the worker commences his leave; or
(b) At the same times as it would have been paid if the worker were still on
duty; in which case payment shall, if the worker in writing so requires,
I be made by cheque posted to a specified address; or (c) In any other way
agreed between the employer and the worker—and the right to receive ordinary
pay in respect of such leave shall accrue accordingly.

" (5) Any long service leave shall be inclusive of any trade or public
holiday occurring during the period when the leave is taken, but shall not
be inclusive of any annual leave occurring during such period."

Under s. 17 (1) (d) any person who fails to comply in any respect with any
provision of the Act is guilty of an offence.

The appellants were prosecuted at the instance of the respondent, a factory inspector, for not granting a dismissed employee named Kemp pay for a period of long service leave to which he was admittedly entitled under s. 7 (2) (c) of the State Act if applicable. The Metal Trades Award, 1952, admittedly applied to the appellants and Kemp, and it was submitted that it was inconsistent with s. 7 (2) (c) and, therefore, rendered it inapplicable to the appellants. The Metropolitan Industrial Court at Melbourne dismissed the information on the ground of the inconsistency alleged. The respondent appealed to the High Court. The first point taken by the present appellants was that the appeal to the High Court was not competent by reason of the provisions of s. 31 of the Conciliation and Arbitration Act. That point failed, and the decision on that point is not challenged. On the point under s. 109 the appeal succeeded. The High Court, holding there was no inconsistency, set aside the order of the Metropolitan Industrial Court and remitted the information to that court for re-hearing.

The appellants submit in the first place that this award, on its true construction, regulates all the terms and conditions of employment; that it occupies the whole field; that long service leave is a term or condition of employment; and that, therefore, the Act, so far as applicable to metal trade workers, is inconsistent with the award, although the award makes no reference to long service leave and does not purport to deal with it. If this is right the appeal succeeds. Alternatively, the appellants submit that there is an actual conflict between the relevant provisions of the State Act and provisions of the award. There was no issue between the parties as to the tests of inconsistency as laid down in *Ex p. McLean* (1) ((1930), 43 C.L.R. 472) and other cases. It was common ground that no "inter se" issue within s. 74* arose (*O'Sullivan v. Noarlunga Meat, Ltd.* (2), [1956] 3 All E.R. 177).

There is an express reference to long service leave in s. 13 and s. 25 of the Conciliation and Arbitration Act which deal with the powers of a conciliation commissioner and the court respectively:

"13.—(1) A conciliation commissioner shall not be empowered to make an order or award—(a) altering the standard hours of work in an industry; (b) altering the basic wage for adult males (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed; (c) making provision for or in relation to, or altering a provision for or in relation to, long service leave with pay; (d) determining or altering the basic wage for adult females (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult female, without regard to any circumstance pertaining to the work upon which, or the industry in which, she is employed) or the principles upon which it is computed.

"25. The court may, for the purpose of preventing or settling an industrial dispute, make an order or award—(a) altering the standard hours of work in an industry; (b) altering the basic wage for adult males (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed; (c) making provision for or in relation to, or altering a provision for or in relation to, long service leave with pay; (d) determining or altering the basic wage for adult females (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult female, without regard to any circumstance pertaining to the work upon which, or the industry in which, she is employed) or the principles upon which it is computed . . ."

The Commonwealth power from which the award is derived comes from s. 51 (xxxv). There is, of course, no Commonwealth power to legislate on industrial

* Constitution of the Commonwealth of Australia, s. 74; 6 HALSBURY'S STATUTES (2nd Edn.) 282.

A relations generally but only with respect to conciliation and arbitration for the prevention and settlement of industrial disputes. The powers of the court and a commissioner are necessarily limited. An award cannot give a form of relief that is not relevant to a matter in dispute (*R. v. Galvin, Ex p. Amalgamated Engineering Union, Australian Section* (3) (1952), 86 C.L.R. 34 at p. 40).

Against this background the appellants' submission seems a remarkable one.

B An award will, of course, normally be construed as exhaustive in relation to matters with which it expressly deals. The appellants cited *Clyde Engineering Co., Ltd. v. Cowburn* (4) ((1926), 37 C.L.R. 466) and *Colvin v. Bradley Bros. Pty., Ltd.* (5) ((1943), 68 C.L.R. 151). In each case the award and the State Act dealt with the same subject-matter. In *Cowburn's* case (4) there were, as RICH, J., said (37 C.L.R. at p. 522) "different minimum wages and different maximum hours" provided by the Act and the award respectively. In *Colvin's* case (5) an order under a State Act prohibited the employment of females at milling machines altogether, whereas the award allowed their employment unless this had been declared unsuitable by a Board of Reference.

The award in the present case is a composite document, in that it embodies orders made either by the court or by commissioners in earlier disputes when the commissioners had wider powers than they now have under s. 13 of the Act set out above. The award deals with basic wages, margin wages, apprenticeship, travelling and camping allowances, hours of work, overtime, holidays and Sunday work, contract of employment, annual and sick leave and other miscellaneous matters which need not be enumerated. There is no reference to long service leave. The logs setting out the dispute or disputes which led to the award were not before the court. It is plain that the question of long service leave had not been raised. If it had been raised, the commissioner would have had to refer it to the court. If the appellants' submission were right, it would mean that the commissioner had prevented the State from dealing with a "matter" which he could not himself deal with.

Their Lordships agree with the High Court that long service leave is an entirely distinct subject-matter from those matters which are determined and regulated by the award. In other words, long service leave differs in kind from public holidays and from annual leave. It is a separate item in industrial relations. This would seem obvious in principle but is placed beyond argument in the present context by the provisions of s. 13 and s. 25 of the Conciliation and Arbitration Act, which specify it as a separate item. An obligation to grant long service leave imposes, no doubt, a burden on employers. It may or may not, according to the circumstances, justify a reconsideration of other conditions such as wages, hours or annual leave. Most terms and conditions of employment are inter-related in this way, but this does not mean that an award as to wages or annual leave is, for that reason, *inconsistent* with a provision for long service leave or canteens or some other separate matter.

H This being so, their Lordships are of opinion that there are no grounds in principle or authority for construing this award as covering the "field" of long service leave.

The respondent sought to reinforce his case by an argument based on s. 51 of the Conciliation and Arbitration Act which reads as follows:

I "When a state law, or an order, award, decision or determination of a State Industrial Authority, is inconsistent with, or deals with any matter dealt with in, an order or award, the latter shall prevail, and the former shall, to the extent of the inconsistency, or in relation to the matter dealt with, be invalid."

It was submitted that the words "or deals with any matter" made it more difficult for the appellants to argue that the award had disposed sub silentio of a matter with which it did not expressly deal. Their Lordships agree with the High

Court that the argument is "difficult to support" and for the purposes of this case may be ignored. A

There remains for consideration the alleged particular inconsistencies. There is, it is said, actual conflict between certain specific provisions of the award and the relevant provisions of the State Act. It is, of course, possible for Acts dealing primarily with different subject-matters to have inconsistent provisions on particular matters. Apparent inconsistencies may, however, disappear, as here, when the words are construed in the limited context of the respective Acts. If in dealing with annual leave a man said, "I only get a fortnight's holiday a year", he would not mean that he worked seven days a week for fifty weeks. B

The first point was based on the terms of the award dealing with dismissal on notice. By cl. 19 (b) employment can be terminated by a week's notice or by the payment or forfeiture of a week's wages. This is, it is said, inconsistent with s. 9 (2) of the State Act, in that men who have served for ten years or more if dismissed get more than one week's pay. The argument was developed and other provisions relied on, but it fails in limine once it is realised that the two documents are dealing with separate and distinct matters. The words of the award are appropriate to the general position of wage earners with which it is dealing. They do not purport to be applicable to long service leave, should provision be made for those who have so served. If the award had itself dealt in later clauses with long service leave, one might well have expected the "general" clause to be made expressly subject to the provisions of the later special clauses. The absence of such words creates no inconsistency when the matters are dealt with, as here, in separate and independent documents. On the basis of this conclusion on the first submission the whole award must be read as subject to the provisions of a State Act, if any, dealing with long service leave. C D E

Reliance was also placed on cl. 19 (c) (i) of the award which reads as follows:

"An employee (other than an employee who has given or received notice in accordance with sub-cl. (b) of this clause) not attending for duty shall, except as provided by cl. 20 of this award, lose his pay for the actual time of such non-attendance." F

This, it is said, means "no work no pay", whereas the State Act provides for thirteen or more weeks of pay for no work. The answer as stated above can be reinforced in this case by the fact that the clause makes no reference to annual leave which, under cl. 21 of the award, means two weeks of pay with no work. The word "duty" may well have been inserted to make it clear that the clause was not to operate when the employee was not due to attend either under his contract or under the award, or under any valid State Act. G

For the above reasons, which are, in substance, the same as those given in the judgments of the High Court, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants will pay the costs of this appeal. H

Appeal dismissed.

Solicitors: *Park Nelson & Co.* (for the appellants); *Freshfields* (for the respondent).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

A

RUSSELL v. RUSSELL AND ROEBUCK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), February 19, 20, 1957.]

B

Divorce—Residence by wife—Petition by husband—Prayer in answer and cross-petition by wife—Husband domiciled in Eire—Wife resident in England for appropriate time—Wife entitled to relief—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 6, s. 18 (1).

C

Divorce—Jurisdiction—Husband domiciled in Eire—Petition by wife based on her residence in England—Husband not entitled to relief in cross-prayer or cross-petition—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 6, s. 18 (1).

D

The husband petitioned for divorce on the ground of the wife's adultery; the wife denied the adultery and cross-petitioned for divorce on the ground of the husband's desertion, and the court found both charges proved. The husband was, however, found to have been domiciled in Eire at the date of his petition, which accordingly failed for want of jurisdiction. The wife had resided in England for three years prior to the date of her cross-petition, and at the date of that cross-petition the husband was domiciled in Eire. The questions thus arose (a) whether the court's jurisdiction under s. 18 (1) (b)* of the Matrimonial Causes Act, 1950, on the ground of the wife's residence in the United Kingdom extended to granting a decree to the wife notwithstanding that the suit was initiated by the husband's petition and s. 18 (1) conferred jurisdiction only "to entertain proceedings by a wife", and (b) whether under s. 18 (1) there was jurisdiction to grant any relief to a husband domiciled abroad where there was jurisdiction to grant a decree to his wife.

E

Held: (i) the wife could be granted a decree since she was entitled, by virtue of s. 6 of the Act of 1950, to avail herself of the provisions of s. 18 (1) (b) either by a prayer put into her answer or by a cross-petition, notwithstanding the fact that the suit as a whole had been initiated by the husband's petition which had failed for want of jurisdiction (see p. 934, letter H, post).

F

Faulkner v. Faulkner ([1941] 2 All E.R. 748) applied.

(ii) the husband could not be granted a decree, since the court had no jurisdiction under s. 18 (1) to hear a cross-prayer or cross-petition of a husband who was not domiciled in England (see p. 936, letter E, post).

G

Levett v. Levett (ante, p. 720) applied.

[As to residence by wife as founding jurisdiction in divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 316, para. 633, note (e), and 7 HALSBURY'S LAWS (3rd Edn.) 105, para. 185, note (p).]

For the Matrimonial Causes Act, 1950, s. 6, s. 18 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 396, 405.]

H

Cases referred to:

(1) *Roebuck v. Roebuck* (Nov. 1, 1955), unreported.

(2) *Richards v. Richards*, [1952] 1 All E.R. 1384; [1952] P. 307; 116 J.P. 358; 3rd Digest Supp.

(3) *Winans v. A.-G.*, [1904] A.C. 287; 73 L.J.K.B. 613; 90 L.T. 721; 11 Digest (Repl.) 329, 41.

I

(4) *Udny v. Udny*, (1869), L.R. 1 Sc. & Div. 441; 11 Digest (Repl.) 326, 22.

(5) *Gulbenkian v. Gulbenkian*, [1937] 4 All E.R. 618; 158 L.T. 46; 11 Digest (Repl.) 352, 205.

(6) *Hood Barrs v. Heriott*, [1897] A.C. 177; 27 Digest (Repl.) 114, 842.

(7) *Faulkner v. Faulkner*, [1941] 2 All E.R. 748; 110 L.J.P. 70; 165 L.T. 381; 27 Digest 356, 2943.

* The relevant provisions of s. 18 (1) are printed at p. 933, letter I, to p. 934, letter A, post.

- (8) *Chappell v. North*, [1891] 2 Q.B. 252; 60 L.J.Q.B. 554; 65 L.T. 23; 1 A Digest 11, 85.
- (9) *Pickett v. Pickett (otherwise Moss)*, [1951] 1 All E.R. 614; [1951] P. 267; 27 Digest (Repl.) 484, 4233.
- (10) *Levett v. Levett*, ante p. 720.
- (11) *Travers v. Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; 3rd Digest Supp.
- (12) *Pryor v. City Offices Co.*, (1883), 10 Q.B.D. 504; 52 L.J.Q.B. 362; 48 L.T. 698; 1 Digest 10, 74.

Petition.

The parties were married in England in 1935 and there was one child of the marriage. The husband had been born, and had lived the major part of his life, in Scotland. The parties separated in December, 1951. On July 23, 1939, the wife obtained a maintenance order in the sheriff's court, Glasgow, on the ground of the husband's adultery. Subsequently the parties resumed cohabitation. In May, 1952, the wife obtained a maintenance order in the Blackburn borough magistrates' court on the ground that the husband had wilfully neglected to provide her with reasonable maintenance. On Aug. 13, 1952, the husband's application to discharge the order of May, 1952, on the ground that he had made bona fide offers to resume cohabitation was dismissed. The husband appealed to the Divisional Court of the Probate, Divorce and Admiralty Division but his appeal was dismissed on Oct. 29, 1952. In about November, 1952, the husband went to Ireland to work. On Oct. 23, 1953, the wife obtained a maintenance order in the Bray district court, in County Wicklow, Ireland, on the ground of the husband's desertion and wilful neglect to provide her with reasonable maintenance.

By a petition dated Sept. 21, 1954, the husband prayed for a divorce on the ground of the wife's adultery with the co-respondent, one Roebuck. In that petition, the husband alleged that he was resident in County Wicklow, Ireland, and that the wife was resident in Yorkshire, and that both he and the wife were domiciled in England. On Mar. 9, 1955, the wife filed an answer in which she made no admission as to the husband's alleged domicile and alleged:

"If the [husband] is not domiciled in the United Kingdom or in the Channel Islands or the Isle of Man the [wife] will rely upon the facts that during the three years immediately preceding the presentation of this answer she has resided during the whole of that period . . . in the County of York and further and alternatively that the parties were domiciled in England immediately before the [husband's] desertion."

The wife denied the alleged adultery and prayed for divorce on the grounds of the husband's adultery, and desertion as from Dec. 27, 1951. As particulars of desertion, the wife alleged, inter alia, that the husband had between June and December, 1951, formed an association with one Mrs. Ball. By his reply dated June 17, 1955, the husband denied the alleged adultery and desertion. In November, 1955, the suit *Roebuck v. Roebuck*, in which the wife in the present proceedings was cited, came before Mr. Commissioner GALLOP, Q.C., who dismissed the charge of adultery made against the husband (the co-respondent in the present proceedings) and the wife in the present proceedings. The present suit came before SACHS, J., at Leeds Assizes on July 17, 1956. The husband's reply was amended by leave to allege that he admitted that he had not resumed cohabitation since December, 1951, but that he had made bona fide offers to resume cohabitation since December, 1951: the amended reply was delivered on July 24, 1956. On July 24, 1956, the wife filed, with leave of the court, a cross-petition praying for divorce on the ground of the husband's desertion. This stated

"immediately before the desertion alleged in this cross-petition the [husband] was domiciled in England. For a period of three years and

A upwards immediately preceding the commencement of these proceedings the [wife] has ordinarily resided at 18 Nettleton Road, Mirfield in the County of York and still resides at that address."

The wife did not pray for the exercise of the court's discretion in respect of any adultery by her. The husband also by leave of the court made further amendments to the reply. On July 30, 1956, SACHS, J., gave judgment in the course of which he stated:

C "The findings of the court on the material issues are accordingly: first that, the husband is not guilty of the adultery alleged to have taken place in 1938; secondly, that the wife has been guilty of adultery with [the co-respondent] from 1951 to 1953 inclusive; and thirdly, that the wife has established that the husband has been in desertion for three years. In addition there is the finding at any rate as from the end of 1951 that the major cause of the break-up of the marriage has been the wife's unwillingness to leave what she considered to be the security of 18, Nettleton Road [formerly the matrimonial home in Yorkshire] coupled with her original unwillingness to break off the guilty association with [the co-respondent]."

D SACHS, J., then stated that it was common ground that the wife had complied with the requirements of residence entitling her to rely on s. 18 (1) of the Matrimonial Causes Act, 1950, and found that the husband was not domiciled in England at the date of the presentation of his petition in September, 1954. His LORDSHIP then adjourned the suit for further hearing and ordered that the matter be referred to the Queen's Proctor for argument on the question of jurisdiction and the question of discretion. On Sept. 25, 1956, the wife filed a discretion statement admitting adultery with the co-respondent. This case is reported only on the question of jurisdiction under s. 18 (1) of the Act of 1950.

F *H. G. Bennett* for the husband.
M. Gosnay for the wife.
T. R. Nevin for the co-respondent.
Colin Duncan for the Queen's Proctor.

G H SACHS, J.: Almost from the outset of the time when they embarked on matrimony in 1935 the husband and wife have had an unhappy passage and for the last two years the marriage has subsisted only as a wreck which has come before one court or another. Since 1952 various aspects of the conduct of the parties have been considered by some half dozen courts before the present cause was tried. At the hearing at Leeds I came to the conclusion that the husband was not guilty of the adultery in 1938 alleged against him in the wife's answer; that the wife had been guilty of adultery with the co-respondent, Roebuck, over a period from 1951 to 1954, inclusive, as charged in the petition; that the husband had deserted the wife in June, 1953; that the major cause of the break-up of the marriage had been the wife's conduct, including her unwillingness to break off the association with Roebuck; that the husband was not domiciled in England at the date of his petition; and that the wife at the date of her cross-petition had been resident in England for the period referred to in s. 18 (1) (b) of the Matrimonial Causes Act, 1950. Those facts having been found, and I the wife not having filed a discretion statement, I adjourned the matter on July 30, 1956, partly to enable the wife to consider what course she wished to adopt as regards filing such a statement, and, partly, to have the benefit of the Queen's Proctor's assistance on questions of jurisdiction and discretion that arose. Throughout the hearing at Leeds the wife strenuously denied adultery with the co-respondent Roebuck (a denial which she had with more success pursued during the trial by Mr. Commissioner GALLOP, Q.C., of the parallel issue in *Roebuck v. Roebuck* (1) (Nov. 1, 1955), in which she was cited). She has

now filed a discretion statement dated Sept. 25, 1956, and in that she has frankly admitted adultery from 1949 onwards with the co-respondent Roebuck. The contents of that statement have not been challenged on behalf of the Queen's Proctor and for my part I accept the general lines of it, and will return to it later.

I will now deal with two further issues of fact which have been argued in London, each concerned with the inferences to be drawn from the husband's conduct from May or June, 1953, onwards. The first point is as to the effect, if any, of the wife's adultery on the husband's desertion. It is common ground that no questions were put to the husband on the point by either side and, indeed, answers by him on that subject might quite well not have assisted the court. The position, therefore, is that having regard to the principles laid down in *Richards v. Richards* (2) ([1952] 1 All E.R. 1384) it is for the wife to show, if she can, by inferences safely to be drawn and by other matters in evidence, including the husband's relevant conduct, that the discovery of her adultery had no effect on the husband's desertion and that that desertion would have taken place and continued in any event. The facts are that by July, 1952, that is to say before he went to Eire, some ten or eleven months before June, 1953, the husband had become sufficiently suspicious of his wife's association with Roebuck to start having her watched and this surveillance continued until July, 1954. On the other hand at no stage before June, 1953, had he sufficient evidence on which he could come to a reasonable conclusion that that association was adulterous; nor in my view (and this is perhaps more important) did he previously or by that date, June, 1953, believe the association to be adulterous. No question was raised by him on that subject and, during the proceedings before the magistrates of May and August, 1952, no suggestion of such adultery was raised by him. Further there is nothing in the pleadings that sets up any such belief in 1952. Accordingly on the evidence before me I have come to the conclusion that he did not hold such a belief until about May, 1954, when he paid a surprise visit to Mirfield and, further, that his belief commenced then and was reinforced by what was reported to him in July, 1954. Turning now to his own conduct it appears to me that settling down in Eire and later getting Mrs. Ball to follow him in about May, 1953, are matters which I have previously stated constitute material from which an animus deserendi on his part was established. To my mind the correct and indeed the strong inferences to be drawn from the facts as a whole are that at that stage, that is to say May or June, 1953, he had determined to cut his connection with England and his wife irrespective of whether or not she had actually committed adultery; that his later knowledge that his wife was guilty of misconduct had no effect on his actions; and that he would have continued in desertion any way.

The next issue of fact is whether the wife has established that the husband was domiciled in Eire at the time of her cross-petition on July 24, 1956. If she fails on this the husband's domicile of origin prevails and that domicile is Scotland; if he is domiciled there the wife cannot bring herself within the ambit of s. 18 (1) (b) of the Matrimonial Causes Act, 1950. I have more than once said that evidence given by the husband as to the state of his mind was generally unreliable—no uncommon thing in domicile issues. The result is that here again the court has to see whether it can draw sufficiently cogent inferences from his conduct to establish that his domicile was in Eire. If no such inferences can properly be drawn in the present case, his domicile of origin is in Scotland and the wife's cross-petition must fail. Although generally speaking the husband's testimony as to his active intention was not reliable there was one passage in his evidence which did ring true. In certain passages he stated with no small emphasis that he had no intention of returning to Scotland. Whether his assertion that Scotsmen do not go back to their country has any actuarial basis is not for me to discuss, but this particular Scotsman had to my mind at the relevant time no intention of returning and, indeed, established that at the relevant times he

A affirmatively intended not to return to Scotland. I may add that in that respect his conduct seems to have tallied with what I hold as to his intention on that particular point.

Now on that basis the principle to be applied is to my mind that stated in *RAYDEN ON DIVORCE* (6th Edn.) at p. 21:

B "Any person not under disability may, at any time, acquire a new domicile by residing in another country with the intention of continuing to reside there for an indefinite time coupled with the absence of genuine intention of returning to reside permanently in the country in which he was hitherto domiciled."

C I note, too, that in *Winans v. A.-G.* (3) ([1904] A.C. 287) there is a passage in the dissenting speech of LORD LINDLEY (at p. 299), which in so far as it relates to principles has on more than one occasion been quoted as being the law:

"Intention may be inferred from conduct, and there are cases in which domicile has been changed, notwithstanding a clear statement that no change of domicile was intended."

D Again, in the leading case of *Udny v. Udny* (4) ((1869), L.R. 1 Sc. & Div. 441 at p. 458) LORD WESTBURY says:

"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time."

E I have also in mind the well known judgment of LANGTON, J., in *Gulbenkian v. Gulbenkian* (5) ([1937] 4 All E.R. 618) where the distinction is drawn between an intention to reside for an unlimited period and the irrevocability of such an intention—for it is not necessary to prove that the intention is irrevocable.

F Now from the time Mrs. Ball came to and settled down in Eire to the date of the cross-petition is a period of some three years or a little more. When dealing with this subject at Leeds I said:

G "Whatever may have been the character of his residence in Eire up to the time of April or May, 1953, when Mrs. Ball joined him there, it seems to me a proper and perhaps an irresistible inference that by October, 1953, he had abandoned any nexus he may have had with this country. To my mind he had at any rate by then cut his losses as regards England."

H Having heard further argument on the point I am now prepared to and do go further in this respect. I hold that by July, 1956, which is now the relevant date, he had settled in Eire for an unlimited period having no intention of ever going back to Scotland and I hold that the correct inference is that his country of domicile at that date was Eire. I have not excluded and do not purport to exclude the possibility that for good or bad reasons he may on some future occasion go elsewhere; I am only concerned with the proper inference to be drawn on the date I have mentioned.

I Now I turn to the issues of law as to the jurisdiction of this court which have been hotly contested by both sides. The husband contends that as the wife did not initiate the suit she cannot be given relief in it and the wife contends that the court has no jurisdiction to accede to the husband's prayer for a decree. The two sections of the Matrimonial Causes Act, 1950, which require consideration in regard to these arguments are s. 18 (1) and s. 6. The relevant part of s. 18 (1) enacts that:

"... the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife ... (b) in the case of proceedings for divorce ... if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement

the proceedings, and the husband is not domiciled in any other part of the United Kingdom . . .”

Section 6 enacts that:

“If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner’s adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.”

It is to be noted that s. 6 of the Act of 1950 does not differ in its effect from the original s. 2 of the Matrimonial Causes Act, 1866, or from its successor s. 180 of the Supreme Court of Judicature (Consolidation) Act, 1925. Thus the provisions of s. 6 had for some seventy years before the Matrimonial Causes Act, 1937, was passed by the legislature, provided the court power to grant relief to a respondent in specified circumstances. It was s. 13 of the Act of 1937 which, with due knowledge of the power provided by s. 180 of the Act of 1925, first conferred on this court in certain circumstances jurisdiction over “proceedings” by a wife against a husband who had deserted her but who was not domiciled in this country at the date when the “proceedings” were initiated. That word “proceedings” was repeated in s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1949, and again in the codifying s. 18 of the Act of 1950. On the other hand the phrase within which that word was used has been slightly varied. In 1937 the phrase was “For the purpose of any proceedings under Part 8 of the principal Act”; in 1949 it was “in proceedings by a wife for divorce”, and in 1950 it was “to entertain proceedings by a wife.”

For the husband it is contended that the wife, to bring herself within s. 18 (1), must be the originator of the suit in which she prays for a decree. Counsel for the husband contended that this must be so in the same way as “proceedings” must be “brought” by the wife under s. 18 (2) and he argued that the word “brought” in that sub-section has the same meaning as the word “instituted” was held to have in *Hood Barrs v. Heriott* (6) ([1897] A.C. 177). Whatever may be the meaning of the word “brought” in s. 18 (2), where the only possible originator of the suit could be the wife, the general answer to counsel’s point appears in *Faulkner v. Faulkner* (7) ([1941] 2 All E.R. 748). There Hodson, J., had to consider s. 180 of the Act of 1925. In his judgment he stated (*ibid.*):

“... the answer takes the place of the petition, and is in itself a petition praying ... that the marriage may be dissolved ... It seems to me that an answer is in exactly the same position as a petition.”

He accordingly held that the three years’ desertion which was relevant in that particular case had to be calculated as from the date of the answer. That decision runs parallel to that of *Chappell v. North* (8) ([1891] 2 Q.B. 252), where the position of a counterclaim is dealt with. In addition counsel for the wife referred me to *Pickett v. Pickett (otherwise Moss)* (9) ([1951] 1 All E.R. 614), which says, as one would expect, that an answer and a cross-petition can be combined in one document. The result is that a wife by virtue of s. 6 is entitled to avail herself of the provisions of s. 18 (1) (b) by a prayer put either into an answer or into a cross-petition combined in the same document, whether or not the suit as a whole has been initiated by a husband’s petition and whether or not that petition fails for want of jurisdiction.

I now turn to the point that mainly led me to ask for the assistance of the Queen’s Proctor, viz., whether the combined effect of s. 18 and s. 6 is to entitle a respondent husband who is not domiciled in this country to obtain relief on establishing in answer to the prayer of a wife, who has brought herself within the ambit of s. 18 (1) (b), that the wife has committed adultery. It is first to be noted that for the purposes of this particular case it was conceded as common ground that the husband’s position should be regarded as being the same as if he had asked for relief by means of a cross-prayer. That was common ground

because in principle the court would in such a case as the present allow further appropriate pleadings to be filed so as to enable justice not to be defeated by procedural obstructions. Indeed, the fact that the cross-petition here was filed on the agreed basis that all relevant matters raised by the husband in the course of these proceedings to that point were deemed to have been properly put on record in answer to the cross-petition, would render further pleadings otiose and alternatively would provide firm ground on which, even at this stage, to allow any necessary further pleading to be filed.

In essence the conflicting contentions put forward by the parties were, on the one hand, that having regard to s. 6 the words in s. 18 (1) "entertain proceedings by a wife" should be read in regard to the respondent's adultery, cruelty or desertion, all pleadable as discretionary bars, as meaning "to have jurisdiction in relation to the proceedings for divorce as if both parties were at the material times domiciled in England". (The phraseology is that formulated by the DENNING COMMITTEE at para. 83 of their Report* in 1947.) On the other hand, it was argued on behalf of the wife that the relevant words "entertain proceedings by a wife", meant "to have jurisdiction in proceedings initiated by a wife to grant relief to her" and that s. 6 did not affect that construction. It has not unnaturally been argued that it would seem hard to a husband, and might even be distasteful to a court, that a wife, after praying for the exercise of the court's jurisdiction in the knowledge that any adultery of hers must be determined, and after having unsuccessfully contested to the utmost the issue whether she was guilty of such adultery, and having failed on that issue, should then be able to turn round and say that the court has no power to grant relief to the husband according to the justice of the case. It could indeed be argued that a better example of "heads I win and tails you get nothing" would be hard to devise; but such an argument cannot of itself prevail where the issue is purely one of construction and where the intentions of the legislature can be ascertained from the contents of the statute. The court is chary of assuming jurisdiction over the matrimonial affairs of those not domiciled in this country in the absence of clear direction so to do.

The true construction of s. 6 and s. 18 (1) in regard to the point under consideration did, however, in the light of their history, give me some anxiety until the decision last week of the Court of Appeal in *Levett v. Levett* (10) (ante, p. 720). In that case the issue for determination was whether under the rules in *Travers v. Holley & Holley* (11) ([1953] 2 All E.R. 794), a decree of divorce in Germany was valid where it had been obtained on a cross-prayer by a husband who had there been unsuccessfully sued for divorce by a wife on account of his alleged cruelty. The husband was domiciled in England and the wife had gone back to Germany and launched her claim there by virtue of some German enactment comparable to s. 18 (1) (b) of the Matrimonial Causes Act, 1950. It was argued before the Court of Appeal in that case that the foreign decree was good by virtue of the reciprocity rule to which I have just referred. It was decided, however, that the German decree could not be treated as valid in this country. The ground for the decision was that in this country s. 18 (1) (b) did not permit a foreign domiciled respondent to be granted relief on account of his wife's adultery where the court's jurisdiction to grant relief to a wife petitioner in the cause depended on that section. It was accordingly held to follow that there was no reciprocity as between s. 18 and the German enactment on which the husband endeavoured to get his decree.

In giving the leading judgment HODSON, L.J., said (ante, at p. 723):

"The courts in this country under s. 18 have jurisdiction to entertain proceedings by a wife; it is quite true that the meaning of the word 'proceedings' may vary according to its context, and in one authority to which our attention was drawn, *Pryor v. City Offices Co.* (12) ((1883), 10 Q.B.D. 504),

* Cmd. 7024.

from the decision of this court it was quite clear that the word 'proceedings' may cover the whole of the proceedings in question, beginning with the claim and including a counterclaim. It does not follow, to my mind, that in the present context, in considering the question of proceedings being entertained by a wife, the word 'proceedings' includes anything that may follow in the same suit. The position is, I think, exactly the same as if Parliament had used more homely language and said that the court should have jurisdiction to listen to a request or to hear a claim by a wife for a particular form of relief. That approach to this section makes it impossible to hold that a husband, in answer to a wife's claim, could get himself under the umbrella of this section so as to make use of the argument based on reciprocity . . . (ibid., at p. 724) s. 6 puts a person who seeks relief in the answer in the same position as if he or she had presented a petition seeking the same relief. As LORD EVERSHED, M.R., showed in the course of the argument, whereas a wife, deserted in this country by a man who disappeared and went to one of the United States of America, would be entitled *prima facie* to rely on s. 18 (1) (a) of the Act of 1950, the husband would not be in a position in his answer to present a petition seeking relief, namely, divorce, unless he was domiciled in this country; and to my mind no assistance can be gained from s. 6 in the sense that it can be said that s. 6 of the Act of 1950 governs the operation or the effect of s. 18."

Although the Court of Appeal did not have before it a cause which had actually been brought in this country by virtue of s. 18 (1), the ratio decidendi of *Levett v. Levett* (10) undoubtedly applies to the issue of jurisdiction in the present case. It decided conclusively that s. 6 is procedural, a point inherent in the reasoning of the previously cited judgment in *Faulkner v. Faulkner* (7); that the words in s. 6 "if he . . . had presented a petition" refer to a petition which is of its own merit within the jurisdiction of the court; and that "proceedings" in s. 18 do not include a cross-prayer or cross-petition by a respondent husband who is not domiciled in this country.

Accordingly the husband's petition in the present case fails because the court has no jurisdiction to grant the relief that he claims. Having come to the conclusion that the court has no jurisdiction to grant a decree to the husband the only remaining question is whether the wife should, in the exercise of the court's discretion, be granted a decree on her cross-petition.

[HIS LORDSHIP then dealt with the question of discretion and granted a decree in the wife's favour in the exercise of the court's discretion.]

Decree nisi.

Solicitors: *Kershaw & Farley*, Blackburn (for the husband); *Fergusson & Gardner*, Dewsbury (for the wife); *Ramsden, Sykes & Ramsden*, Huddersfield (for the co-respondent); *Queen's Proctor*.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

[END OF VOLUME ONE.]



AB 22 NOV 1990

